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# CALIFORNIA REPORTER

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## 45 P.—48 P.

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# CALIFORNIA REPORTER

## 45 PACIFIC REPORTER

(112 Cal. 683)

## PEOPLE v. STRASSMAN. (Cr. 96.)

(Supreme Court of California. May 22, 1896.)

PERJURY — EVIDENCE — INDICTMENT—ALLEGATION AND PROOF—VARIANCE.

1. A person cannot be convicted of perjury for having falsely sworn, in qualifying as surety on a bail bond, that he was the owner of certain real estate, where the evidence merely proves that title to the property was in another person at a date more than a year prior to defendant's affidavit of ownership, but does not show who had title when such affidavit was made.

2. Where the indictment charges defendant with perjury committed in qualifying as surety on the bail bond of a person held to answer for the crime of grand larceny, and the evidence shows that such person was in fact arrested, examined, and held on a charge of robbery, the variance is fatal.

Department 2. Appeal from superior court, city and county of San Francisco.

Leo Strassman was convicted of perjury, and appeals. Reversed.

Carroll Cook, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. Defendant was indicted for and convicted of the crime of perjury. It was charged that, in qualifying as a surety upon the bail bond of one Kate Farley, who had been held to answer upon a charge of grand larceny, the defendant falsely swore that he was the owner of a certain piece of real property in the city and county of San Francisco.

1. Upon the trial evidence was introduced which traced the record title to the property into one Hilda Strassman more than a year before the date of the alleged perjury. Here the evidence of ownership came to an end. No witnesses were called to prove, and no other evidence was introduced to show, who was the owner or in possession of the property at the time when defendant made affidavit to his ownership. Hilda Strassman was not called as a witness, and there was not even the negative evidence of her testimony that she had not conveyed to the defendant or to another the title which had vested in her. That a conviction of perjury cannot be supported upon such insufficient and incomplete evidence does not admit of discussion. The only argument advanced by the people is that, having shown title in Hilda Strassman more than a year before the date of the alleged crime, the law presumes that she continued to own it until the defendant overcomes the presumption. But all such disputable presumptions give way before the presumption of innocence, which belongs of right to every defendant, and which remains with him until the prosecution by convincing proof has established his guilt. As is said in People v. Douglass, 100 Cal. 1, 34 Pac. 490, there cannot be two presumptions in a criminal case. In the recent case of Hunter v. Hunter, 43 Pac. 756, this court considered at some length the question of conflicting presumptions, and quoted with approval from Matthews on Presumptive Evidence: "A charge of an act of immorality or of disobedience of a positive law will not be received, unless supported by direct evidence. Circumstances showing probability merely are not enough. The fact averred must be conclusively proven."

2. While the indictment charged the defendant with having committed perjury in justifying upon the bail bond of Kate Farley, held for trial for grand larceny, and while the recital in the bail bond itself was that Kate Farley had been committed for trial for the crime of grand larceny, the evidence, and all the evidence, showed that, in fact, Kate Farley had been arrested, examined, and held to answer for the crime of robbery. So far as the proofs disclose, she was not under arrest for grand larceny, or for any other crime saving that of robbery. Kate Farley, then being in custody for robbery, would not be entitled to her liberty upon the bail bond given, and it was mere negligence upon the part of the officer having her in charge to release her. There was no justification, in law or in fact, for her enlargement upon the robbery charge under the bond reciting the separate and distinct crime of grand larceny. The materiality of defendant's false oath is shown by the fact, pleaded in the indictment, that it was given in the course of judicial proceedings pending against Kate Farley. Upon the trial there was no evidence offered to substantiate these averments. No showing is made that proceedings upon a charge of grand larceny are or have been pending against her, and the proof is limited to the establishment of a fact at total variance with the charge in the indictment, namely, that the proceedings against Kate Farley were for the crime of robbery. "In respect to records," says Wharton (Cr. Ev. § 115), "great care is necessary, as any variance at common law is fatal. Thus, at common law, if the whole record to which perjury is incidental is not accurately set forth, there must be an acquittal." The question, then, resolves itself to this: The indictment charged the perjury to have been committed in the course of the proceedings had in the matter of the proceedings against Kate Farley for the crime of grand larceny. It was a necessary averment to show the materiality of the false oath. The matter was one of record. The record was or should have been before the officer who drew the indictment. Upon the trial no effort is made to support this averment, and the prosecution rested its case upon evidence of record proceedings in another and different case. The averment being material, the variance between it and the proof is fatal; or, even if the designation of the crime by any possible stretch of the rule could be considered as descriptive matter, still it, having been pleaded, must be proved as laid. Bish. New Cr. Proc. § 488, subd. 2. So plainly marked is the variance that the facts themselves foreclose the need of discussion. But in illustration of the principles enunciated, and of their application to cases where the failure or omission has been much less conspicuous than that under review, may be instanced, generally, the cases of People v. Coon, 45 Cal. 672; People v. Cox, 40 Cal. 275; Moore v. State, 12 Ohio St. 387; State v. Crogan, 8 Iowa, 523; Chute v. State, 19 Minn. 271 (Gil. 230); while bearing specifically upon the question of perjury are those of State v. Bailey, 31 N. H. 521; State v. Tappan, 21

N. H. 56; Brown v. State, 47 Ala. 47; Com. v. Monohan, 9 Gray, 119; U. S. v. Bowman, 2 Wash. C. C. 328, Fed. Cas. No. 14,631.

It is unnecessary to discuss any of the other points presented by appellant. The judgment is reversed.

We concur: McFARLAND, J.; TEMPLE, J.

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(113 Cal. 1)

## GIBSON v. STERLING FURNITURE CO.

(S. F. 9.)[1]

(Supreme Court of California. May 23, 1896.)

APPEAL—REVIEW—EVIDENCE—MASTER AND SERVANT—PERSONAL INJURIES.

1. A verdict based on conflicting testimony will not be disturbed, though the number of witnesses testifying in appellant's behalf on the issue in question are much greater in number.

2. Where, in an action by a servant, a child 11 years of age, against his master, for personal injuries alleged to have been caused by the negligence of defendant in ordering plaintiff to clean a dangerous machine while in motion, defendant claims that the machine was at rest when plaintiff was ordered to clean it, and that it was started by plaintiff in disobedience of orders, an instruction as to the effect of the negligence of a fellow servant of plaintiff is properly refused, as impertinent.

Department 1. Appeal from superior court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by John T. Gibson, by guardian, etc., against the Sterling Furniture Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. J. & J. H. Moore and Smith & Murasky, for appellant. H. H. Davis and Dunne & McPike, for respondent.

VAN FLEET, J. The plaintiff, a lad of 11 years, while in the employment of the defendant, in its furniture factory, was set to the task of cleaning the rollers of a sandpapering machine, and while thus engaged, the machine being at the time in motion, one of his hands was caught by the sandpaper drum, which was revolving at a high rate of speed, and badly lacerated, torn, and otherwise injured to such an extent as to leave plaintiff permanently maimed. He brought this action to recover for the injury, alleging, in substance, negligence of defendant in putting him at a dangerous task, without knowledge or experience on his part of the dangers incident thereto, and without warning thereof by defendant, or instruction as to how to avoid such dangers. He recovered a verdict, and defendant appeals from the judgment entered thereon, and from an order denying a new trial.

It is very strenuously urged by defendant that the evidence is insufficient to sustain the verdict. But we find absolutely nothing in the record to support such claim. No motion was made for a nonsuit, nor is it now pretended that there was not evidence, on behalf of plaintiff, tending, in legal effect, to make out a case; but it is contended that "the testimony of defendant's ten witnesses overwhelms in toto that of plaintiff," and that the preponderance of defendant's evidence over that of plaintiff made the latter "legally incredible." Without reciting the evidence in detail, which would subserve no useful purpose, it is only necessary to say that there is nothing in the essential nature of the evidence as it appears in the record, with the manner and bearing of the witnesses lacking, to disclose any necessary preponderance in favor of defendant; nor is there anything inherently or otherwise so improbable in the character of the evidence on behalf of plaintiff as to render it legally incredible, or which tends to deny it the effect, which we think it clearly has, of creating a substantial conflict. It is true that defendant's witnesses greatly exceeded in number those of plaintiff, and there was a very sharp and decided conflict between the two as to the facts; but, however great the disparity, mere preponderance in number of witnesses, of itself, cannot of course control the finding of the jury. Much less can it affect our consideration in determining if the verdict finds support in the evidence. Notwithstanding the disparity in this instance, not only did the jury choose to give credence to the plaintiff's evidence, but the action of the judge in denying a new trial must, for the purposes of this review, be implicitly regarded as indicating a like view by the latter, since, had his judgment been otherwise, it would have been his duty to grant a new trial. In such a case, under well-settled principles, we would not be justified in saying, even if we regarded the evidence as strongly preponderating in defendant's favor, that the verdict is not supported by the evidence.

It is claimed that there was error in the refusal of the trial judge to give certain instructions, requested by defendant, designed to submit to the jury the rule that a master is not liable when the injury is suffered through the negligence of a fellow servant. But there was no such issue or question in the case under the pleadings, nor, as we regard it, any evidence to which such principle was pertinent. The theory of plaintiff's case, as we have indicated, was that the injury resulted from the defendant's putting plaintiff at work about a dangerous machine, with which he was not familiar, while the same was in motion, and the failure of defendant to properly warn and instruct him as to the dangers involved in the task he was required to perform; while that of the defendant was that neither it nor any of its employés other than plaintiff himself was in any way negligent or responsible for the injury, but that, when plaintiff was set at work cleaning the machine, it had been wholly stopped, and was not in motion, and that there was no danger whatsoever attendant upon plaintiff's work while the machine remained in that condition, and that the accident and injury occurred solely "from a freak of willful, unforeseen, and reckless disobedience on plaintiff's part in putting on the motion gearing and removing the safeguard to said machine." The fact that plaintiff was directed by defendant to perform the task in question was not denied; the only material issue being whether or not he was set at work while the machine was in motion, and so dangerous without knowledge on his part of such dangers, or proper warning by defendant to enable him to avoid them. This issue in no way involved the principle which it is sought to have submitted to the jury. If there was negligence in the particular involved in that issue, it was the negligence of the master, and for which he is responsible, notwithstanding the immediate instrumentality through which such negligence occurred was the act of a fellow employé of the plaintiff. Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306. Under the pleadings, therefore, and evidence, the instructions in question were properly refused. Conlin v. Railroad Co., 36 Cal. 404. The refusal of the other requested instructions involves no error. So far as they were pertinent to the evidence, and were correct expositions of the law, they were sufficiently covered by the instructions given.

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[1] Rehearing denied.

We discover no error in the rulings of the court on questions of evidence. Nor do we think the court abused its discretion in denying defendant's motion for a new trial. There is no such showing of accident or surprise as should be required to invoke the favorable consideration of a court and induce it to set aside a verdict. As to the ground of newly-discovered evidence, the showing wholly fails to disclose a requisite degree of diligence, assuming that the evidence can be regarded as of a character likely to produce a different result upon another trial, which to our minds is not obvious. The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(112 Cal. 677)

## JOHN A. ROEBLING'S SONS CO. v. BUTLER. (S. F. 129.)

(Supreme Court of California. May 22, 1896.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—PLEADING.

In an action against a stockholder for his proportionate share of a corporate debt, it must be alleged in the complaint what the whole number of subscribed shares was, the liability of the stockholder being dependent upon the proportion which his own holding bears to the total number of subscribed shares; and, in default of such allegation, the complaint is subject to a general demurrer.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by John A. Roebling's Sons Company against C. C. Butler and another. Defendant Butler interposed a general demurrer to the complaint, which was overruled; and, upon failure to answer, judgment was rendered for plaintiff. Defendant Butler appeals. Reversed.

Rodgers & Paterson, for appellant. Wall J. Tuska, for respondent.

HENSHAW, J. The trial court overruled defendant's general demurrer to plaintiff's complaint. Defendant refusing to answer, judgment against him was entered. From this judgment he appeals.

The plaintiff, a creditor of the S. S. Construction Company, a corporation, sought to charge defendant, as a stockholder thereof, for his proportionate share of the debt. The complaint averred the amount of capital stock of the defendant corporation, and the number of shares into which it was divided. It likewise averred ownership in defendant of a certain specified number of shares of this stock during the period within which the liability was created. But it did no more than this. It did not allege, nor can it be determined from the complaint, what the total number of the subscribed shares actually was, nor what proportion the holding of this defendant bore to the total amount of subscribed stock. As the number of individual stockholders' shares is to the whole number of subscribed shares, so is his proportion of the debt to the total amount of the debt. Unless, therefore, these three known factors are pleaded,—namely, the number of the stockholders' shares, the total of the subscribed shares, and the amount of the debt,—it is impossible from the complaint to determine what amount of liability is sought to be charged against a stockholder. This is so plain that it is conceded by respondent, but it insists that the admitted defect in the complaint is one which cannot be reached by general demurrer, but is subject to attack by special demurrer only. The precise question arose in Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752, where this court said that the averment of these elements is essential to the statement of a cause of action. The judgment is reversed, and the cause remanded, with directions to the trial court to sustain defendant's demurrer.

We concur: McFARLAND, J.; TEMPLE, J.

(112 Cal. 689)

## In re BLYTHE'S ESTATE. (S. F. 185.)

(Supreme Court of California. May 22, 1896.)

COURTS—PROBATE JURISDICTION—CONCLUSIVENESS OF JUDGMENT AGAINST CLAIMANT.

By Code Civ. Proc. § 1664, the superior court is given jurisdiction of proceedings to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of a decedent, and the interest of each respective claimant thereto; and where any claimant in such proceedings is adjudged to have no interest in an estate, and the judgment is affirmed on appeal, it constitutes an adjudication which concludes the claimant from any further participation in matters connected with the estate, and from questioning any further action of the court therein.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings in the matter of the estate of Thomas H. Blythe, deceased. From an order denying the Blythe Company a new trial, it appeals. Affirmed.

Geo. W. Towle, Jr., for appellant. W. H. H. Hunt, for respondent.

HENSHAW, J. This is an appeal by the Blythe Company from the order denying it a new trial in the matter of the application of Florence Blythe Hinckley for a decree of partial distribution of the estate of Thomas H. Blythe, deceased. The said company was a party to the proceedings instituted under section 1664 of the Code of Civil Procedure, and appealed from the judgment and decree of the court rendered therein, and also from the order of the court denying it a new trial. Both of these appeals were here determined adversely to appellant's contention. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522.

The stress of appellant's argument in this case is an attack upon the former decisions of this court rendered in the matter of said estate, and it is here contended that this court, in those decisions, has given an unwarrantable construction and interpretation to section 1387 of the Civil Code, and has denied to the cases of In re Sanford's Estate, 4 Cal. 12, and Pina v. Peck, 31 Cal. 359, the weight which is due them as authority. The question thus presented was fully and elaborately argued before the court upon the former Blythe appeals, and the conclusions reached and expressed in Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, and 102 Cal. 262, 36 Pac. 522, were arrived at only after most painstaking and careful consideration by the court, and were concurred in by all the justices then qualified to act. If, after such consideration and determination, we were inclined to consider the question anew, there is an insurmountable objection to doing so in this appeal. The Blythe Company, as has been said, was one of the parties to the original proceeding, wherein, by the finding and decree of the court, it was adjudged that the predecessors of appellant company were not of kin to Blythe. The company having attacked the soundness of this finding upon direct appeal, and the judgment and decree made against it by the trial court having been here affirmed, it would seem that in all proceedings subsequent thereto the Blythe Company would stand as a stranger in interest to the estate of the deceased, and would not, therefore, be entitled to oppose or contest any proceedings had therein. But to this appellant answers that the duty and power of the court, under section 1664 of the Code of Civil Procedure, were limited to adjudicating kinship to the deceased, where such kinship, if it existed, would make the claimant an heir, and that the court, therefore, had no right or power to decide and declare that other claimants were not of kin, or that other claimants were of kin, but not of such kin as to entitle them to succession. But this is entirely too narrow a construction to be put upon the section. The section declares that the court, after indicated proceedings, acquires jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of the deceased, and that, upon the trial of the issues, the court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto and therein. By this section a claimant is not entitled to be heard at all unless he claims to be of such kin as would entitle him to succession. The court acquires jurisdiction to determine, and it is made its duty to determine, not alone the heirship to said deceased, but the interest of each respective claimant to his estate. That this may and should properly be done by a decree establishing the degrees of kinship or relation in which the separate claimants stood to the deceased does not admit of debate; and, where a claimant is found to bear no kinship whatsoever to the deceased, a finding and judgment to that effect is properly within the jurisdiction of the court, and within the issues to be determined. The section declares that the final determination of the court shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate. To the proceedings which terminated in the original decree, this plaintiff was a party. It endeavored unsuccessfully, upon direct appeal, to overcome and destroy that judgment. It failed in that attempt, and, so far as further proceedings in this estate are concerned, it is concluded by it. The order appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(112 Cal. 679)

## AH TONG v. EARL FRUIT CO. (Sac. 2.)

(Supreme Court of California. May 22, 1896.)

Assumpsit—Instructions—Opinion Evidence—Relevancy—Custom—Books of Account—Witness—Impeachment—Joinder of Parties.

1. In an action to recover for fruit sold under guaranty, where the quantity shipped to defendant was in issue, and it appeared that defendant had packed the fruit in what were called "40-pound boxes," the testimony of witnesses engaged in packing fruit was properly admitted to show that such boxes, if well packed, would hold more than 40 pounds.

2. It was not prejudicial error for the court, in charging the jury, to refer to the testimony showing the capacity of the boxes to be more than 40 pounds in more positive terms than to the testimony showing the capacity to be less.

3. Plaintiff having delivered the fruit in bulk, and having had nothing to do with the packing, it was not error to refuse to charge the jury that, if the fruit was received and sold

by the box, plaintiff should be credited only at the rate of 40 pounds per box.

4. In an action to recover for fruit sold on guaranty as to price, a former employé of defendant testified as to declarations of defendant's manager regarding a guaranty he had made to plaintiff. Defendant moved to strike out the testimony as irrelevant, on the ground that it referred to another transaction. The witness could not fix the date, but thought he could from certain memoranda which he did not then have with him. *Held*, that the court had a right to assume that the relevancy would be shown upon the recall of the witness, and defendant having failed to recall the witness for cross-examination, he cannot assign the refusal to strike out as error.

5. The contract under which plaintiff claimed having been express, testimony on the part of defendant as to a custom relating to the subject-matter thereof was inadmissible.

6. It was not competent for the defendant to attempt to impeach the memory of a witness by the testimony of others to the effect that he was a person of weak memory.

7. In an action to recover for fruit sold under a guaranty as to price, clear of expenses, where the defendant pleaded as a counterclaim certain expenses he had paid, an instruction that, if the jury found that the contract of guaranty had been made as alleged, they would find for the plaintiff, and, if they found no such guaranty, they should find for defendant, allowing him for his expenses incurred in marketing the fruit, was a fair statement of the issue.

8. It was error to allow the cashier of a bank to testify that the books of the bank showed that, on a certain date, the bank had cashed a check drawn by defendant in favor of plaintiff, witness having no independent recollection of the fact; but as there was no dispute as to the fact that the check was delivered to plaintiff on or before that date, the time of payment was immaterial, and the error without prejudice.

9. An objection that the plaintiff had a partner interested in the demand sued upon who was not joined in the action, since it was not raised in the pleadings, cannot be raised for the first time on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Ah Tong against the Earl Fruit Company. There was a judgment for plaintiff, and an order denying a new trial, and defendant appeals. Affirmed.

Frank H. Short, for appellant. H. Welch, for respondent.

BRITT, C. Plaintiff, a Chinese, early in August, 1893, delivered a quantity of pears to defendant, a corporation, to be sold upon commission. He alleged, in his complaint, that defendant, as part of its contract with him, guarantied to him a net return of $15 per ton for the pears; that he delivered 134,190 pounds of the fruit to defendant, and was entitled to receive therefor, at the rate guarantied, the sum of $1,006.44; that defendant paid only the sum of $550, leaving a balance due of $456.44, for which he sues. Defendant denied the guaranty, and set up, as a counterclaim, that the $550 paid by it to plaintiff was merely an advance on his fruit; that the net proceeds of sale were less than that sum; that plaintiff is indebted to it for the excess advanced to him, as well as for expense of packing the fruit, freights on same, etc., to the amount of $1,257.53, for which it demanded judgment. An issue was also made on the quantity of fruit delivered by plaintiff. Plaintiff obtained a verdict and judgment for $389.33.

Defendant packed the pears in boxes, called "40-pound boxes," and shipped them by rail to the east for sale,—six car loads in all, of 497 boxes each. Several witnesses, who had been engaged more or less in the business of packing fruit, testified their opinion that the boxes, if well packed, held about 40 pounds each. Appellant attacks this evidence at almost every conceivable point; but the chief objection seems to be that the issue did not admit of such proof, and that the witnesses were not shown to be sufficiently skilled to justify the reception of their opinions. The question was as to the number of tons within the alleged guaranty. The number of boxes was known, but there had been no actual weighing nor agreement that the fruit should be measured by the nominal capacity of the boxes. Such capacity was, therefore, fairly a subject for estimation. Frey v. Lowden, 70 Cal. 550, 11 Pac. 838; Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532. It appears that defendant made no objection at the trial to the competency of the witnesses to estimate the weight of fruit in the boxes, and it cannot be urged for the first time on appeal. Brumley v. Flint, 87 Cal. 471, 25 Pac. 683. It is said that plaintiff did not prove the boxes to be well packed. This fact, however, was fully established by the testimony of witnesses produced by defendant.

Among the instructions of the court to the jury was this: "As to the weight of those boxes, gentlemen, you are to determine. Some of the witnesses swore,—one swore from 42 to 45 pounds; that was Mr. Oluffs; Mr. Romain about 45; Mr. Clark about 42; Mr. Hodge, I think he said about 40 pounds." Hodge was a witness for defendant. It is argued, now, that such instruction was erroneous, in that the court spoke less positively of the testimony of Hodge than that of Oluffs, Clark, and Romain, who were called by plaintiff; that Hodge had better opportunity for judging of the weight of the pears, by reason of actual observation while the packing and shipping of the same was going forward, and that his testimony should not have been classed with that of the other witnesses, who gave estimates only of the contents of similar boxes; that the witnesses for plaintiff had not testified at all to the weight of "these boxes,"—the boxes which actually contained plaintiff's pears,—but only as to the weight of such boxes well packed; that Romain's estimate was 44, and not 45, pounds, as stated in the instruction; that certain qualifications of the testimony were not stated; and that the court omitted to state the evidence upon this subject of some other witnesses for defendant. Other objections are taken which we need not specify. This criticism is rather more fastidious than just. There is no doubt on the evidence that the boxes concerning which plaintiff's witnesses gave their opinions were of the same kind and size as those in which the pears were shipped. The qualifications of the testimony which the court did not state related chiefly to the packing weight of large and small pears; there being evidence that the pears of plaintiff were of large size, and most, if not all, of the witnesses being of opinion that the boxes would contain a less weight of such pears as compared with smaller. The testimony of other witnesses for defendant, not stated by the court, was that of witness Pfluger, that the net weight of the boxes was about 40 pounds, and that of witness Gifford, that the average net weight of fruit in such boxes is from 40 to 45 pounds. While we see nothing in the instruction which could have aided the jury in their deliberation, we also fail to see how the jury could have been influenced to defendant's prejudice by either its contents or its omissions. Obviously, the court was not attempting a summary of the evidence on the point in contemplation, but rather to illustrate the diversity of opinion among the witnesses which rendered necessary the exercise of discretion by the jury. If defendant desired greater fullness, it might have requested the statement of additional particulars.

Defendant requested an instruction to the effect that, if the pears were received and sold by the box, "and if such boxes were such as are customarily bought and sold as 40-pound boxes, and were so received and sold by defendant, plaintiff is not entitled to be credited for any more than 40 pounds per box." This instruction was properly refused. Had its bearing been restricted to the counterclaim set up by defendant, it would, perhaps, have been unobjectionable. Not being so restricted, its tendency was to mislead. Plaintiff delivered the pears in bulk, and he had nothing to do with the boxing. If there was a guaranty at all it was of a certain sum per ton, and there is no evidence that it had reference to any conventional ton of more or less than 2,000 pounds.

One Polkinghorne, formerly an employé of defendant, called as a witness for plaintiff, gave testimony of the declarations of Pfluger, defendant's managing agent, about a guaranty of $15 per ton on fruit he (Pfluger) had made to "the Chinaman" at Los Palmas,—the place where plaintiff's pears were,—in the month of August, 1893. Defendant claimed that the declarations really had reference to an outright purchase of fruit, which it made of plaintiff about August 29, 1893, and moved the court to strike out the evidence as irrelevant. It seems to have been the opinion of the court that its relevancy was to be determined by the time when Polkinghorne began work for defendant, whether about August 1st or later in the month, and as to this his testimony was confused. The court declined to pass on the motion then, the witness thinking he might discover such date by going home. At the same time defendant was informed that it would have opportunity to further cross-examine him. In fact, Polkinghorne was not recalled, and no ruling was made on the motion. If it appeared that defendant's motion was well grounded when Polkinghorne left the witness stand, the failure of the court to rule on the same before the submission of the case was error; but, from a careful reading of all the testimony of Polkinghorne, we are satisfied that the court could not justly assume that it was irrelevant to the issue on trial, however mistaken he may have been as shown by other evidence. Further cross-examination might have shown the motion to be proper; but, if defendant desired this, it should have demanded the recall of the witness.

The testimony of Pfluger, testifying as plaintiff's witness, to the effect that he bought fruit from plaintiff about August 29th, and paid for the same, and that he took no fruit from plaintiff, to sell on commission, except that in controversy, was properly admitted as tending in some degree to show that the declarations mentioned by Polkinghorne referred to the guaranty alleged by plaintiff. That the "fruit" referred to by Polkinghorne and Pfluger was pears, and that plaintiff was "the Chinaman" they had in mind, sufficiently appears from Pfluger's statement, on cross-examination, that the pears of which he spoke to Polkinghorne were those he bought and paid plaintiff for on August 29th.

Defendant sought in various ways to introduce evidence of its habits of business, and that it was usual for growers to pay the expense of getting their fruit to its packing house at Fresno, etc.; but, as the contract between the parties was express, and did not rest in implication or presumption, and it was not shown that they dealt with reference to such customs, the evidence was properly excluded. Burns v. Sennett, 99 Cal. 371, 33 Pac. 916.

One Davis testified for plaintiff. Defendant endeavored to prove by another witness that Davis was a person of weak memory. The court rightly rejected the evidence. The memory of a witness not affected by mental derangement is not to be impeached by other witnesses in order to disparage his testimony. It must be done by cross-examination. Goodwyn v. Goodwyn, 20 Ga. 600; Bell v. Rinner, 16 Ohio St. 45; 1 Whart. Ev. 567a.

Defendant asked the witness Pfluger, testifying in its behalf, whether the expenses of getting pears from the orchard at Los Palmas to Fresno were paid by plaintiff or defendant. An objection by plaintiff to the question was sustained; but the witness afterwards testified fully to the effect that defendant paid the same, and the error, if any, was cured. Defendant argues that the court, by its instructions, took these charges from the consideration of the jury. The record hardly bears out the contention. Plaintiff alleged, in his complaint, a guaranty by defendant of $15 net per ton for the fruit, defendant to bear all expenses. The court told the jury, in effect, that, if they found that such a contract had been made by defendant, then they would find for plaintiff the price of the pears at that date, deducting only the sum of $550 already received by him; but it also told them that, if they found no such guaranty, then their verdict should be in defendant's favor "for the costs and expenses incurred by defendant in shipping and marketing said pears, and the moneys advanced by defendant to plaintiff, after deducting all sums received by defendant from the sale of said pears."

The cashier of a certain bank was permitted to state that the books of the bank showed that, on August 7, 1893, it cashed a check of $150 drawn by defendant in favor of plaintiff,—he having no independent recollection on the subject, and defendant objecting to the evidence as hearsay, incompetent, and immaterial. The witness did not profess to have had at any time personal knowledge of the matters recorded in the books, and we think the court erred in admitting the evidence; but we also think the error could have worked no injury to defendant. There is no dispute that the check was drawn on or about August 4th, and delivered to plaintiff on or before August 7th, and we perceive no consequence in the exact time of payment.

It is claimed that plaintiff should not recover because the evidence shows he had a partner who was interested with him in the demand sued upon, and who is not joined as a party to the action. Conceding that such was the evidence, yet, as the objection was not raised by the pleadings, it was waived. Williams v. Railroad Co. (Cal.) 42 Pac. 974.

Defendant had rendered a statement of account to plaintiff showing a considerable balance due from him as the result of the shipment and sale of the pears. Defendant requested an instruction based upon this as an account stated between the parties, qualified by the proposition that the jury should find that plaintiff made no objection to the correctness of the items in the statement. The court refused. There was no evidence on which to found the instruction. The testimony of Mr. Pfluger shows that plaintiff did object to the account rendered on the ground that a sum certain had been guarantied to him.

Certain instructions were asked by defendant, in order, we are informed by its brief, "to prevent the jury from being misled by statements of counsel for plaintiff in their closing arguments." They were refused by the court. The statements of counsel which may have made such instructions proper are not contained in the record, and it does not appear that for any other reason they were necessary. We therefore see no error in refusing them.

Some other points are made by appellant, but they need not be specially noticed. We have inquisitively examined them all, and find no legal ground for reversal. We recommend that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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113 Cal. 7

## CRAIG v. HESPERIA LAND & WATER CO. (L. A. 2.)

(Supreme Court of California. May 23, 1896.)

CORPORATIONS—ASSESSMENTS—SUBSEQUENT TRANSFERS—COLLECTION OF LIEN.

1. A certificate of shares of stock in a corporation is merely evidence of the ownership of the shares, and the corporation's power to collect a delinquent assessment against such shares is not affected by the issuance of a new certificate and a transfer of the shares, but the new owner takes subject to the lien.

2. An owner's right to have his stock transferred, and a new certificate issued to the purchaser, is not defeated by the fact that there is an unpaid assessment against the shares.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by John W. Craig against the Hesperia Land & Water Company. From a judgment in favor of defendant, and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

Geo. B. Cole and H. A. Barclay, for appellant. Graves, O'Melveny & Shankland, for respondent.

HAYNES, C. Action for the conversion of stock in a corporation. Defendant is a corporation, organized under the laws of this state. On November 18, 1893, plaintiff was the owner of 50 shares of stock in the defendant corporation, represented by certificates Nos. 72 and 79, each for 25 shares. These certificates were in defendant's possession. On the day above mentioned, plaintiff, having agreed to sell 40 of said shares to one Kaelin, offered to indorse and deliver said certificates to the corporation, and demanded that 40 shares thereof be transferred to said Kaelin, and new certificates issued,—one to Kaelin for 40 shares, and one to himself for the remainder. This demand was refused, for reasons about which there was some controversy, though it is reasonably clear that the only reason given for not complying with the demand was that the stock was "in litigation." On November 20th, two days after the demand, this action was brought. The defense to the action is based upon the claim that the stock in question is liable for certain unpaid assessments. The court refused all the instructions requested by the plaintiff, and instructed the jury to return a verdict for the defendant. This appeal is from the judgment and an order denying plaintiff's motion for a new trial.

A chronological statement of the assessments made and of the holdings of the shares in question will simplify the facts and the questions made. In 1890 an informal or voluntary call was made of $7 per share, and all the stockholders paid except Samuel Merrill, who then owned 50 shares, represented by certificate No. 26. On December 9, 1892, assessment No. 4 was made of $10 per share. This assessment was made to cover and include the voluntary assessment of $7 per share, Samuel Merrill not having paid his proportion, amounting to $350; the intention being to credit all the others with the voluntary payment, and requiring them to pay $3 per share in addition, and the Merrill stock to pay $10 per share. Prior to that assessment, on November 23, 1892, Samuel Merrill sold and transferred 25 shares of his stock to the plaintiff, John W. Craig, and 25 shares to J. H. Merrill, and certificate No. 71 was issued to Craig and certificate No. 72 was issued to J. H. Merrill. After that assessment became delinquent, Craig and Merrill brought an action to cancel said assessment No. 4, and obtained a restraining order to prevent the sale. Afterwards a nonsuit was granted in that action, and plaintiff's motion for a new trial thereof was denied on November 17, 1893. On September 20, 1893, at a delinquent sale under assessment No. 5, Merrill not having paid the assessment, Craig bought his stock, and a new certificate, numbered 79, was issued to plaintiff. On October 19, 1893, assessment No. 6 of $1 per share was ordered, to become delinquent November 17th, and the day of sale was fixed for December 6, 1893. This assessment was not paid by the plaintiff, and became delinquent the day before plaintiff's demand for the transfer of his stock was made, though it appears that plaintiff had no knowledge of that assessment until after this suit was commenced, when he received notice of the delinquency. He was not informed of it by the company when his demand was made, and the refusal to transfer the stock was then based upon the statement that the stock was "in litigation," referring to the suit of Craig and Merrill against the corporation to enjoin assessment No. 4. Assessment No. 4 upon certificates 71 and 72 remained unpaid at the commencement of this action, but, under a subsequent assessment, which was paid by 71, No. 72 was sold, and plaintiff became the purchaser, and a new certificate, No. 79, was issued to him; and it is conceded by the respondent that, as to the shares represented by that certificate, they were discharged as to assessment No. 4, so that that assessment now affects only 25 shares, while the last assessment, No. 6, affects the whole 50 shares. The record is silent as to any provision in the by-laws of the corporation affecting the question, nor is there any express provision of the statute permitting or prohibiting the transfer of certificates of stock upon the books of the corporation during delinquency; and the question to be determined is whether the corporation, by a transfer of plaintiff's shares after an assessment thereon became delinquent, affected its right to enforce its assessment against the shares so transferred?

Respondent contends, "that, after an assessment, and before delinquent sale, the assessment not having been paid, a transfer of delinquent shares to a stranger would entirely defeat the power or the authority of the corporation to collect its dues in the manner provided for in the Civil Code." In support of this contention counsel argue that "the corporation had a lien (or the equivalent of a lien, so far as holding appellant to his status as a book owner of the shares), which appellant could not defeat by diverting the shares into a new channel of ownership beyond the reach of the corporation." The lien, however, is upon the shares, and not upon the certificate. The certificate is merely evidence of ownership of the shares. When an old certificate is surrendered, and a new certificate is issued, the new certificate represents the same shares; but the shares themselves remain subject to any lien the corporation may have upon them, and the new owner takes subject to such lien. The identity of the stock is not affected by the transfer. Hawley v. Brumagim, 33 Cal. 394; Atkins v. Gamble, 42 Cal., at pages 99, 100. The keeping of a stock book, in which the original issue and all subsequent transfers must be entered, enables the holder or purchaser to trace his shares back to the original issue by the numbers of the different certificates, and thus identify the shares upon which any assessment has been made, and enables him to ascertain with certainty, in connection with the other records of the corporation relating to assessments and delinquent sales, whether his shares are free from liens or liability in favor of the corporation, and in the same manner enables the corporation to enforce its delinquent assessment upon the shares liable therefor, no matter how many transfers have been made subsequent to the assessment; each transferee taking the legal title, but subject to the assessment, just as the grantee of the legal title to land takes it subject to all valid recorded liens.

If respondent's contention is sound, it must follow that transfers upon the books must cease, when the assessment is made, for any or all of the shares assessed may become delinquent; and it would also follow that, if an assessment were made which stockholders generally regarded as illegal, and they should contest the same in the courts, they would be obliged, pending the litigation, however protracted it might be, either to hold their stock subject to all the liabilities of a "bookholder" until the end of the litigation, or pay an unjust or illegal assessment. Such ruling would improperly and unjustly interfere with the disposition of property by the owner, and would not add to the security of the corporation in the collection of delinquent assessments. A certificate of stock is not a negotiable instrument. Barstow v. Mining Co., 64 Cal. 388, 1 Pac. 349; Graves v. Mining Co., 81 Cal. 304, 22 Pac. 665; Swim v. Wilson, 90 Cal. 129, 27 Pac. 33. In analogy to other nonnegotiable instruments, a purchaser would take subject to all equities in favor of the corporation; but whether a transferee upon the books would take his stock discharged of any lien undisclosed by the corporation at the time of the transfer and the issuance of a new certificate, need not now be determined, nor do I think it was determined in the case of Craig v. Water Co., 107 Cal. 675, 40 Pac. 1057 (the pleadings in which case are set out in the record in this case), inasmuch as it may have been held in that case that the voluntary payment of $7 per share was regarded as an indebtedness of the corporation to the contributors, and that assessment No. 4 was made to meet that and other liabilities. If, then, the transfer of plaintiff's shares upon the books of the corporation, and the issuance of new certificates, would not have affected the power of the corporation to collect the delinquent assessment on such shares by a sale thereof, such delinquency did not justify the refusal to make the transfer, and plaintiff's objection to evidence of those facts set up in the answer, if offered as a full defense to the action, should have been sustained, though proof of the unpaid delinquent assessment would have been admissible as affecting the value of the stock; and it also follows that the court erred in instructing the jury to find for the defendant.

Water Co. v. Herberger, 82 Cal. 603, 23 Pac. 134, cited by respondent, sustains the views we have expressed. I can discover no difference between the right of a corporation to collect a valid assessment, and its right to collect a stipulated part of subscription to stock, nor how the nonpossession of the certificate affects that right in either case. In Mandlebaum v. Mining Co., 4 Mich. 465, cited by respondent, the question arose between a stockholder who had lost his certificate, to which was attached a blank power of attorney for its transfer signed by the original holder, of whom the loser purchased it, and the vendee of the finder, who had purchased it in good faith, and to whom the company issued a certificate after notice of the loss by the true owner. It was there held that the holder of a certificate so indorsed and transferred is entitled to the same rights respecting it, as against third parties, which the law confers upon the holder of commercial paper. It is obvious that a broad distinction exists between that case and this. The corporation there might well be estopped to deny the title of one to whom it transferred the stock after notice of the loss, but that does not touch the question of its right to enforce a delinquent assessment notwithstanding the transfer. In this state neither the finder of an indorsed certificate nor his vendee would acquire any right to the stock. Sherwood v. Mining Co., 50 Cal. 412.

The fact that plaintiff did not know of the assessment at the time he demanded the transfer, nor at the time suit was commenced, does not affect the validity of the assessment, nor the liability of the stock therefor; but it is evident that, if respondent's contention is sound, the holder of stock may not only be deprived of the benefit of an advantageous sale, which he would desire to make under any circumstances, but he would be denied the right to dispose of his stock to avoid personal liability for debts about to be incurred which he did not approve, and which, in his judgment, would be ruinous, not only to the corporation but to himself as a stockholder. The judgment and order appealed from should be reversed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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113 Cal. 21

## PELTON v. SAN JACINTO LUMBER CO. et al. (L. A. 77.)

(Supreme Court of California. May 25, 1896.)

NEGOTIABLE INSTRUMENTS—MATERIAL ALTERATION—RELEASE OF SURETIES—CORPORATION MAKER.

1. Where a note is made in California, without designating a place of payment, and is indorsed by sureties, the subsequent insertion of "at Ilion National Bank, Ilion, N. Y.," written by the maker before delivery, is a material alteration, which releases the sureties; since without the alteration the note would have been payable only in California, under Civ. Code, §§ 1489, 3100.

2. The fact that the maker of a note was a corporation, and the indorsers stockholders therein, did not affect the liability of the latter as sureties.

3. The alteration of a note of a corporation by the president, who was authorized to negotiate a loan for the corporation, and secure the same by the note, with indorsers, was not available to the corporation as a defense.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by J. Rand Pelton against the San Jacinto Lumber Company and others on a note. From a judgment in favor of plaintiff, certain defendants appeal. Reversed in part, and in part affirmed.

Wilson & Bulla, for appellants. Anderson & Anderson, for respondent.

VANCLIEF, C. This appeal is from a judgment on a promissory note made by the San Jacinto Lumber Company to the plaintiff, and alleged to have been indorsed by the other appellants, and by M. T. Winton and D. M. McDonald, who are also defend ants. The defense pleaded by appellants is that the note was materially altered without their knowledge or consent, after it was signed by the corporation and indorsed by the other appellants, but before delivery to plaintiff. The appeal is upon the judgment roll without a bill of exceptions, and the only matter in controversy is whether or not the findings of fact by the court warrant the judgment against appellants.

The pertinent facts found are substantially as follows: On May 21, 1890, the corporation defendant was about to obtain a loan of $2,100 from the plaintiff, who then resided in the state of New York, and, to secure the payment of such loan, was to make its promissory note, with indorsers. The note was drawn and signed at Los Angeles, Cal., May 1, 1890, by the corporation, through the agency of its president, M. T. Winton, and its secretary, F. M. Caswell, and immediately thereafter was indorsed by the appellants Caswell and Fuller, and left with the president, Winton, for the purpose of procuring additional indorsers. As thus signed by the corporation, and indorsed by Caswell and Fuller, the note was payable six months after date, but no place of payment was designated therein. Afterwards, in the absence of Caswell and Fuller, and without their knowledge or consent, Winton altered the note so as to make it payable "at the Ilion National Bank, Ilion, N. Y."; and, after being so altered, the note was indorsed by Winton and D. M. McDonald, and by them sent to plaintiff in New York, who thereupon loaned to the defendant said sum of $2,100, without notice of said alteration of the note. The note contained a clause requiring the payment of attorney's fees in case of suit thereon. All the indorsers of the note were stockholders in the corporation defendant, before and at the time each indorsed the note, but it does not appear how much stock either of them owned. At the maturity of the note, it was presented for payment at the Ilion bank, N. Y., and payment demanded, but was not paid, and thereupon was duly protested for nonpayment, of all which due notice was given to the indorsers. When the case came on to be tried, it was dismissed as against Winton, but for what reason does not appear; but a joint judgment was rendered against all the other defendants for the full amount of principal and interest of the note. The defendant McDonald has not appealed.

That the alteration of the note was material, and such as would discharge sureties, whether indorsers or guarantors, is unquestionable. Before the alteration, and as indorsed by Caswell and Fuller, the note, whether negotiable or not, was payable only in this state (Civ. Code, §§ 1489, 3100); but, after the alteration, it was payable only at a designated bank in the state of New York, unless the payee elected to accept payment elsewhere. Woodworth v. Bank, 19 Johns. 391, and notes to same case, 10 Am. Dec. 267; Pahlman v. Taylor, 75 Ill. 629; Morehead v. Bank, 5 W. Va. 74; Tied. Com. Paper, § 394; 1 Greenl. Ev. § 565; Brandt, Sur. §§ 381–390. These propositions, as general rules, are not controverted by counsel for respondent; but they contend that by reason of the circumstance that Caswell and Fuller were stockholders of the corporation defendant, and, by virtue of that relation, would be indirectly and incidentally benefited by the loan, they are not entitled to the favor accorded by law to uninterested sureties. But to this point they have cited no authority, and I have found none. Conceding that Caswell and Fuller were indirectly benefited, the benefit could have been only in proportion to the stock owned by them at the time of the loan, and to that extent they were made personally liable by force of section 322 of the Civil Code, independently of any contract. But they are not sued on their statutory liability. The pleadings do not show even that they were stockholders; and the mere finding that they were so is of no consequence in this action, since a judgment in their favor in this action cannot affect their statutory liability. They are sued on an alleged contract, which, according to the findings of fact, they never executed. The proposed contract indorsed by them was never completely executed for want of delivery to plaintiff. Brandt, Sur. § 388. It follows, I think, that the findings of fact do not warrant the judgment against either Caswell or Fuller.

But, as I read the findings, the president of the corporation was authorized to negotiate the loan, and to secure it by the corporation note, with indorsers; that, accordingly, he drew the note, and delivered it to the plaintiff in the form described in the complaint, that being an ordinary form; that the plaintiff accepted the note, and loaned the money to the corporation thereon in good faith;, and that the alteration complained of by the first indorsers was made by the agent of the corporation before delivery of the note to plaintiff. Upon this state of the facts, I think the alteration of the note is not available to the corporation as a defense to the action. I think the judgment against the San Jacinto Lumber Company should be affirmed, but, as against the defendants Caswell and Fuller, that it should be reversed; and that the court below should be instructed to modify the judgment accordingly.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment against the San Jacinto Lumber Company is affirmed, but as against the defendants Caswell and Fuller it is reversed; and the court below is instructed to modify the judgment accordingly.

113 Cal. 15

## McCARTHY v. BROWN. (S. F. 262.)

(Supreme Court of California. May 25, 1896.)

TRIAL BY THE COURT — FINDINGS OF LAW AND FACT—EJECTMENT—DEFENSES.

1. In ejectment, a finding that defendant "ousted the plaintiff" is sufficient, since the probative facts need not be stated.

2. A finding that, on a certain date, "defendant did oust and eject plaintiff from the possession of said lot, * * * and has ever since wrongfully and unlawfully withheld possession from plaintiff," is a sufficient finding of the fact of ouster, though placed under the heading "Conclusions of Law"; the use of the words "wrongfully and unlawfully," in describing the withholding, being harmless surplusage.

3. A tenant at will cannot defend an action of ejectment by his landlord on the ground that he had no notice to quit, where the answer expressly denies plaintiff's title, and sets up ownership in defendant.

4. Where the findings in ejectment show title in plaintiff, the right of present possession is presumed, as a matter of law.

Commissioners' decision. Department 1. Appeal from superior court, Mariposa county; John M. Corcoran, Judge.

Ejectment by Caroline E. McCarthy against J. L. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

J. J. Trabucco and Jos. F. Peck, for appellant. J. H. Rogers and F. H. Gould, for respondent.

VAN CLIEF, C. Ejectment. Judgment for plaintiff. Appeal from judgment, on judgment roll. Appellant claims that the findings do not support the judgment, because: First. The finding (No. 16) that defendant "ousted the plaintiff" is a conclusion of law, in that it does not find the facts constituting the ouster. Second. That there is no finding "that plaintiff, at the time of commencing the suit, was entitled to the possession" of the demanded premises.

1. In the case of Smith v. Mohn, 87 Cal. 497, 25 Pac. 696, it was said: "They [findings] should be statements of the ultimate facts, and not of the probative facts. Mathews v. Kinsell, 41 Cal. 512." In Hihn v. Peck, 30 Cal. 286, the court said: "It has been uniformly held that it is not necessary for the court, in its findings, to present the results of last analysis; but, on the contrary, that it would be sufficient if the court found the facts entering as terms into the legal proposition upon which the prevailing party based his right of recovery. The 'facts' which the court is to find, and the 'facts' which a pleader is to state, lie, according to the decisions in this state, in the same plane; that is, in both connections, facts are to be stated according to their legal effect." In Murdock v. Clarke, 90 Cal. 435, 27 Pac. 275, the court said: "A finding which follows the pleading is sufficient. In this, as in other cases, it is sufficient to find the ultimate facts." Therefore, to determine the sufficiency of a finding of fact, it is only necessary to ascertain what statement of that fact is required in the pleading. In Payne v. Treadwell, 16 Cal. 243, the court said: "Now, what facts must be proved to recover in ejectment? These only: That the plaintiff is seised of the premises, or of some estate therein in fee, or for life, or for years, and that the defendant was in their possession at the commencement of the action. * * * It is the ultimate facts,—which could not be struck out of a pleading without leaving it insufficient,—and not the evidence of these facts, which must be stated." In Garrison v. Sampson, 15 Cal. 95, proof of holding over of premises by defendant was objected to by defendant, on the ground that such proof was inadmissible under the general allegation of the complaint, and could only be admitted under specific averment of the facts. The court, on appeal, said: "We do not think this point well taken. * * * A holding over by the defendant is, in effect, an ouster, and may be so charged." In Boles v. Cohen, 15 Cal. 151, the court said: "The complaint * * * distinctly alleges prior possession in the plaintiffs, and an entry and ouster by the defendants, and that the defendants are still in possession of the property. There can be no doubt of the sufficiency of these allegations." See, also, Boles v. Weifenback, Id. 144. While I think the ultimate fact of ouster is sufficiently expressed in finding No. 16, under the heading of "Facts," there can be no doubt that it is so in finding No. 6, under the heading of "Conclusions of Law," as follows: "That on December 11, 1890, defendant did oust and eject plaintiff from the possession of said lot 5, block 3, and has ever since wrongfully and unlawfully withheld said possession from plaintiff." Here the fact of ouster is distinctly expressed; and, as to the withholding of possession, the qualifying words "wrongfully and unlawfully" are harmless surplusage. The force of this finding, as a fact, is not impaired by its having been placed under the heading of "Conclusions of Law." Jones v. Clark, 42 Cal. 180; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Edwards v. Bank, 59 Cal. 149; Bath v. Valdez, 70 Cal. 355, 11 Pac. 724; Spargur v. Heard, 90 Cal. 228, 27 Pac. 198; Millard v. Supreme Council, 81 Cal. 343, 22 Pac. 864.

The court found, in effect, that the occupancy of the demanded premises by the defendant, up to August, 1890, was under and with the consent of the plaintiff. Appellant contends that this is a finding that defendant was a tenant at will, and that since there is no finding of service of notice in writing to remove from the premises, according to section 789 of the Civil Code, the tenancy was not terminated before the commencement of the action, and consequently plaintiff had no right to the possession. While it is the general rule that in actions between landlords and tenants at will, in order to give the former a right of action, notice to quit is necessary, yet in the case at bar the allegations of the complaint of the seisin and right of possession of the plaintiff are denied in the answer, and a distinct claim of ownership by the defendant is there alleged. In Smith v. Ogg Shaw, 16 Cal. 90, the court said: "The tenant, having disclaimed the title of the landlord and his own relation of tenant, cannot invoke the protection and advantages of that relation. The defendant's answer expressly makes this denial of title and holding the possession as tenant, or that plaintiff was entitled to the possession. * * * The effect of this denial was to make the defendant a trespasser. He was not entitled to notice to quit. Whenever he assumed to hold in defiance of the plaintiff's title, the plaintiff was authorized to maintain his action for the recovery of the premises, and he could not set up the denial of the title, and then claim the benefit of holding in subordination to it. Tayl. Landl. & Ten. 309; Jackson v. Wheeler, 6 Johns. 272; Jackson v. Deyo, 3 Johns. 422." The decision in Smith v. Ogg Shaw was affirmed in Bolton v. Landers, 27 Cal. 104, and Simpson v. Applegate, 75 Cal. 345, 17 Pac. 237.

2. As to plaintiff's right to the possession of the demanded premises, findings 1, 2, 3, and 4, I think, are amply sufficient. They show the paramount source of title in one Murry (antedating any claim of defendant or her grantors), and mesne conveyances from Murry down to plaintiff; the conveyance to the latter having been executed and delivered to her some nine months before the commencement of the action. These disclose title in the plaintiff, carrying with it the right to possession. In Payne v. Treadwell, 16 Cal. 243, the court, by Justice Field, said: "The right to the possession follows as a conclusion of law from the seisin, and need not be alleged. * * * The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of seisin in 'ordinary language'—the right of present possession is presumed, as a matter of law. * * * The withholding of the possession from one who is seised of the premises is presumptively adverse to his right, and wrongful." See, also, Haight v. Green, 19 Cal. 118; Salmon v. Symonds, 24 Cal. 266; Depuy v. Williams, 26 Cal. 314. I think the judgment should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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(113 Cal. 26)

## DICKEY v. GIBSON et al. (Sac. 105.)[1]

(Supreme Court of California. May 26, 1896.)

HOMESTEAD—MORTGAGE BY HUSBAND—JUDGMENT—AMENDMENT WITHOUT NOTICE.

1. Under Civ. Code, § 1265, as amended in 1880, providing that on the death of either spouse a homestead declared upon community property vests absolutely in the survivor, and Code Civ. Proc. § 1474, providing that when the homestead is selected from the separate property of the husband, who joined in its selection, on the death of the wife it goes absolutely to the surviving husband, a husband, after his second marriage, may give a valid mortgage on a homestead selected from his separate property during the first marriage.

2. In an action on a note, the court found as facts that there were due plaintiff certain amounts, separately, as principal, interest, counsel fees, and costs, and that they aggregated a sum stated. As conclusions of law, it found that there were due the same items, and aggregate amount, except that the right-hand cipher was omitted from the amount due as principal. *Held*, that the court could correct the error after judgment, without notice.

3. Where the decree in foreclosure, by inadvertence or mistake, omits a fractional quarter of the land described in the mortgage and the findings, the court may amend the decree without notice, after its entry, by including such land.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; Wm. O. Minor, Judge.

Action by Lafayette Dickey against Crecencia Gibson, executrix of the estate of Samuel Gibson, deceased, and others, to foreclose a mortgage. From a judgment for plaintiff, the executrix appeals. Affirmed.

C. W. Eastin, for appellant. L. J. Maddux, for respondent.

SEARLS, C. This is an action to foreclose a mortgage. Plaintiff had judgment of foreclosure, and Crecencia Gibson, as executrix, appeals. The contention of the appellant is that a portion of the mortgaged premises were and are the homestead of said appellant and of Samuel Gibson, her testator, and that as to such homestead the mortgage of the plaintiff and respondent herein never was, and is not now, a lien thereon. The following facts will serve to illustrate the contention: In April, 1875, Samuel Gibson was the owner of all the land described in the mortgage herein, and resided thereon with his then wife, Guadalupe Gibson, and their two minor children. The land was the separate property of said Samuel Gibson, acquired by him before marriage. On the 16th day of April, 1875, and while so residing thereon, the said Gibson and his said wife made, executed, acknowledged, and filed for record, in due form, in the county of Stanislaus, where said land is situate, their declaration of homestead upon all of said land, the value of which was and is less than $5,000. Subsequently, and during the life of said wife, said Samuel Gibson and Guadalupe Gibson, his wife, sold and conveyed a portion of said homestead. In 1879 the said wife, Guadalupe Gibson, died. On or about February 18, 1882, Samuel Gibson intermarried with Crecencia Gibson, the appellant herein, and they have since resided upon the premises in question with the two minor children of the first marriage, and with six minor children, the fruit of the second marriage. Subsequent to the second marriage, probably, Samuel Gibson re-purchased the land so sold by him and his first wife, Guadalupe. On the 2d day of December, 1889, the plaintiff and respondent herein loaned to said Samuel Gibson $5,700, and the latter made to said plaintiff his promissory note therefor, payable one year after date, with interest at 8½ per cent. per annum, compounded annually, etc., and, to secure the payment of said promissory note, said Gibson executed his mortgage to plaintiff on all the land referred to herein, including that sold and reconveyed to said Gibson, as well as the homestead premises. The mortgage was recorded. On the 28th day of May, 1894, at the county of Stanislaus, state of California, said Samuel Gibson departed this life, leaving a last will, under which Crecencia Gibson was nominated as executrix, and such proceedings were thereafter had that the said last will was duly admitted to probate, and said Crecencia Gibson duly appointed executrix thereof, and she duly qualified as such executrix, and still is acting as such. Crecencia Gibson, the appellant here, did not execute the mortgage, or receive any portion of the consideration of the note which it was given to secure. Respondent presented his claim to the executrix for allowance, and then brought this action to foreclose; waiving in his complaint all recourse against any other property of the estate, except the mortgaged premises. By the decree the court ordered a sale of the property, other than the alleged homestead, to be first made, and then the homestead premises, if necessary to satisfy the demand of plaintiff. Section 1265 of the Civil Code, as amended in 1880, provides as follows in reference to homesteads: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title [title 5, pt. 4, div. 2, Civ. Code]; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title." As will be observed from the foregoing section, upon the death of either spouse, a homestead declared upon community property vests absolutely in the survivor. In the hands of such survivor, it is protected against enforced sale, precisely as before it had been protected to the community by its homestead character. Sanders v. Russell, 86 Cal. 119, 24 Pac. 852; In re Burdick's Estate, 76 Cal. 639, 18 Pac. 805; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116.

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[1] Rehearing denied.

Prior to the amendment of 1880, and under the law of 1862, the homestead in such cases went to the survivor, subject to forced sale for debts accruing after the death of the other spouse. Watson v. His Creditors, 58 Cal. 556. When, as in this case, the homestead is selected from the separate property of the husband, who joined in its selection as a homestead, then, upon the death of the wife, it goes absolutely to the surviving husband. In re Croghan's Estate, 92 Cal. 370, 28 Pac. 570; Code Civ. Proc. § 1474. The title to the homestead property then vested absolutely in Samuel Gibson at the death of his first wife, Guadalupe Gibson, in 1879, which was some 10 years prior to the making of the note and execution of the mortgage herein. Could he then execute a valid mortgage on the homestead premises? We think this question must be answered in the affirmative. By the death of the first wife, the homestead property vested absolutely in the surviving husband, Samuel Gibson. As far as the legal title is concerned, it vested in him as fully and perfectly as though no homestead had ever been carved out of it. The limitations and immunities which accompanied the enjoyment of the property under such title modified, not the title, but its enjoyment, and were only such as the statute imposed. Save as to these limitations and immunities, the homestead ceased to exist. It was, also, under section 1474, exempt from the payment of any debt or liability contracted by, or existing against, either the husband or wife, or either of them, previous to or at the death of such husband or wife, except as provided in the Civil Code. Code Civ. Proc. § 1474. The Civil Code provides the manner by which the homestead may be sold, abandoned, or incumbered. Sections 1240–1244. The legislature evidently contemplated that cases would arise in which third persons would succeed by purchase to the rights and title of successors to homesteads, for it is provided by section 1485, Code Civ. Proc., that such purchasers "shall have all the rights and benefits conferred by law on the persons whose interests and rights they acquire." Herrold v. Reen, 58 Cal. 443, was a case in which a homestead was declared by husband and wife upon community property under the act of 1860. In 1862 the statute was so amended that it provided, as at present, that upon the death of the husband or wife the property, as at present, vested in the survivor. The husband died subsequently to this amendment. Under the act of 1862, as at present, in order to constitute a valid mortgage on the homestead it was necessary for the spouses to cooperate. After the death of the husband, the wife executed a mortgage upon the homestead property, and it was held valid and binding, although the mortgaged premises had been set apart by the probate court as a homestead for the mortgagor and her children. When the Civil Code (section 1242) provided that the homestead of a married person could only be conveyed or incumbered by the execution and acknowledgment of an instrument by both husband and wife, it was dealing with the condition which it had established by the same title, in reference to homesteads, and for the protection of the spouses in their status as husband and wife, and with no view to the altered conditions existing after the death of one of the spouses, when there was no marital relation to protect, and when, by the same law, it was provided that the title to the homestead property, which during coverture was held jointly, should vest in the survivor.

It would require a more emphatic declaration than is to be found in our statute to authorize a construction which would forever deny to the homestead survivor the right of alienation of property, the title to which is vested in him "absolutely." We must not be understood as holding that in the hands of Samuel Gibson the former homestead was liable to sale on a money judgment against the latter. That question was determined in Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116, against such contention. That case did not hold, however, that the survivor could not mortgage the property, but indicated, without deciding, that he could do so. The following language was used: "It does not follow that, because the survivor can mortgage the property after the title vests in him, it is subject to sale under execution; or that, because the title vests absolutely in the survivor, the homestead is subject to forced sale. Such title is entirely consistent with the law of exemptions;" citing In re Headen's Estate, 52 Cal. 294. Waples, in discussing this question, says: "By the provision 'the homestead property selected by the husband and wife, or either of them, * * * shall, upon the death of the husband or wife, vest absolutely in the survivor,' after the demise of either, the power to mortgage is in the widow or widower, as the case may be." Wap. Homest. p. 601. The title to the homestead property, having vested in Gibson at the death of his first wife, was not affected by his second marriage to the appellant herein. As was said in Graham v. Stewart, 68 Cal. 379, 9 Pac. 555: "The marriage changed her social status, but did not change her right to the property. In its title and use it remained vested in her as the true owner, usable by her for her exclusive benefit, and disposable by her, without the consent of her husband, in the manner provided by law,—i. e., by a conveyance of the property," etc. The facts of that case are on all fours with this, except that there the husband had died, and the widow had again married, and thereafter executed a mortgage on the former homestead, while here it was the husband who survived and executed the mortgage. We are of opinion that, upon both principle and authority, the mortgage executed by Samuel Gibson to the respondent was valid, and created a lien upon the property in question.

The portions of the complaint which appellant moved to strike out were proper as a predicate for the injunction which plaintiff sought, and as a foundation for the appointment of a receiver. The temporary injunction was dissolved, and no receiver was ever, so far as appears, appointed.

The following mistakes occurred in the proceedings, and were amended by the court without notice to appellant, and these amendments are urged as error: (1) The court found there was due to plaintiff, as principal upon the note in suit, $5,700, and as interest $1,957.21, as a counsel fee $200, and costs $20.25,—aggregating $7,877.46. As conclusions of law from the foregoing findings of fact, the court found that there was due plaintiff on the promissory note in the findings set out the principal sum of $570, thus omitting a cipher, to make it $5,700, as in the facts. The conclusion as to interest, counsel fees, and costs, together with the aggregate of $7,877.46, for which judgment was ordered, was precisely as in the finding of facts. This was, as abundantly appeared by the record, a mere clerical misprision, which the court could, on its own motion, amend, with or without notice. (2) In entering the decree, by inadvertence and mistake, the fractional S. E. ¼ of S. W. ¼ of section 36, township 2 S., range 7 E., Mt. D. B. & M., was omitted, although contained in the mortgage and findings. The court amended the decree, one month after its entry, by including therein this fraction. What we have said of the former amendment applies to this also. Bostwick v. McEvoy, 62 Cal. 496; Beatty v. Dixon, 56 Cal. 624; Fallon v. Brittan, 84 Cal. 514, 24 Pac. 381; Egan v. Egan, 90 Cal. 21, 27 Pac. 22; 1 Freem. Judgm. (4th Ed.) § 72a.

We recommend that the judgment be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

113 Cal. 182

## WIGGINS v. MUSCUPIABE LAND & WATER CO. (No. 19,432.)

(Supreme Court of California. June 5, 1896.)

IRRIGATION—RIGHTS OF RIPARIAN PROPRIETORS—APPORTIONMENT OF WATER—IRRIGABLE LANDS.

1. In determining the rights of riparian proprietors to the waters of a stream, for irrigation, it is within the power of a court of equity to apportion the flow by periods of time, rather than by division of the quantity, when such apportionment would best secure the rights of the parties; and such apportionment may be extended to the use of the water for domestic purposes, when necessary.

2. In determining the rights of riparian proprietors to the waters of a stream for irrigation, it is the amount of irrigable lands each proprietor owns that is the controlling element, and not the amount actually under cultivation at the time.

3. It appeared that the stream contained, ordinarily, at the point where it entered defendant's land, 150 inches of water; that, in flowing through defendant's land, 100 inches were lost by absorption and evaporation, so that the flow at plaintiff's line was only 50 inches; that in the dry season the quantity was only 100 inches at the entrance to defendant's land, and no water reached plaintiff's land. *Held*, that in a decree granting each of the proprietors the use of the full flow of water for specified portions of the time, based on the number of acres of irrigable lands owned by each, it was proper to allow the defendant, upon providing for the delivery to plaintiff, at his line, of the amount of water in excess of 100 inches, to divert 100 inches of the water to his own use.

In bank. Appeal from superior court, San Bernardino county; Lucien Shaw, Judge.

Action by W. R. Wiggins against the Muscupiabe Land & Water Company to enjoin defendant from interference with plaintiff's rights to water for irrigation. From a decree denying the injunction, and fixing the rights of the parties, plaintiff appeals. Affirmed.

Harris & Gregg and Byron Waters, for appellant. W. P. Gardiner, E. E. Rowell, and Willis, Cole & Craig, for appellee.

HARRISON, J. The plaintiff is the owner of a rectangular tract of land, having an area of 1,000 acres, lying to the south and west of a larger tract belonging to the defendant, the Muscupiabe Land & Water Company, and through both of these tracts of land there flows a stream of water known by the name of "Devil Canyon Creek." This stream has its source in the mountains north of the defendant's tract, and flows through the canyon in a southerly direction, and thence southerly and southeasterly, through the defendant's tract of land, to the north line of the plaintiff's tract, which it crosses in a southeasterly direction, and again enters the defendant's tract. The length of its course through the defendant's land before it reaches the plaintiff's land is 15,570 feet, and its course southeasterly across the plaintiff's land is 3,200 feet in length, when it again enters the land of the defendant, through which it flows for 13,450 feet. Of the lands of the plaintiff, only the northerly 245 acres are within the watershed of this stream, and riparian thereto. With irrigation this land can be made productive, but without irrigation it is dry and practically useless. The land of the defendant, which lies to the north of the plaintiff's land, adjacent to and bordering upon the stream, is rough, rocky, sandy, and worthless, and for the first 4,000 feet south of the place where the stream enters this land is not susceptible of cultivation. Below this point, and at a short distance to the eastward of the stream, a portion of the defendant's land—about 1,200 acres in extent, lying north of a prolongation of the north line of the plaintiff's tract—is within the watershed of the stream, and, if irrigated from the stream, may be made productive. In July, 1891, the defendant diverted upon this land all the waters of the stream above the plaintiff's tract, and thereupon the plaintiff commenced the present action for the damages sustained thereby, and to enjoin the defendant from any further interference with the flow of the stream. The cause was tried by the court, which found, in addition to the foregoing facts, the following: "(22) The most valuable use to which the water of said stream can be put is that of irrigation. The portion thereof that would be required for domestic and culinary purposes and for watering stock would not perceptibly diminish the volume of water flowing in the stream, when there is sufficient therein to be available for irrigation. (23) The bed of said stream is sandy and porous, and the air in that locality is, during the irrigating season, dry and hot. The quantity of water usually flowing in the stream varies greatly in different years, and in different seasons of the same year, and considerably in different portions of the day, there being more flowing at night than in the daytime. The usual irrigating season lasts from June 1st to October 1st. During the winter season, and when the water is not wanted for irrigation, there is more water flowing therein than is needed, or can be used, by the riparian owners. After the water enters the lands of the Muscupiabe Land & Water Company, a large portion thereof is lost by evaporation and by absorption, before it reaches the one thousand acre tract of said Wiggins. The flow of the stream also greatly diminishes from the end of the rainy season until about August 15th of each year (24) In a season of average rainfall, when there is no diversion of the water of said stream, the usual flow of the water therein at the point where it enters the land of said Muscupiabe Land & Water Company, and at the point where it enters the land of Wiggins, computed in miners' inches, measured under a four-inch pressure, is as follows: 'From July 1st to July 15th: At the north line of said company's land, one hundred and fifty inches; at the north line of Wiggins' place, fifty inches. From July 15th to September 10th: At the north line of said company's land, one hundred inches; at the north line of Wiggins' place, none. From September 10th to October 1st: At the north line of said company's land, one hundred and fifty inches; at the north line of Wiggins' place, fifty inches. When there is no more than one hundred inches at the point where said stream enters the land of said company, the same is all taken up by evaporation and absorption, so that none of it reaches the one thousand acre tract of said Wiggins.' (25) The said Muscupiabe Land & Water Company has constructed and now maintains a dam across the said stream, and a ditch leading therefrom onto the land of the company aforesaid sufficient in size to carry all the waters of said stream. When, during the irrigating season, the water of said stream is all diverted in said ditch until the bed thereof below the said dam becomes dry, and the water is afterwards turned again down and allowed to flow in said stream uninterrupted, it requires two days' flow before any of it will reach the one thousand acre tract of Wiggins, owing to the absorption of water by the creek bed, and the evaporation by the heat and dryness of the air, and the said stream does not attain its full flow at the north line of Wiggins' tract until about five days after it is so returned to said stream. (26) If the said stream were divided by quantity at the dam of said company, and the proper proportion in quantity which would be due to each of said riparian owners for his reasonable use thereof was allowed to flow in separate streams to each, the amount allowed to said Wiggins would be so small that none of it would ever reach his land. (27) The amount of water required to irrigate such of the lands of the said company and of said Wiggins as is properly susceptible of irrigation is the equivalent of a constant flow of one miner's inch, measured under a four-inch pressure, to each five acres of said land. (28) Under all the circumstances and facts in this case, a reasonable and equitable division of said water between the said Muscupiabe Land & Water Company and the said Wiggins would be to allow to the said Wiggins the full flow of the stream, uninterrupted and continuous, for eight days out of each forty days, beginning April 1st of each year, upon said one thousand acre tract, and to allow to the said Muscupiabe Land & Water Company the full flow of the stream during the remaining portion of each period of forty days: provided that, when there are no more than one hundred miners' inches of water, measured under a four-inch pressure, flowing in said stream at the point where it enters the land of the said Muscupiabe Land & Water Company, the said company should be allowed to divert all the water of said stream, and to continue so to divert the same until there are more than one hundred inches aforesaid flowing at said point." The conclusions of law, and the judgment thereon, follow substantially the twenty-eighth finding, and by the judgment the plaintiff is enjoined from diverting the water of the stream for use upon any portion of his 1,000-acre tract, except the northerly 245 acres thereof, and the defendant is enjoined from diverting the waters of the stream for use anywhere, except upon its land lying to the north of a line drawn in prolongation of the north boundary of the plaintiff's tract. From the judgment thus rendered the plaintiff has appealed, bringing the appeal here upon the judgment roll alone, without any bill of exceptions, and urges in support of his appeal that the findings of fact are insufficient to sustain or justify the judgment.

One of the grounds for a reversal urged by the appellant is that the judgment fails to provide for his right to use the waters of the stream for culinary or domestic purposes. The claim that this right is denied by the judgment is not sustained by the record. The judgment makes no limitation upon the use to which the water shall be applied by either of the parties, except that it shall not be used upon land which is not riparian to the stream. The principle contended for by the appellant is that the court had no authority to render a judgment by which he would be prevented from a continual flow of the stream for these purposes, and, although he has cited expressions from some opinions in support of this contention, an examination of the cases in which they occur fails to sustain the principle invoked by him. The opinion of Mr. Justice Thornton in Stanford v. Felt, 71 Cal. 253, 16 Pac. 900, was not concurred in by any of the other justices; and in Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, it was held that the plaintiff had no interest in the waters of the stream, and consequently the use to which the water might be applied by either party was not before the court for consideration. By the common law a distinction was recognized between the right of a riparian owner to the ordinary use of the water for supplying his natural wants for domestic uses and for cattle, and the right to its use for his artificial wants, such as pleasure grounds, manufacturing, etc.; and although, in the exercise of this right, the superior proprietor might make any reasonable use of the flow of the stream for all domestic purposes, irrespective of any diminution caused thereby to the injury of an inferior proprietor, he could not exercise the right for any extraordinary use that would interfere with the rights of the inferior proprietors, or interrupt the regular flow of the stream, if thereby he interfered with its lawful use by them. Miner v. Gilmour, 12 Moore, P. C. 156; Wadsworth v. Tillotson, 15 Conn. 366.

The power of a court of equity to apportion the flow of water in a stream to the respective riparian owners by periods of time, rather than by a division of its quantity, so that each may have the full flow of the stream during such designated periods, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner would better conserve the rights of all the riparian owners, was fully considered and established in Harris v. Harrison, 93 Cal. 676, 29 Cal. 325. It was said in that case: "According to the common-law doctrine of riparian ownership, as generally declared in England and in most American states, upon the facts in the case at bar plaintiffs would be entitled to have the waters of Harrison canyon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity; but in some of the Western and Southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor, and this must be taken to be the established rule in California,—at least, where irrigation is thus necessary." In an arid country, water for irrigation may become a natural want of man, as exigent as when needed for domestic purposes, since without it vegetation would cease, and the sources of life be indirectly destroyed. See Evans v. Merriweather, 3 Scam. 496. When, as in the present case, a stream, instead of increasing as it goes towards the sea, constantly diminishes, until it finally disappears, or ceases to have any appreciable volume, it is very evident that its beneficial use can be regulated better by periods of time, rather than by a division of its quantity. A perpetual use of the water by all of the proprietors would be impracticable, for the reason that a perpetual use by the upper proprietor would, during a large portion of the year, entirely deprive the lower proprietor of any flow, and a just protection of the rights of both is best effected by its division in periods of time. In Harris v. Harrison the plaintiff claimed in his complaint the right to divert the waters of the stream for domestic uses as well as irrigation, but the power of the court to apportion the water for purposes of irrigation was the point chiefly presented and considered in the opinion of the court. The same principles, however, which authorize an apportionment of the flow by periods of time, for purposes of irrigation, justify such apportionment for domestic uses. The use to which different proprietors may apply the waters of the stream which flows through their lands is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied, but it is a right annexed to the land, and a part thereof, and is an inherent element of the property which he has in the land itself. This right in each proprietor is, however, relative to the rights of the other riparian proprietors, and is to be exercised with proper regard to those rights.

The evidence before the superior court has not been brought before us, and we must assume, not only that the findings of fact made by that court were sustained by the evidence, but also that the findings which were made contain all the facts which the evidence before the court authorized it to make. As the appellant must show that the court below has committed error, it was incumbent upon him, if he would controvert the correctness of its judgment by reason of its failure to make suitable provision for his domestic needs, to show that he offered evidence upon this issue, and that the court failed to give due consideration to this evidence. By invoking the aid of a court of equity to protect him in his rights, he binds himself to recognize and observe the rights which the court may determine are held by others in the same subject-matter; and, if he would question the judgment of the court upon these relative rights, he must show that he presented to the court evidence of the rights which he claims the court has failed to protect. Not only does the record fail to disclose that any evidence was offered by the appellant tending to show that he requires any water for domestic uses, but the finding of the court that his tract of land, without irrigation, is dry and practically useless, tends to destroy his claim for such uses. In the absence of the evidence, we must hold that, in its allotment of the amount of water to be given to each party, the court took into consideration all of the uses for which it was shown that the water was available,—domestic uses as well as irrigation; that it considered the rights of the respective claimants, as well in view of the purposes for which the water was required, as of the amount of water available for such purposes. The finding of the court that the only way to provide for a reasonable use of the water is to divide its flow by periods of time, as well as its finding of the specific periods which, "under all the circumstances and facts in this case," would be a reasonable and equitable division of the water, must be held to be justified by the evidence, and to provide for all the uses to which either proprietor is entitled to apply the water. It cannot be said, as a matter of law, that the inferior proprietor has a necessity for a continuous flow for domestic purposes, any more than for purposes of irrigation. In either case he is entitled to only a reasonable use, and what is a reasonable use is a question of fact, depending upon all the circumstances appearing in each case. If neither of the proprietors has any use for the water other than for domestic purposes, a court would naturally fix the length of the periods during which each should be entitled to the flow, as well as the frequency of their recurrence, different from what it would if the waters of the stream were used for irrigation; but, whenever it should appear from the circumstances of the case that the only method by which either proprietor could have a reasonable use of the stream would be to allow to each its full flow for a reasonable time, the only equitable adjustment of their rights would be to thus apportion the flow. Whether this apportionment should be for alternate weeks, or alternate days, or for a specific portion of each day, must be determined by the facts of each case, and in the absence of the evidence of these facts the action of the trial court must be held to be correct.

The record does not disclose the amount of water flowing in the stream at any other dates than between the 1st of July and the 1st of October, or that there is at any time a flow of more than 150 inches at the point where it enters the land of the defendant; and, although it may be assumed that the loss by absorption and evaporation is greater during the summer than in the winter, the only finding upon this point is that, when there is no more than 100 inches at the point where the stream enters the land of the defendant, the same is all taken up by evaporation and absorption, so that none of it reaches the 1,000-acre tract of the plaintiff, and that in a season of average rainfall this is the actual loss between July 1st and October 1st. The loss by absorption and evaporation is so great that, without any consumption by the defendant for any purposes, only 50 inches would reach the land of the plaintiff at any portion of this period. How much of this 50 inches is consumed or required by the defendant for domestic purposes or natural wants is not shown, but it is consistent with the findings of the court to assume that it appeared from the evidence before it that the necessities of the superior proprietor for domestic uses were such that, by giving him the right to a continuous flow, none of the water would reach the land of the plaintiff during the irrigating season. It is very evident from the record that the cause was tried with reference to the rights of the respective parties to the water for purposes of irrigation, and that the right to the water for domestic purposes was not considered an issue in the case, or made a subject of controversy at the trial. Although, in his complaint, the plaintiff alleged, in general terms, his right to the waters of the stream "for the irrigation of said land, and for culinary and domestic purposes," his specific allegations that during the irrigating season "no more water reaches his land than is required for irrigating the cultivated portion thereof," and that he has no other source of irrigating the cultivated portion of his tract than from the waters of the stream, and the further allegation that the damage which would be sustained by him in consequence of a diversion of the waters by the defendant, and for which he sought the aid of the court, was the destruction of the fruit trees and vines and alfalfa growing on the land, justify the conclusion that the right to divert the waters for irrigation was the only issue presented to the court. The finding of the court that the most valuable uses to which the water of the stream can be put is that of irrigation, and its further finding that when there is sufficient water in the stream to be available for irrigation the portion that would be required for domestic and culinary purposes would not perceptibly diminish its value, corroborate this conclusion.

It is further contended by the appellant that, inasmuch as the court finds that he has cultivated 85 acres of his irrigable land, and that the respondent has cultivated only 13 acres of its irrigable land, and, as it does not appear that the respondent intends in the future to irrigate or cultivate any greater area, the judgment should not have given the defendant the use of the greater portion of the water. The right of a riparian owner to the use of the water is not, however, measured by the amount which he actually uses, and it is not to be assumed that the same amount of land will be cultivated in every succeeding year. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation, would be properly made a controlling element in adjusting their respective rights to the flow of the stream; otherwise a readjustment would be necessary whenever either party should cultivate a greater or less area. The finding of the court that "the only method by which the plaintiff can be given the reasonable use of said stream is to divide the flow of the stream by time, and allow him the full flow of the stream during such time as may be reasonable," furnishes the principle upon which this portion of the judgment rests; and the further finding that "the amount of water required to irrigate such lands of the defendant and of the plaintiff as are properly susceptible of irrigation is the equivalent of a constant flow of one miner's inch, measured under a four-inch pressure, to each five acres of said land," gives the basis for the application of the principle in behalf of the respective parties. The judgment protects the plaintiff against any waste or unnecessary diversion by the defendant in case it shall not cultivate its land, or only a small portion thereof, by the provision that, when it shall not actually use all or any portion of said waters upon its irrigable land, the plaintiff shall be entitled to use the same.

The appellant also objects to that portion of the judgment which provides that the defendant may provide means for carrying to the north line of the plaintiff's land, without diminution, all of the waters of the stream in excess of 100 inches which shall at any time be flowing at the point where the stream enters the land of the defendant, and that, if it shall elect to do so, it shall have the right, at any of the times during which the plaintiff is by the judgment entitled to the use of the waters of the stream, to deliver said excess to the plaintiff at the northerly line of his tract, and that, if it shall so deliver said excess to the plaintiff during the time it shall make such delivery, it shall have the right to appropriate to its own use the said 100 inches. This provision in the judgment is based upon the finding that 100 inches of the water of the stream is lost by absorption and evaporation between the time that the stream enters the land of the defendant, and before it reaches that of the plaintiff, and accords with the simplest principles of equity in the adjustment of the respective rights to the waters of the stream. The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream, or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream, where it enters its land, and preserve and utilize, the 100 inches, which would otherwise be lost by absorption and evaporation. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

113 Cal. 56

## KIRSCH v. KIRSCH. (No. 15,702.)

(Supreme Court of California. May 27, 1896.)

Divorce—Rights of Parties in Community Estate — Judgment — Res Judicata — Adverse Possession — Writ of Assistance — Jurisdiction.

1. In an action for divorce the judgment determined certain land to have been community property, and vested the same in the husband absolutely, and ordered that he should pay to the wife a certain sum upon her delivery of a quitclaim to the premises, and said judgment was affirmed on appeal. Shortly before the entry of said judgment said husband conveyed to another, who subsequently brought ejectment against both husband and wife. In the ejectment suit said wife demurred to the husband's cross complaint, and the demurrer was sustained (upon what ground did not appear), and a judgment for costs was entered in favor of the wife upon the husband's failure to amend. *Held*, that the absoluteness of the husband's title was not made to depend upon the payment of the money to said wife, and that said last-mentioned judgment did not preclude him from petitioning for a writ of assistance to recover possession of the property under the judgment in the divorce action.

2. As limitations did not run during the pendency of the appeal, the assertion of plaintiff that since the rendition of the judgment in the divorce action she had acquired title by adverse possession was groundless where less than three years elapsed from the time the judgment was affirmed to the commencement of proceedings to recover possession.

3. The court in an action for divorce has jurisdiction to issue a writ of assistance to put a party in possession of land which the judgment vested absolutely in him.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Elizabeth A. Kirsch against C. F. Emil Kirsch. From an order granting defendant a writ of assistance to recover possession of certain premises, plaintiff appeals. Affirmed.

Fisher Ames, for appellant. H. B. Mayo and T. A. McGowan, for respondent.

HENSHAW, J. Appeal from an order made November 2, 1893, granting respondent a writ of assistance to recover possession of certain real property. Appellant and respondent had been wife and husband. Appellant sued her husband in divorce, claiming a piece of real property, title to which stood in her name as her separate property. The husband answered and cross complained, charging his wife with adultery, and declaring the land in question to be the property of the community. He was granted a divorce by judgment and decree entered March 18, 1887. It was also decreed that the property in question was community property, and in making disposition thereof the court awarded it to the husband, "the same to belong to him absolutely, and to be his sole and separate property, free from any claim by or of the plaintiff." The judgment proceeds: "And it is further ordered that the defendant pay to plaintiff herein, or to her attorney, within sixty days from the date of the entry of this decree, the sum of five hundred dollars in cash, in United States gold coin, provided, nevertheless, that the said plaintiff shall and does, within that time, execute and deliver to the defendant or his attorney a full and sufficient quitclaim conveyance of all her pretended right, title, and interest (as the same appears of record) in and to said real estate and property, and in case of her failure to execute and deliver such quitclaim conveyance within said time said defendant shall be, and he hereby is relieved from the payment of said sum of five hundred dollars." From this judgment an appeal was taken to this court, by which it was affirmed in May, 1890. Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083. The day before the entry of the judgment and decree in the superior court the husband made a deed of grant of the land to Charles Green, which deed was acknowledged and duly recorded a few days thereafter. In the year following—1888—Green began an action in ejectment against Mr. and Mrs. Kirsch to recover possession of the land. Mr. Kirsch answered, denying Green's title, and denying that he was in possession of the land. By cross complaint he pleaded that the deed to Green was a mortgage, and that Green and Mrs. Kirsch, ever since March 17, 1887, had been in possession, receiving the rents and profits of the property, which exceed the amount of the mortgage debt. He prayed judgment that the deed be declared a mortgage, that an accounting be had, and that the premises be restored to him under reconveyance from Green.

Mrs. Kirsch filed a general and special demurrer to this cross complaint, which was sustained (upon what ground does not appear), with leave to amend. Kirsch not having availed himself of this permission, judgment for her costs was thereupon entered in favor of Mrs. Kirsch. The action of Green v. Kirsch is yet pending and untried. Thereafter, in 1893, respondent herein served notice upon appellant that he would apply to the court for the order here appealed from. The order was granted upon the papers, files, and records of the divorce case, the Green ejectment case, and such affidavits as were introduced by the respective parties.

We regard the controversy, whether the deed to Green was or was not a mortgage, and the matters touching the Green ejectment suit, as presenting questions immaterial to this consideration. Green was not a party to the proceedings which terminated in the order for the writ. His rights are in no way affected by that order. His action in which he pleads ouster and the possession of Mr. and Mrs. Kirsch is pending, and its merits will not be affected by a determination as to which of defendants between themselves is entitled to possession. The only consideration in this regard meriting notice is the effect of the judgment in favor of Mrs. Kirsch upon Mr. Kirsch's cross complaint. Her demurrer raised a number of legal objections: (1) Insufficient facts to constitute a cause of action; (2) improper joinder of several causes of action; (3) ambiguity, unintelligibility, and uncertainty. Leave was given by the court to amend. It does not appear that the merits of the cause of action were involved in the order sustaining the demurrer. The judgment was for costs. It cannot be said that any bar or estoppel against respondent is raised by such a judgment. Terry v. Hammonds, 47 Cal. 32; Hardenbergh v. Bacon, 33 Cal. 356; City of Los Angeles v. Mellus, 59 Cal. 444; Morrell v. Morgan, 65 Cal. 575, 4 Pac. 580. The rights of appellant and respondent to the property in question, excepting so far as either may have since acquired new and independent rights thereto, are to be measured by the language of the judgment in divorce, which was affirmed upon appeal. The property was community property. It was awarded absolutely to the husband. He in turn was to give the wife $500, but only upon the execution by her of a quitclaim deed. The absoluteness of his title was not made to depend upon the payment of the money. On the contrary, the wife's right to the money was made to depend upon condition precedent that she execute the deed. If she did this, she had a claim upon him for that amount. If she did not, she had no claim. In either or any event the property was his, and her claim was not made a lien upon it. It was in the nature of a money demand, the collection of which could be enforced by appropriate process. It appears that the wife remained in possession, and neither executed the deed nor received the money. She says she offered to make the deed, but the husband refused payment, saying he had sold, and had no further interest in the property. As might be expected, there is a denial of this by the husband, who says he is, and always has been, ready to pay the $500, but that Mrs. Kirsch would not execute the deed. The court seems to have believed Mr. Kirsch.

Appellant contends, however, that she has acquired a new title to the property by adverse possession, and that this title cannot be litigated in this manner and in this proceeding; that it should be tested either in ejectment or in an action to quiet title, when she would be entitled to a jury trial, and the right to cross-examine hostile witnesses. Reserving for the moment the consideration whether a writ of assistance may issue at all in an action such as this, we are well satisfied that, where a new and independent right to property has been acquired, or where a prima facie showing of the acquirement of such a right is made, the writ should not issue, and cannot operate to affect such new and independent right. The writ relates back to and operates upon those rights only which have been determined by the judgment. The reason for the issuance of the writ is to give effect to rights awarded by the judgment. It should not and cannot operate to establish in the one party or to destroy in the other any rights to the property independent of those determined by the judgment. So it would follow if appellant in this case had made even a prima facie showing of a new title by adverse possession, the issuance of the writ which would have passed judgment upon that title would have been improvident and irregular. But, while appellant claims a new title by adverse possession, the bald assertion of an unsupported claim is not a sufficient warrant for asking the court to withhold its process. If appellant, six months after the entry of the decree, should resist the issuance of the writ upon the claim that she had since the entry of the decree acquired title by adverse possession, the groundlessness of the contention would entitle it to no consideration. The claim, in short, must be reasonable, and supported by a reasonable showing. This claim, however, is not. The judgment entered in March, 1888, was appealed from by Mrs. Kirsch. In 1890, less than three years before the application for the order here appealed from, that judgment became final by affirmance in this court. The action was then pending until June, 1890 (Code Civ. Proc. § 1049), and while it was pending she could not acquire title by adverse possession, since during the pendency of the appeal all rights under the judgment were suspended. As Kirsch, while the appeal was pending, could enforce no rights under the judgment per contra the possession of the wife during that period could not be held to be adverse to her husband.

There is left for consideration the question whether a writ of assistance is the proper process in such a case. Our statutory action of divorce in its nature pertains to equity. The court, in fixing the status of the litigants, has the unquestioned power to dispose of the property of the community, dividing it between the spouses in such proportions as seem just. It has also jurisdiction to determine whether or not a given piece of property is or is not community property. Having these ample powers to adjudge and to award, it would be anomalous, indeed, if under our simplified procedure it were obliged to send either of the parties into another forum to prosecute another action to obtain possession of that which it had the power to give. Discussing the powers of a court of equity this court said in Montgomery v. Tutt, 11 Cal. 190: "The power of the court to issue the judicial writ, or to make the order and enforce the same by writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be co-extensive with its jurisdiction over the subject-matter." Says Chancellor Kent in Kershaw v. Thompson, 4 Johns. Ch. 609: "When the court has obtained lawful jurisdiction of the case, and has investigated and decided upon its merits, it is not sufficient for the ends of justice merely to declare the right without affording the remedy." We think the issuance of the writ in such a case as this is permissible upon principle and conformable to the letter and spirit of section 187 of the Code of Civil Procedure. The order appealed from is affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

I dissent: McFARLAND, J.

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(5 Cal. Unrep. 381)

## LUDY v. COLUSA COUNTY. (No. 18,403.)[1]

(Supreme Court of California. May 27, 1896.)

CLAIM AGAINST COUNTY—REPAIR OF HIGHWAY.

In an action against a county, by a road overseer, to recover for services and money expended in the repair of county roads, testimony of the road commissioner that he had spoken to plaintiff in regard to working on the public roads, and had always directed him not to run in debt in excess of the funds appropriated for such work, and that he did not know anything about plaintiff's doing the work on which his claim was based until the bills therefor came in, is insufficient to show that the work in question was authorized by the commissioner, so as to authorize plaintiff to recover therefor. Garoutte, J., dissenting.

In bank. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Action by one Ludy against the county of Colusa. There was a judgment for defendant, and plaintiff appeals. Affirmed.

M. J. Keys, for appellant. Ernest Weyand, for respondent.

HARRISON, J. The plaintiff was the road overseer of road district No. 6, of the county of Colusa, from January 1, 1891, until May 12, 1891. Between March 31st and May 12th of that year, as such overseer, he performed work and expended moneys upon the roads in that district, and others, at his instance and request as such overseer, also performed work and furnished materials for the benefit of the roads in the district. Claims on behalf of the plaintiff and the others who had been employed by him were presented to the board of supervisors of the county, and upon their rejection the others assigned their claims to the plaintiff, and the present action was brought by him for the recovery of the whole amount of said claims. The cause was tried by the court without a jury, and the court found that "there was no direction of the board of supervisors of Colusa county, nor of any member thereof, or of the road commissioner of said district No. 6, nor of any road commissioner, to the said plaintiff, W. W. Ludy, road overseer of said road district No. 6, nor to any one else, to do the work alleged in the complaint to have been done, or any part thereof, or to furnish material as in said complaint alleged, or any part thereof." Judgment was thereupon rendered in favor of the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

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[1] Rehearing denied.

The following provisions of the Political Code were in force at this time:

"Sec. 2641. Each supervisor shall be ex officio road commissioner of the several road districts in his supervisor district, and shall see that all orders of the board of supervisors pertaining to the roads in his district are properly executed.

"Sec. 2642. The road overseer shall, under the direction of the road commissioner of his district, perform the duties in this chapter hereinafter specified.

"Sec. 2643. The boards of supervisors of the several counties of this state shall have general supervision over the roads within their respective counties. They must by proper ordinance: * * * (7) Order and direct overseers, specially in regard to work to be done on particular roads in their districts."

Each of the several county government acts that the legislature has passed has also, in subdivision 4 of section 25 in the several acts, given to the board of supervisors of their respective counties jurisdiction and power to lay out, maintain, control, and manage public roads, turnpikes, ferries, and bridges within the county. Section 2645 of the Political Code, as it was amended March 19, 1889 (St. 1889, p. 339), provided as follows: "Road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must: (1) Take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts." And, as thus amended, it was in harmony with the provisions of section 25, subd. 4, of an amendment to the county government act, which was passed three days earlier at the same session of the legislature (St. 1889, p. 232), by which road overseers, in their respective districts, were authorized "to employ all labor required, and direct the conduct of work of any kind done upon any and all public roads." At the next session of the legislature, however, a new county government act was passed, March 31, 1891 (St. 1891, p. 295), which took effect immediately, in which, by section 25, subd. 4, this power was taken away from the road overseers, and it was provided that "the road commissioners in their respective districts shall employ all labor required, and direct the conduct of work of any kind done upon any and all public roads." On the same day section 2642 of the Political Code was amended (St. 1891, p. 474) by providing that the office of road overseer should be abolished, and that "whenever in this Code the words road overseer occur, they shall be taken and construed so as to read road commissioner." The provisions of this act did not take effect, however, until January, 1893, so that the office of road overseer was continued until that time, with its duties modified by the above provision of the county government act. The road overseer was still required to take charge of the highways, and perform certain duties, under the direction of the road commissioner, but he was not authorized to employ any labor therefor. The complaint in the present action alleges that all of the labor performed by the plaintiff and by the others, as well as the moneys expended by the plaintiff, for which this action is brought, was performed and expended after the 31st of March, 1891; and not only is there no averment that the labor, either of the plaintiff or of the others, was employed by the road commissioner, but it is expressly alleged that it was all done at the special instance and request of the plaintiff, and the court finds that there was no direction of the road commissioner to do the work, or to furnish the material.

At the trial the supervisor who was the road commissioner for the district embracing road district No. 6 testified that he had spoken with the plaintiff in relation to working on the public roads in that district, and had always told the road master not to run in debt. On cross-examination he was asked: "If you ever did speak to Mr. Ludy on the subject of doing work, you not only told him not to do work in excess to the amount of money apportioned for the payment of the indebtedness,—not to run the district in debt in excess of the funds of the district?" to which he replied: "Yes, sir; that was the understanding with all the road masters." The plaintiff contends that from this testimony the court should have found that he was properly directed to do the work, and that the above finding of the court was contrary to the evidence. The witness, however, testified that he did not know anything about the plaintiff's doing the work, and did not know anything about the work, until the bills came in Under these statements of the witness, we cannot say that the decision of the court was not justified by the evidence. There was no evidence that the road commissioner ever employed the plaintiff to do any work, or authorized him to employ other labor. As the statute did not confer upon the plaintiff any authority to employ labor for the improvement of the roads, and thereby create a charge against the county, the plaintiff not only did not state a cause of action in his complaint, but he failed at the trial to establish any claim against the county, either on behalf of himself, or either of his assignors. The judgment and order are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; HENSHAW, J.

GAROUTTE, J. I dissent. This is an action brought against the county of Colusa by one Ludy, road overseer of a certain road district in that county. He brought the action for labor performed by himself upon the public roads, and also as assignee of the claims of some 15 others for labor performed upon these roads, and material furnished which was used thereon. There is no claim of any kind made that the services were not performed and the materials furnished, nor any claim that the prices charged were excessive, but, upon the contrary, the record shows plaintiff attempting to recover an honest debt of Colusa county, and it should be paid. Two questions only are presented by the record upon this appeal: First, as to the sufficiency of the allegations of the complaint to support a judgment; and, second, as to the sufficiency of the evidence. It is conceded that if plaintiff, as road overseer, was authorized to do this work by the road commissioner of the district, such authority would be sufficient; but it is now insisted that there is no allegation in the complaint to that effect, and that, therefore, a cause of action is not stated. Under the facts disclosed by the record, a recovery by plaintiff should not be defeated upon any such grounds. Those facts are these: (1) A general demurrer to the sufficiency of the complaint was overruled by the trial court; (2) the complaint contains a general allegation of indebtedness from defendant to plaintiff of the amounts set out therein; (3) evidence was introduced at the trial as to the plaintiff's authority from the road commissioner to do the work; (4) the court made a finding of fact upon such evidence; (5) the court treated the allegation of indebtedness stated in the complaint as a material and sufficient allegation of the fact, and made a finding upon the issue created by the answer in that respect. For these reasons, in common justice, we are bound to hold that now the complaint should be deemed sufficient to support the judgment. To hold otherwise, a party would be wronged of a most substantial right by invoking a very technical rule of law. The court made a finding of fact that plaintiff was not authorized by the road commissioner to do the work. We are clear that this finding is directly opposed to the evidence. The only testimony offered upon this point was that of Mr. Herd, the road commissioner, who testified as follows: "Q. Did you ever speak to Mr. Ludy [road overseer] with relation to working upon the public roads of that district, in the spring of '90 and '91? A. Oh, yes; we always talked about the roads. Q. Did you tell Mr. Ludy at any time that he was running in debt, and was doing more work than was required? A. No; I don't know anything about him doing that work, in fact. Q. You say you don't know whether you spoke to Mr. Ludy concerning doing work, or not doing work? A. I am not positive about it. I presume I did, though. Q. You presume you did? A. Yes, sir. Q. If you ever did speak to Mr. Ludy on the subject of doing work, you only told him not to do work in excess of the amount of money apportioned for the payment of the indebtedness,—not to run the district in debt in excess of the funds of the district? A. Yes, sir; that was the understanding with all the road masters." There is but one construction to be put upon this evidence, and that is that the road overseer had general authority from Mr. Herd to do the necessary work in repairing the roads of his district, to the extent of the money on hand in the road funds of that district, and there is no pretension here that such instructions were violated. Conceding that the commissioner did not know plaintiff was doing the particular work upon which a recovery is here sought, that fact is immaterial; for the work was done under a general authority, which, we have seen, was plainly conferred.

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113 Cal. 38

## SANTA PAULA WATERWORKS et al. v. PERALTA. (L. A. 15, 18.)

(Supreme Court of California. May 27, 1896.)

IRRIGATION—APPROPRIATION OF WATER BY ALIENS—PRESCRIPTION—LIMITATION AS TO USE.

1. An appropriation of water in 1865 by defendant, an alien, was valid, giving him rights therein superior to the rights acquired in the same stream by a subsequent appropriation.

2. In an action to quiet title to certain water rights, where plaintiff claimed under an appropriation made in 1867, it appeared that defendant appropriated water from the creek in 1865, and had used it continuously for 27 years; that since 1872 he had limited his use to 50 inches of water, one day in the week, for irrigation purposes, and one-half inch of water, constant flow, for domestic purposes. *Held*, that defendant was entitled to a judgment confirming his rights in the water to the extent of his use since 1872.

3. It was error to limit defendant's use to a half inch of water to the place where his house was located, the water being available for use on any portion of defendant's lands.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county.

Action by the Santa Paula Waterworks and others against Julio Peralta to quiet title to certain water rights. From a judgment determining the rights of the parties, both plaintiffs and defendant appeal. Modified.

W. H. Wilde and Orestes Orr, for plaintiffs. Daly & Toland, Shepherd & Eastin, and R. F. Del Valle, for defendant.

BRITT, C. In this action the court below adjudged that the plaintiffs, as tenants in common, have the right to divert and use the water of the Santa Paula creek, in Ventura county, to the extent of 600 inches, measured under a 4-inch pressure, subject, however, to the superior right of defendant to divert and use 50 inches of the water, measured as aforesaid, during "one day of twenty-four hours in each week, from Saturday afternoon to Sunday afternoon," and subject to the further right of defendant to take one-half an inch of water in constant flow, to be used only within a specified section of land. All parties have appealed from the judgment. Plaintiffs claim that on the findings made by the court they should have been awarded 600 inches of water absolutely, and that the judgment should be modified accordingly; while defendant contends that he is aggrieved in several particulars, and that the judgment should be reversed in order that a new trial may be had. The court found, among other matters, that in the year 1865 the defendant diverted by means of a ditch then constructed by him, having capacity to carry 120 inches of water, a part of the flow of said creek (the course of which lay mainly through public lands of the general government), and applied the same to the irrigation of certain land which he held by mere occupancy, and to other purposes. He was then an alien, and had not declared his intention to become a citizen of the United States. On December 11, 1867, he declared such intention pursuant to the naturalization laws. In 1869 he established his residence on public land in a certain section 34, upon which, in 1881, he filed a pre-emption claim. He continued to live in said section until 1886, when he removed therefrom. Prior to 1869 he extended his ditch, and conducted the water previously diverted by him to the vicinity of his house in said section 34, where he used the same for irrigation. domestic purposes, and the watering of live stock as before. It sufficiently appears that he utilized the water by means of his ditch for the purposes stated, with only occasional interruptions. during the space of 27 years beginning in 1865. It was his custom to turn on the water for irrigation one day in the week,—Saturday afternoon to Sunday afternoon,—and then to return it into the stream, excepting such quantity as was necessary for watering his stock and for domestic purposes; and the court found that he had ceased any use of the water except as above stated. It was further found that since the year 1872, when the quantity of water in the creek was less than 600 inches, the defendant has used for irrigation no more than 50 inches. Among the "conclusions of law" appears the following: "The defendant is also the owner of the right to use one-half an inch of water, measured under a four-inch pressure constant flow, at the place where his house was located on section 34, * * * and to secure such flow is entitled to divert sufficient water to produce that amount through his ditch to the place of use."

The first step towards acquiring the interest in the water of the creek now held by plaintiffs was a notice of the appropriation thereof, to the extent of 700 inches, posted by certain persons with whom plaintiffs are in privity, in the month of August, 1867. This was followed forthwith by the construction of a system of ditches having capacity to carry 600 inches, into which some water was turned in the year 1868. The use of the water drawn through such system of ditches for various beneficial purposes has continued ever since, being increased from time to time; and since 1874 such use has amounted to 600 inches when that quantity was obtainable, though in the dry season the flow in the stream has frequently—perhaps commonly—been less than 300 inches. Upon the facts thus outlined the plaintiffs insist that their claim to 600 inches of water is superior to any interest of the defendant, for the reason that at the time of his appropriation, in 1865, he was an alien, and hence, they say, was not competent to appropriate the water. They found their argument on those provisions of the federal statutes restricting the acquisition of preemption and other rights in the public lands to citizens of the United States and those who have declared their intention to become such. The inference they seek to enforce seems to be that as Peralta, prior to December, 1867, could not, by reason of alienage, initiate title to government land, so he was incompetent to obtain by appropriation right to water flowing on such land. We cannot accede to this proposition. The silent acquiescence with which the government, prior to the act of congress of July 26, 1866, regarded the appropriation of water on its lands, as well as the express recognition extended by that statute to rights so acquired, did not discriminate between Trojan and Tyrian,—citizens or aliens. Married women and minors were, in general, not competent to pre-empt land, but we have never heard that they might not make a valid appropriation of water. The tests of such appropriation were priority of possession and beneficial use (Maeris v. Bicknell, 7 Cal. 261; Davis v. Gale, 32 Cal. 26; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, and 22 Pac. 198); and title, or the right to acquire title, in the place of intended use, has never been a necessary element in the ownership of appropriated water. Besides, since the prior appropriation of water is a mode of acquiring a right in real property by purchase (Hill v. Newman, 5 Cal. 445), the alienage of the defendant was a matter between him and the government, and, if it were admitted that, as against the government, he could have no valid right in the water, yet until "office found" it is conceived that private individuals were not at liberty to treat his appropriation as void of effect, or the water itself as still open to another taker. Norris v. Hoyt, 18 Cal. 217; Racouillat v. Sansevain, 32 Cal. 376; Lobdell v. Hall, 3 Nev. 516. The defendant's appropriation was, therefore, prior to that of the plaintiffs, and, as no facts are found to show that they have acquired by prescription a right to more water than the judgment allows to them, it follows that their appeal is unavailing. In support of defendant's appeal the principal grounds urged are that the court erred in not finding the quantity of water originally appropriated by him, in restricting his use for irrigation to 24 hours on Saturday and Sunday of each week, in not finding as a fact the quantity he may use for domestic purposes, and in restraining such use to certain limits,—the said section 34. Although the court nowhere found the extent of defendant's original appropriation, yet, as it did find that after 1872 he used no more than 50 inches for irrigation, and made such use only at certain times of the week, the omission was immaterial. All the water which he did not use was subject to the appropriation of plaintiffs. And this consideration disposes also of the objection to the action of the court in limiting defendant's use of the water for irrigation to 24 hours of each week commencing on the afternoon of Saturday. He having ceased to use the water at other times, the plaintiffs might lawfully take it at those times. Smith v. O'Hara, 43 Cal. 371. The statement contained in that part of the court's decision which is headed "Conclusions of Law," to the effect that defendant owns the right to divert through his ditch half an inch of water, constant flow, for use at the place where his house was situated in said section 34, read in connection with the other findings, is a sufficient ascertainment of his interest in the water for domestic purposes. It is to be treated as a finding of fact, though it is certainly misplaced. Spargur v. Heard, 90 Cal. 221, 27 Pac. 198. See the discussion and cases cited in Society v. Burnett, 106 Cal. 538, 39 Pac. 922. But there is no warrant in the record for that clause of the judgment restricting the place where defendant may use said half inch of water. If he had the right to use it "at the place where his house was located on section 34," then, in the absence of some other fact qualifying the right, the legal conclusion is that he may use it elsewhere; may change the place of use at will (Davis v. Gale, 32 Cal. 26); though, of course, he could not by such a change increase the quantity of flow to which he is entitled. The judgment should be modified by striking therefrom the portion limiting the place where defendant may use said half-inch of water, viz. the following words: "To be used only on section 34, township 4 north, of range 21 west, S. B. M." and, as so modified, it should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by striking therefrom the portion limiting the place where defendant may use one-half inch of water in constant flow, viz. the following words: "To be used only on section 34, township 4 north, range 21 west, S. B. M.," and as so modified is affirmed.

(5 Cal. Unrep. 386)

## DAVEY v. SOUTHERN PAC. CO. (No. 15,999.)[1]

(Supreme Court of California. May 27, 1896.)

RAILROADS — INJURIES TO LICENSEE ON RIGHT OF WAY — ADMISSION OF EVIDENCE — REVERSIBLE ERROR.

A complaint for injuries sustained by falling into an excavation between the tracks of defendant's road alleged that the right of way was an easement in a public highway. On trial, plaintiff admitted that the fee of the right of way was in defendant. Without any amendment, and without objection from defendant for variance, the trial proceeded on the theory that plaintiff could recover as a licensee, and that the excavation was in a path in general use by the public, to the knowledge and acquiescence of the defendant. *Held*, reversible error to exclude exidence that the path had been used constantly by the public, without objection from defendant, on an objection that it was "immaterial, irrelevant, and incompetent," since the objection was insufficient to raise the point of variance.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Rosalie Davey against the Southern Pacific Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Gordon & Young, for appellant. Maxwell, Dorsey & Soto and Maxwell & McEnerney, for respondent.

HENSHAW, J. The action was for damages for personal injuries. At the conclusion of plaintiff's evidence, defendant moved for and was granted a nonsuit. Plaintiff pleaded that defendant operated its railroad upon a public highway in Alameda county, known as "Stanford Street." She averred that there was a culvert or drain crossing Stanford street, and extending under the tracks of defendant, which drain was securely and safely covered with planking and earth. Defendant opened this culvert, and left it "open and unprotected and in a dangerous condition for the whole length across said Stanford street, and under the track" of defendant. Upon the night of the accident, plaintiff "proceeded to cross said railroad track on said street," and was precipitated down through and between the rails of said track into the excavation. By this fall, and in this manner, she suffered the injuries complained of. It will be noticed that the complaint charges that the defendant corporation maintained its road upon a public highway. It clearly appears to have been the intent of the pleader to charge defendant with negligence in having laid open and left unguarded a drain or culvert upon a highway over which it had merely an easement in common with the general public. The complaint will bear no other construction. In such a case it is well settled that a railroad, having only an easement over a public street, possesses no rights therein superior to those of the public, saving such as the nature of its occupancy and use necessitate. A traveler upon that public highway may cross and recross the tracks of the railroad at his pleasure, and may expect to find that portion of the street covered by the roadbed of the railroad in a reasonably safe condition for public use and travel. Entirely different, however, is the rule and right of such a corporation operating its road over a right of way, upon land which it owns in fee. Here it not only enjoys all the incidents of private ownership; but from the well-known character of its use, and the necessity for swift and uninterrupted locomotion over its land, one who obtrudes upon the right of way is a trespasser, guilty of gross negligence, and the railroad generally owes him no duty further than to guard against his wanton injury. But though plaintiff, in effect, pleaded that defendant's right of way was an easement over a public highway, upon the trial she abandoned this position. She admitted that the right of way is on land owned by defendant in fee, and undertook, without change or amendment of the complaint, to establish that for many years a footpath led to and crossed the track at the point of the accident, and that this footpath was openly, constantly, and continuously used by the neighborhood without let or hindrance from defendant. It was claimed that the nature of the use shown would, inferentially, establish knowledge upon the part of defendant, and that plaintiff, in crossing the track upon this path and under these circumstances, was not a mere trespasser, but did so under acquiescence, and as a licensee of the defendant company. This evidence was all excluded under objection by defendant's attorney that it was "immaterial, irrelevant, and incompetent." The court, in ruling, said: "If you can show the railroad company knew this, and made no objection to it, I will allow it." This evidence was clearly inadmissible under proper objection. It did not tend to establish any issue joined by the pleadings. There was a manifest variance between the complaint which charged a dangerous excavation made upon a public highway and evidence which sought to show an excavation made upon the private property of defendant along the line of a footpath over which plaintiff was licensed to pass. The difficulty which arises comes from the fact that no proper objection was made. The question of variance was never presented for consideration to the trial judge, or to opposing counsel, and is here made for the first time. The objection made in the trial court is insufficient to present the point. Dikeman v. Norrie, 36 Cal. 94; McKay v. Riley, 65 Cal. 623, 4 Pac. 667; Howland v. Railway Co. (Cal.) 42 Pac. 983. The case seems to have been tried upon the theory that the evidence was admissible under the pleadings, but that the plaintiff must establish knowledge by defendant of the use of its land for a footpath. But the evidence which the court refused to admit was directed to the proof by inference of the knowledge of defendant, as well as to the existence and use of the path. As in Hansen v. Southern Pac. Co., 105 Cal. 379, 38 Pac. 957, plaintiff sought to show a use which would carry with it the inference of knowledge, since, as to its own property rights, defendant would be presumed to know what was generally known. Railroad Co. v. Troutman, 11 Wkly. Notes Cas. 453; Davis v. Railway Co., 58 Wis. 646, 17 N. W. 406; Isabel v. Railroad Co., 60 Mo. 475; Griffiths v. Railway Co., 14 Law T. (N. S.) 797. The evidence, therefore, would have been admissible under a proper pleading. Whether it would have proved sufficient to establish a license in plaintiff, and knowledge and acquiescence in defendant, were matters which, under proper instructions, were for the jury to decide. Noyes v. Railroad Co., 92 Cal. 285, 28 Pac. 288; Hansen v. Southern Pac. Co., 105 Cal. 379, 38 Pac. 957; Troy v. Railroad Co., 99 N. C. 298, 6 S. E. 77; Barry v. Railroad Co., 92 N. Y. 289; Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539; Townley v. Railroad Co., 53 Wis. 626, 11 N. W. 55; Taylor v. Canal Co., 113 Pa. St. 162, 8 Atl. 43; Davis v. Railway Co. (Wis.) 17 N. W. 406.

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[1] Rehearing granted.

The motion for a nonsuit was made upon the ground that the evidence showed that plaintiff was a trespasser, to whom defendant owed no duty. Such, indeed, was the showing of the evidence, since all that plaintiff offered to establish that she was at the place of injury under permission was rejected. While, therefore, the nonsuit was properly granted under the admitted evidence, for the error in rejecting plaintiff's offered evidence the judgment is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

(113 Cal. 46)

## GALVIN et al. v. PALMER. (S. F. 22.)[1]

(Supreme Court of California. May 27, 1896.)

EQUITY—JURY—EVIDENCE—PART OF DOCUMENT—AUTHENTICATION OF COPY—ERROR WITHOUT PREJUDICE.

1. In equity, where a jury is impaneled merely as a body advisory to the court, to assist it in determining disputed facts, the court may direct a verdict, though the evidence is conflicting.

2. Under Code Civ. Proc. § 1923, which provides for certified copies of an original, or parts thereof, for the purposes of evidence, part of a map of a United States reservation, duly certified by the legal custodian thereof, as required by section 1918, subd. 9, is admissible to show that certain lands are within the boundaries of the reservation.

3. Where a certificate to a copy of a document recites the official character of the officer as the legal custodian of it, his authority to certify a copy of it is proved, prima facie, by the certificate itself.

4. Possible error in the admission of evidence is without prejudice, where there is independent and uncontradicted evidence enough to establish the issue.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by E. M. Galvin and J. E. Galvin, by their guardian, against E. H. Palmer, for possession of lands. From an order granting plaintiffs a new trial, defendant appeals. Reversed.

Thos. G. Huxley, for appellant. M. G. Cobb and Henry C. Dibble, for respondents.

HENSHAW, J. Plaintiffs, who, at the date of the commencement of this action, were minors, averred their ownership and possession of a piece of land situated at the corner of Beach and Hyde streets, in the city and county of San Francisco. They further averred that defendant asserted title to the land, and that this title was based upon a deed obtained by defendant's grantor from the city and county of San Francisco by fraud. After the United States had granted the land to the city and county of San Francisco, upon trust to convey to those in bona fide possession at the date of the passage of said act (July 1, 1870), defendant's grantor falsely and fraudulently represented himself to hold such possession of said land, and thereby procured a deed to the same from the city. At the date of the passage of the act defendant's grantor was not, but plaintiff's grantors were, in such actual possession, all of which was well known to the defendant at the time he took his deed. The prayer was for a decree declaring defendant to hold his title in trust for plaintiffs, and compelling him to convey the same to them. For answer the defendant made denial, pleaded the statute of limitations, and by cross complaint set up his title, and asked a decree establishing it as good and valid. Though the action was in equity, the court impaneled a jury, whose verdict, being advisory merely, it was in no wise bound to accept. At the conclusion of the evidence the jury was instructed to render a verdict for defendant, which it did, and judgment was entered in accordance therewith. Thereafter plaintiffs moved for and obtained a new trial, from the order granting which this appeal is taken.

The grounds urged for the new trial were newly-discovered evidence, insufficiency of the evidence to justify the verdict, and errors of law occurring at the trial. The court, in granting the motion, based its order upon the single ground that it had erred to the prejudice of plaintiffs by admitting in evidence a portion of a map, which ruling will hereafter come under review. This order of the court relieves from consideration the question of the sufficiency or insufficiency of the evidence. Kauffman v. Maier, 94 Cal. 277, 29 Pac. 481. While it is true that, in actions at law, where a trial by jury is a matter of right to either party, it is error for the court to instruct the jury to render its verdict for one or the other when the evidence is conflicting, the rule does not obtain where, in equity, a jury is impaneled merely as a body advisory to the court, to assist it in determining disputed facts. In such cases the court may, even under conflicting evidence, reject the verdicts, general or special, of the jury, and enter a decree in accordance with its own determination, or, what is an equivalent, it may direct a particular verdict upon the facts as being in accord with its own conclusions. There was no error, therefore, in the court's instruction, even if it be conceded that the evidence was conflicting. But, in truth, the evidence was not conflicting, or, even if, by a most liberal concession, a conflict be acknowledged, it was upon matters which, by reason of other considerations, could not have advantaged the plaintiffs if the disputed points had been determined in their favor.

To make this apparent, a review of the facts here becomes necessary. In 1850 the president of the United States, by proclamation, reserved for public purposes certain lands upon the peninsula of San Francisco at Point José or Point San José, now commonly designated "Black Point." By latter proclamation, in 1851, the boundaries of this reservation were reduced and made to embrace the following tract: "The promontory of Point José within boundaries of not less than eight hundred yards from its northern extremity." By all the evidence in the case, uncontradicted, it appears that the lot in question was within the boundaries both of the original and of the reduced reservation. By act of congress of 1870 (16 Stat. c. 197, § 1), in which the United States relinquished certain of these reserved lands to the city and county of San Francisco, one of the trusts declared was "to grant and convey the remainder of said land to the parties severally, who are, at the date of the passage of this act, in the actual bona fide possession thereof by themselves or their tenants, and in such parcels as the same are so held and possessed by them; or who, if they have not such possession, were deprived thereof by the United States military authorities when they went into the occupancy of said military reservation, or were deprived thereof by intruders or trespassers, against whom possession may be recovered by legal process." Defendant's predecessor in interest made proof of his right to a deed to the land in question under this act, and through this source title vested in defendant, by deed of the city, December 24, 1870. Plaintiffs introduced a deed of the land from the commissioners of the funded debt to J. W. Bowman, acknowledged in November, 1852; a deed of an undivided one-half thereof from Bowman to S. Hopkins, acknowledged in January, 1853; a deed from Bowman to plaintiffs of his remaining interest, acknowledged in July, 1881; and a deed from Hopkins to plaintiffs of his interest, acknowledged in April, 1880. Their title from this source depends for its validity upon the soundness of the claim, which they urge, that the land originally belonged to the city of San Francisco. This claim, however, is untenable. Upon the conquest of California title to the lands of the pueblo which had not passed into private ownership vested in the United States. Grisar v. McDowell, 6 Wall. 364; Trenouth v. San Francisco, 100 U. S. 253; Association v. Knight, 85 Cal. 470, 24 Pac. 818; Thompson v. Doaksum, 68 Cal. 596, 10 Pac. 199; People v. Holladay, 68 Cal. 443, 9 Pac. 655. It is not claimed that these lands were held in private ownership prior to the commissioners' deed. And, as it has been decided that the reservation of the Presidio was a valid executive act, which excluded these lands from acquisition by private individuals (Grisar v. McDowell, supra), it follows, necessarily, that the commissioners' deed was ineffectual and worthless as a conveyance of title. Plaintiffs next sought to establish a title by adverse possession; but, as they were unable to prove payment of taxes for the requisite number of years, their claim failed so completely and admittedly that it is not even argued in their briefs. Plaintiffs' final effort was directed to showing that defendant's predecessor was not in the bona fide possession of the land at the date of the act of relinquishment, and that defendant's deed was, consequently, procured by fraud. But neither of the plaintiffs, who are minors, was born at the date of the passage of this act. They themselves cannot claim, therefore, as beneficiaries under the act. They must rely, as was admitted, upon the strength of their grantors' rights. In this regard, then, they occupy the same, and no better, position than would these grantors. As to them, the fraud, if fraud there be, was committed in 1870, and they were chargeable with knowledge of it, since not only were the proceedings public, but they culminated in a recorded deed to the property which they claimed. This cause of action, then, was long barred, as to the grantors of plaintiffs, and, consequently, to plaintiffs themselves. Love v. Watkins, 40 Cal. 561; Groghan v. Spence, 71 Cal. 125, 12 Pac. 719; Hecht v. Slaney, 72 Cal. 366, 14 Pac. 88; Ohm v. City and County of San Francisco, 92 Cal. 445, 28 Pac. 580.

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[1] Rehearing denied.

Moreover, the deed to defendant, like a patent, is prima facie evidence that the officers performed their duty in issuing it; and so that it was issued to the rightful claimants. These presumptions can be attacked only by him who connects himself with the title, and not by a stranger, or one in hostility to it. Low v. Lewis, 46 Cal. 549; McCreery v. Sawyer, 52 Cal. 257; Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673; Payne v. Treadwell, 16 Cal. 220; Doll v. Meador, 16 Cal. 295; Churchill v. Anderson, 56 Cal. 55; O'Connor v. Frasher, 56 Cal. 499; Leroy v. Cunningham, 44 Cal. 599; Naglee v. Palmer, 50 Cal. 641; Palmer v. Galvin, 72 Cal. 183, 13 Pac. 476; Chapman v. Quinn, 56 Cal. 266; Peabody v. Prince, 78 Cal. 511, 21 Pac. 123. It was incumbent on plaintiffs, therefore, first to prove that they or their grantors were in the actual bona fide possession at the date when the act went into operation, and this, as the court says, and the evidence shows, they signally failed to do. The utmost which their evidence can be claimed to establish is that no one held such possession; but such a showing leaves plaintiffs strangers to the title, and against them, on this ground, the deed of the city to defendant becomes conclusive, since they cannot be permitted to attack it. In proof that the land was within the limits of the military reservation, there was admitted in evidence, over plaintiffs' objection, a portion of a map of the reservation showing the location of the land with relation to the boundary of the government tract. The judge granted the motion for a new trial upon the sole ground that he believed he had committed error in admitting this evidence, and, as it was evidence which greatly influenced him in his determination that the land was a part of the Presidio reservation, he deemed the ruling to be prejudicial to the interests of plaintiffs. We think the learned judge, in his conscientious efforts to avoid injustice, here, and not upon the trial, fell into error. The drawing, which was a portion of a map, was offered with the following certificate: "I, Charles S. Stewart, colonel of the United States corps of engineers, do hereby certify that I am the legal custodian of a map of the Point San José U. S. military reservation, as located within boundaries of not less than eight hundred yards from said point, and that said map was prepared by and is part of the records of the United States war department, and that this map is a true and correct copy of so much of the original map in my custody as embraces the tract of land located in the city and county of San Francisco, within the former boundaries of said reservation, and bounded northerly by high-water mark of the bay of San Francisco, easterly by the former eastern boundary of said reservation as originally located, southerly by North Point street, and westerly by Larkin street. In witness whereof, I have hereunto set my hand and private seal (having no official seal), this sixteenth day of April, 1883. C. Seaforth Stewart, Col. of Engineers, U. S. A. [Seal.]" This certification is in strict accord with the provisions of section 1918, subd. 9, and section 1923 of the Code of Civil Procedure.

The objections made by plaintiffs to the introduction were two: First, that the whole map should be introduced, and not a part; and, second, that there is no law making Col. Stewart a certifying officer of a copy of the map. As to the first of these objections it is sufficient to say that section 1923, Code Civ. Proc., contemplates and provides for the introduction in evidence of a part of a map or document. The object of the evidence was to establish that the land in question was within the boundaries which the United States government had set to the reservation, and that portion of the map was offered which showed the land and the inclosing boundary. The whole map would have shown no more, or, if it would, it became the duty of plaintiffs' attorney, who had himself, under direction of the court, inspected the original instrument, to point out the precise particular in which the offered portion worked an injury by its incompleteness, or failed fully to express the truth of the matter sought to be proved. He did not do this. If the whole map would have shed no more light upon the question, the offered portion was material and admissible, and the remainder immaterial and unnecessary. The second ground of objection, which was that "there is no law making Col. Stewart a certifying officer of a copy of the map," is no better founded than was the first. The objection is tantamount to an admission that the map is a record of the war department, and that Col. Stewart is the legal custodian thereof, as he well might be under the customs, rules, or orders of the department. The certificate also recites these facts. Assuming them as true, the law authorizing him to make the certificate is found in section 1918, subd. 9, Code Civ. Proc. Moreover, the official character of the officer as the legal custodian of the document, and therefore authorized to certify a copy of it, is proved, prima facie, by the certificate itself. Mott v. Smith, 16 Cal. 533, 552. And, finally, an error in admitting the map could not have been prejudicial to plaintiffs, because there was sufficient independent and uncontradicted evidence to show the location of the land; second, by presumption the deed from the city to defendant, which deed plaintiffs introduced in evidence as part of their case, showed the land to be within the reservation (Collins v. Bartlett, 44 Cal. 383); third, plaintiffs pleaded that the land was granted by the United States to the city and county of San Francisco in trust, and failed to connect themselves with this government title.

As to the alleged newly-discovered evidence, it was either cumulative upon the proposition that no one was in the actual bona fide possession of the land at the time the act of congress became operative, or it sought to show that, though the land was taken by the United States authorities, and was within the boundaries which they laid out, still these boundaries were incorrect. Even if this latter evidence were admissible, no diligence is shown, and no reason why it was not procured upon the trial. At the same time it clearly appears, by counter affidavits, that plaintiffs' guardian, by reason of former litigation between the parties over the same land, must have been fully advised as to its materiality and bearing upon the present case. The order is reversed, and the cause remanded, with directions to the trial court to deny the motion for a new trial.

I concur: McFARLAND, J.

I concur in the judgment. TEMPLE, J.

(113 Cal. 64)

## GLUGERMOVICH v. ZICOVICH. (S. F. 13.)[1]

(Supreme Court of California. May 28, 1896.)

ACTION ON NOTE — GARNISHMENT AS DEFENSE — COSTS.

1. The maker of a note who, at the time of its maturity, has been garnished in attachment, then pending against the payee, cannot set up such garnishment as a defense to the action, nor to the recovery of costs and the attorney's fee provided for in the note.

2. His proper course is to move for a stay pending such garnishment proceeding.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by V. Glugermovich against A. Zicovich. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Veuve, for appellant. H. V. Morehouse, for respondent.

BRITT, C. Action on a promissory note for the sum of $473, made by defendant to plaintiff, and which fell due June 14, 1894. One of its provisions was that, in case of suit, a reasonable counsel fee should be allowed. On said June 14th Zicovich, the maker, was garnished in respect of his indebtedness on the note in an action brought by one Coschina in a justice's court against the plaintiff here, said Glugermovich. Such attachment was in force when this action was begun,—June 15, 1894,—and the defendant, Zicovich, pleaded the fact thereof in his answer. The suit of Coschina v. Glugermovich was yet pending and undetermined at the time of trial of the present case. Upon such trial plaintiff recovered judgment for said sum of $473, together with further allowance for counsel fees and costs of suit.

[1] Rehearing denied.

A proper mode of procedure for the garnishee under such circumstances was long ago pointed out by the decisions of this court. He may, by affidavit or other appropriate means, bring to the attention of the court where he is sued by his own creditor the facts of the garnishment, and apply for a stay of proceedings until the action of the attaching creditor can be disposed of. McKeon v. McDermott, 22 Cal. 667; McFadden v. O'Donnell, 18 Cal. 160. Doubtless, also, cases may arise where the court would find it expedient, for the purposes of justice, to allow the cause to proceed to judgment, but staying execution upon the whole, or enough thereof, to provide for the satisfaction of the demand for which the debtor is garnished; the end sought being to enforce payment from him once, and only once, and that to the person whose claim against him turns out to be legally superior. Drake, Attachm. §§ 699–701; Jones v. Wood, 30 Vt. 268; Creed v. Creed, 161 Mass. 107, 36 N. E. 749. In this instance the defendant applied for neither a suspension of the action nor any stay of execution, and since, as the authorities cited show, the matter pleaded by him constituted no defense, the court was justified in rendering judgment absolute for the sum due on the note.

Nor do we see that the costs and attorneys' fees are on a different footing. The defendant promised to pay attorney's fees in case of suit. The garnishment was no bar to the right to sue. Hence, the recovery of attorney's fees seems, under the circumstances, necessarily to accompany any recovery at all. And so of the costs which are incidental to the judgment. What should have been the effect, on the matter of attorney's fees and costs, if, before final judgment here, the liability of Glugermovich, and the consequent force of the garnishment, had been established in the action brought by Coschina, is not now for decision, though we incline to think that, in such a case, the defendant ought not to suffer prejudice from plaintiff's failure to pay his own debt, and that the right of the latter to recover attorney's fees or costs should be made contingent on his successful resistance of the action in which the debt due to him was attached. See Shealy v. Toole, 56 Ga. 210; Oriental Bank v. Tremont Ins. Co., 4 Metc. (Mass.) 1.

The judgment should be affirmed, but, upon the going down of the remittitur, the court should permit the defendant, on proper notice, to show what, if any, payment he has made, or is compellable to make, on account of the attachment of Coschina, and direct the satisfaction of the judgment to that extent.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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113 Cal. 80

## PEOPLE v. HICKMAN. (Cr. 115.)

(Supreme Court of California. May 28, 1896.)

JURY—SPECIAL VENIRE—CHALLENGE—CRIMINAL LAW—CONFESSIONS—WHAT CONSTITUTES—WITNESS—IMPEACHMENT—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

1. Disallowing a challenge to the panel returned under a special venire because that venire was rendered necessary on account of the depletion of the regular venire, due to the liberality on the part of the judge in allowing excuses to those summoned, is not ground for reversal, in the absence of a showing that the judge abused his discretion in the matter of allowing the excuses.

2. A statement by defendant, in answer to the remark of the constable who arrested him that his possession of the stolen article looked suspicious, "Well, damned if it don't," is not a confession, so as to render it inadmissible without proof that it was voluntarily made.

3. A statement by defendant, in reply to the remark of a constable that he wished he had stopped a wagon which passed him the night of the theft, driving rapidly, that it was best for him that he did not, or otherwise he might not have stopped any more, is not a confession, so as to render it inadmissible without proof that it was voluntarily made.

4. Where accused testifies in his own behalf, to discredit him, testimony as to his general reputation in the community for "truth, honesty, and integrity" is admissible.

5. Where, to discredit accused's testimony, a witness is asked as to defendant's "reputation" for truth, etc., instead of his "general reputation," a general objection to such question, without calling the attention of the court to the particular vice in the form of the question, is insufficient.

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Jerome Hickman was convicted of grand larceny, and appeals from the judgment and an order denying him a new trial. Affirmed.

Theo. S. Shaw and E. C. Reichard, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Defendant was convicted of grand larceny, and appeals from the judgment and an order denying him a new trial. He assigns numerous errors.

1. The exceptions taken in the impanelment of the jury are without merit. The course pursued by the trial judge as to the time and manner of requiring peremptory challenges to be exercised has been the established rule in criminal cases in this state for upwards of 25 years. People v. Scoggins, 37 Cal. 679. The challenge for cause interposed by the prosecution to the juror Fulkreth was properly allowed. The challenge was sufficiently specific, and the juror, in having formed an opinion based upon hearing the sworn evidence taken on a former trial of the same case, was clearly disqualified. Nor was there any error in disallowing the defendant's challenge to the panel returned under the special venire. The necessity for the issuance of that venire arose from the want of a sufficient number of jurors remaining on the regular list to form a panel. The fact that the depletion of the regular panel may have arisen from too great a

liberality on the part of the judge in allowing excuses to those summoned thereon cannot affect the regularity of the special venire, the matter of excuses being one of wide discretion, and nothing being made to appear to show its abuse. The special venire was regularly issued and returned. Code Civ. Proc. § 227.

2. The constable who arrested the defendant was permitted, against the defendant's objections, to testify to certain statements or declarations made by defendant in a conversation between them after the arrest, and this ruling is assigned as error. The subject of the larceny was a calf, which was taken from the pasture of its owner, near the town of Porterville. In the evening before the theft the owner having been informed that there was a calf tied down in his pasture, got a friend and the constable, and drove out to the field. On the way out they met a two-horse wagon being driven rapidly towards town, but the night was too dark to enable them to identify the driver or the team. When they reached the pasture the calf was gone, but evidence of where it had been tied was found, and wagon tracks led from near the place to the premises of the defendant. The next morning a search of defendant's premises was made by the constable, and in a shed on the place was found a quarter of beef or veal, the hide and the head and entrails on the floor. Upon this discovery, the constable remarked to defendant, "Jerome, this looks kind of suspicious," and defendant answered, "Well, damned if it don't." Subsequently, in talking with defendant on the way to the jail, the constable referred to the incident of meeting the wagon on the evening before, and, to quote his language as given in his testimony: "I remarked to him [defendant] that I had a notion to stop that wagon when we met it, or that afterwards I wished that I had stopped it; and he said that it was probably the best thing for me that I didn't try to stop it; that, if I had attempted to stop it, I probably would not have stopped any more,—something to that effect. I don't remember exactly the language he used." Defendant objected to this conversation, and asked that it be stricken out, on the grounds that it was irrelevant, incompetent, and immaterial, and constituted a confession made under duress of arrest and imprisonment, and was for that reason inadmissible. Aside from the fact that the constable had testified that nothing was said or done by him to induce the defendant to talk, or any promise of clemency, or threats made to defendant, there was no error in the admission of the conversation in evidence. The statements or declarations of the defendant were in no sense a confession or admission of guilt, and did not require preliminary proof of their voluntary character. "A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgements of guilt." People v. Le Roy, 65 Cal. 613, 4 Pac. 649, and cases there cited. The fact that these statements of the defendant, when considered with the other facts in the case, had a tendency to prove guilt, did not constitute them confessions, or subject them to the rule applicable to the latter. "An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt." People v. Parton, 49 Cal. 637. In this case, as in those above cited, the defendant did not admit his guilt, but denied it from first to last. The evidence was, therefore, clearly within the rule of admissibility.

3. The defendant took the witness stand in his own behalf, and gave testimony tending to exculpate him from the charge. In rebuttal the prosecution introduced a number of witnesses who testified that the general reputation of defendant in the community for truth, honesty, and integrity was bad. This evidence was objected to by the defendant upon the grounds that it was irrelevant, immaterial, and incompetent, and that its introduction was an unwarranted attack on the character of defendant, which was not in issue, and constituted misconduct of the district attorney in offering it. This objection was overruled, and the admission of the evidence is now urged as error. The evidence was properly admitted. The moment the defendant submitted himself as a witness, his character, as such witness, for truth, honesty, and integrity, was involved, and he became subject to the same rules for testing his credibility before the jury by impeachment or otherwise, as any other witness. People v. Beck, 58 Cal. 212; People v. Bentley, 77 Cal. 7, 18 Pac. 799. The course of the prosecution was one of the recognized methods for attacking the character of a witness, and its application in the present instance was a proper one. Code Civ. Proc. § 2051.

A further objection is made in this connection. There were some six or seven impeaching witnesses in all put on by the prosecution. To all of them, except in two instances, the form of the questions calling for their knowledge was unobjectionable; the witnesses being asked, in the usual formula, if they knew "the general reputation of the defendant for truth, honesty, and integrity," etc. In two instances, however, the word "general" was, whether by inadvertence or otherwise, omitted in putting the question. The objection interposed by defendant in each of the instances, including the two last, was the same as above stated, and no specific suggestion or objection as to the mere form of the question was in any instance made to the court or opposite counsel. Defendant now insists that in the two instances indicated his objection was clearly good, and should have been sustained. In the first place, while it is true that the inquiry is to be confined to the general reputation of the witness, it is not necessarily true that this object can only be accomplished by using in all instances one stereotyped form of question. As, for example, in the case before us, in each of the two instances where the term "general" was omitted in putting the question, the whole manner of the inquiry and the character of the questions asked evinced as clearly to the witness on the stand and the jury that it was the general reputation of the impeached witness that was being sought as though that fact had been expressed in exact terms. This is all that is required. But, in the next place, if defendant wished to avail himself of the objection now made, he should have directed the attention of the judge by specifically calling his attention to the vice in the form of the question now complained of. He cannot be heard to urge or point out here for the first time an objection of any more specific character than that made in the court below. People v. Bush, 68 Cal. 629, 10 Pac. 169; Howland v. Railway Co. (Cal.) 42 Pac. 983; People v. Frigerio, 107 Cal. 151, 40 Pac. 107.

There are no other points requiring special notice. We find nothing reprehensible in the conduct of the district attorney or his assistant, either in the method of examination of witnesses or their argument to the jury. The case would seem to have been conducted throughout with a due regard for the rights of the defendant. We have examined the other assignments, and find that they involve no error. The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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(113 Cal. 97)

## BARRERE v. SOMPS. (S. F. 127.)[1]

(Supreme Court of California. June 4, 1896.)

PLEADING—INSUFFICIENCY OF ANSWER—ACTION ON CONTRACT—LIABILITY OF BAILEE.

1. Under a complaint for money deposited with defendant for plaintiff's use, alleging a promise to repay it to plaintiff on demand, testimony showing that the money was deposited with defendant to secure the return of certain property loaned to plaintiff under a contract of employment was inadmissible.

2. Where the answer denied specifically the allegations of the complaint, it was sufficient to raise the question of variance between the complaint and the proof.

3. Plaintiff contracted to sell goods manufactured by defendant under a guaranty as to profits, defendant furnishing a horse and wagon necessary to the business, to secure the return of which in good condition plaintiff deposited money with defendant. *Held*, that plaintiff, in order to recover the amount so deposited, must allege and show a fulfillment of the condition to return the property loaned.

4. The exercise of ordinary care to prevent loss or injury to a horse and wagon will not relieve plaintiff from liability for failure to return the property, unless such loss or injury was due to the defective appliances furnished by defendant.

5. On a recovery by plaintiff, he is entitled to interest only from the date of his demand for payment, and not from the date of the deposit.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Jean Barrere against P. G. Somps to recover money deposited with the defendant for the use of plaintiff. There was a verdict for plaintiff, and defendant appeals. Reversed.

Gordon & Young, for appellant. Naphtaly, Friedervirch & Ackerman, for respondent.

HAYNES, C. The allegations of the complaint in this action are as follows: "That the defendant is indebted to the plaintiff in the sum of five hundred dollars, United States gold coin, heretofore deposited by plaintiff with the defendant, to and for the use of this plaintiff, and which said sum the defendant promised to repay to plaintiff on demand; that, although thereto requested, defendant has neglected and refused, and still neglects and refuses, to pay over the said sum of five hundred dollars to this plaintiff." The prayer was for judgment for said sum, with interest and costs. A general demurrer to the complaint was overruled, and the defendant answered, and (1) specifically denied the several averments of the complaint; (2) alleged the deposit of said sum under an agreement in writing executed by the parties to the action, a copy of which is attached to the answer, and which is as follows: "Exhibit A. This agreement, made this 28th day of September, 1890, between P. G. Somps, of San Francisco, the party of the first part, and Jean Barrere, of the same place, the party of the second part, witnesseth: Said party of the second part does hereby agree to purchase soda water from said party of the first part at the rate of seventy-five cents per dozen, and to resell the same; and said party of the first part does hereby guaranty to said party of the second part at least twenty dollars per week profit on such resales made by him, provided said party of the second part devotes his whole time to this business. And in consideration of said party of the second part purchasing from said party of the first part exclusively all soda water to be resold by him, said party of the first part does hereby hire unto said party of the second part horses and wagon and necessary syphon bottles for facilitating the sale of soda water. The party of the first part shall have the right to terminate this contract at any time, but said party of the second part cannot terminate it except on thirty (30) days' notice; and, at such termination, said party of the second part does hereby agree to make a full disclosure of the names and addresses of all his customers to said party of the first part. And as security for the faithful performance of his part of this contract, and to save and hold harmless said party of the first part from all damages arising by or through the acts of said party of the second part, and to secure the return of all property hired by said party of the second part, as aforesaid, in good order and condition, said party of the second part does hereby deposit with said party of the first part the sum of five hundred dollars. In witness whereof, the parties hereto have hereunto set their hands and seals this —— day of September, 1890. P. G. Somps. Jean Barrere. Witness: T. Carrolot." The second defense, after alleging the substance of the contract, alleged that plaintiff received from the defendant under said agreement one horse of the value of $125, one wagon, and 160 bottles of the value of $1 each; that plaintiff failed to return said horse and said bottles, and damaged said wagon while in his possession to the extent of $97.50; and on the termination of said contract failed and neglected to disclose to defendant the names and addresses of his customers, whereby said customers were lost to defendant, to his damage in the further sum of $500; and stated the aggregate of his damages at $882.50. The same facts were also alleged by way of counterclaim. A jury trial was had, and a verdict returned for the plaintiff for said sum of $500, with interest from September 28, 1890, the date of said agreement, and defendant appeals from the judgment entered thereon, and from an order denying his motion for a new trial.

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[1] For modification of opinion, see 45 Pac. 572.

The plaintiff was called and examined as a witness in his own behalf, and during his examination in chief he testified that when he entered defendant's employment he paid him $500. His counsel then asked him, "What was the understanding with reference to that?" Counsel for defendant objected, on the ground that the contract under which the payment was made is in writing, and speaks for itself. It was then admitted that the copy of the contract attached to the answer was correct, and it was read in evidence by the plaintiff, his counsel contending, however, that it was a nullity, and "was never lived up to by the parties." After testifying to the route or district in which he was to sell soda water, and that he was paid $20 per week without regard to the quantity sold, he said, "I deposited $500 with him." His counsel then asked the following question: "You left this money there as security, did you?" Defendant objected to the question upon the ground that it was irrelevant, immaterial, and incompetent under the pleadings; that if the plaintiff could sustain his action at all it must be upon the claim that he gave Mr. Somps $500, and that it had not been returned; that if plaintiff seeks to recover by reason of his compliance with the provisions of a contract, he has failed to bring any such action." Defendant's objection was overruled, and he excepted. The same question was again made by the defendant by motion for a nonsuit, the plaintiff having rested at the conclusion of his examination. In his motion for a nonsuit counsel for defendant contended that there was a variance between the pleadings and proofs; that plaintiff should have pleaded the contract, and the modifications of it. This motion was denied, and defendant excepted. While the common counts are in some cases sufficient under the Code, it is safe to say they are insufficient in those cases where they were insufficient under the old system of pleading. "Where a special contract is still open, and has not been rescinded by mutual consent, it is necessary to declare specially." 1 Chit. Pl. 368. This is not a case where a promise to repay upon demand is implied from the mere fact of a deposit. Here the money was deposited under a special contract, as security for its performance by the plaintiff, and is, therefore, a pledge. "A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time" (Civ. Code, § 1823); and "a depositary must deliver the thing to the person for whose benefit it was deposited on demand, * * * unless he has a lien on the thing deposited. * * *" (Id. § 1822). Something more than a demand was, therefore, necessary. The question whether the plaintiff had returned all the property in good order and condition, and whether he had made full disclosure of the names and addresses of his customers, and had faithfully performed his contract, were matters which, by the terms of the contract, were to precede its termination; and until these matters were settled or adjusted the contract remained, though as to the sale of the soda water it had ended. The very purpose of the deposit remained open and unadjusted, and the respective liabilities of the parties disputed and unsettled. Therefore, under the common-law system of pleading, the common count was not sustained by the evidence offered by the plaintiff, and much less has he complied with the code system, which requires him to allege every material fact which it is necessary for him to prove upon the trial. Under either system his allegations and proofs must agree, and it is not sufficient that his evidence discloses a cause of action against the defendant unless it be the cause of action he has alleged in his complaint. The first defense pleaded by the defendant denied specifically each material allegation of the complaint, and that defense was certainly as efficient to raise the question of variance as the denial under the old system that the defendant "did not promise in manner and form as in the declaration is alleged," which put in issue not only the promise, but all the facts alleged. Conceding, for the purposes of this opinion, that the common count is a sufficient complaint for the recovery of an ordinary deposit or bailment,—not upon condition,—and upon which an implied promise arises to repay upon demand, the evidence introduced by plaintiff showed an entirely different transaction, whatever may be the true construction of the contract between the parties. The contention of plaintiff that the contract created only the relation of employer and employé and not that of vendor and vendee as to the soda water, and that he was not a hirer of the horses, wagons, and syphon bottles, is immaterial so far as the questions above considered are concerned, as the security provided for in the contract was applicable to whatever relation was in fact created by it, and covered every injury the defendant may have suffered from the failure of the plaintiff to perform it. The conclusion we have reached renders a reversal necessary, and relieves us from the necessity of considering other questions made by appellant except so far as they may arise upon a new trial.

1. Interest on the deposit is not recoverable from the date of the deposit. The deposit was a condition upon which the contract was entered into, and, in the absence of a special provision in the agreement that defendant should pay interest, the profits or compensation plaintiff was to receive under the contract covered and included any incidental benefit the defendant may have received from its use until it became payable to plaintiff; but the plaintiff is entitled to interest upon the amount he may be entitled to recover from the date of his demand for repayment.

2. Whether the terms of the agreement and the conduct of the parties thereunder constituted the relation of vendor and purchaser of the soda water, or that of employer and employé, is of little importance, as there appears to be no controversy between the parties as to profit or compensation; and, as to plaintiff's liability for the loss of the horse and bottles and injury to the wagon, we think it must depend upon the construction of that provision of the contract relating to the return of the property in good order and condition, and the subsequent conduct of the parties thereunder; for, independently of the contract as to the return of the property, whether plaintiff was a hirer of the property or an employé for reward, he was bound to exercise ordinary care in its use. Civ. Code, §§ 1852, 1978; Wood, Mast. & S. § 325. The court below instructed the jury, in effect, that the written contract was nothing more than an agreement between master and servant, and that it was the duty of the plaintiff as an employé to use reasonable and ordinary care in the preservation of his master's property intrusted to him. The construction thus given is that which would have been required if the following clause had been omitted from the contract, viz.: "And to secure the return of all property hired by said party of the second part, as aforesaid, in good order and condition, said party of the second part does hereby deposit with said party of the first part the sum of five hundred dollars;" and, therefore, unless this language increases plaintiff's liability beyond that which the law attaches to a bailment for hire, or the responsibility of an employé for the want of ordinary care, its insertion in the contract was idle and meaningless. This cannot be presumed. It was intended to have some effect, and we see nothing in the contract itself, or in the circumstances surrounding the parties at the time it was made, to change the natural meaning of the clause in question. It is not an answer to defendant's contention to say that it is a hardship upon the plaintiff to be compelled to pay for losses not attributable to his want of ordinary care. As was said in Transportation Co. v. O'Neil, 98 Cal. 5, 32 Pac. 705: "Where a party has expressly undertaken, without qualification, to do anything not naturally or necessarily impossible under all circumstances, and he does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause over which he had no control, but against which he might have provided in his contract; * * * and the only qualification or limitation of this obligation by the law is that it would not bind the defendant in case the loss had been caused by the culpable negligence or other wrongful act of the plaintiff." See, also, Dermott v. Jones, 2 Wall. 6, where it was said: "No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract." The qualification laid down in Transportation Co. v. O'Neil, supra, must not be lost sight of, however, as the subsequent conduct of the defendant may have been such as to relieve the plaintiff from this clause of the contract. If the defendant furnished to the plaintiff, to be used by him in the performance of the contract, a horse of peculiar habits, which rendered his use unsafe, or required unusual care on the part of the driver, and these peculiarities were known to the defendant and unknown to the plaintiff, or if the horse was used by the plaintiff in the manner directed by the defendant, or if the plaintiff used the only means provided by the defendant to prevent it from running away, the plaintiff would not be liable for the damages caused by its running away. The defendant was to furnish all the appliances necessary or proper for the business to be done by the plaintiff, and if he provided a hook attached to the seat of the wagon for the purpose of fastening the lines when the driver left the wagon, and furnished no other means of securing the horses, it was equivalent to a direction to secure them in that way. This mode of securing the team, we may reasonably suppose, was intended by the defendant to economize the time of the plaintiff, and to

thus enable him to visit more customers, and sell more soda water, and thus promote the business interests of the plaintiff. Whether the acts or directions of the plaintiff were of the character above outlined, and whether the injury to the horse and wagon and the destruction of the bottles were caused thereby, are questions of fact about which no opinion is expressed. The judgment and order appealed from should be reversed, with leave to both parties to amend their pleadings.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with leave to both parties to amend their pleadings.

113 Cal. 68

## PEOPLE v. CURTIS. (Cr. 120.)

(Supreme Court of California. May 28, 1896.)

CRIMINAL LAW—ORDER TO DISMISS—ERRONEOUS ENTRY—CORRECTION OF MINUTES.

1. Defendant and others, as county supervisors, were indicted separately for having, corruptly and in violation of official duty, voted for the payment of a claim against the county. Other indictments were also returned charging illegal voting for the appointment and payment of certain officials. Defendant was acquitted on the latter charge, and, when the case of another supervisor on this charge was called, the district attorney moved to dismiss all such cases. No list of the cases included in the motion was made, and, after the order was granted, the clerk, at the suggestion of the attorney for the defendant, entered in his rough minutes a memorandum of dismissal as to the cases in the first class as well as those in the second class. *Held* that, on the discovery of the mistake before entry of the order in the regular minutes, it was within the power of the court to correct the order to make it conform to the intent of the motion, and to vacate so much thereof as applied to the cases not intended to be included.

2. The preliminary minutes of dismissal acquired no force by the subsequent filing of a formal order, attested by the clerk, as filed on the date of the original order; it appearing that the docket was prepared by the procurement of the attorney for the defendant after the vacating order, and with full knowledge thereof.

Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

William Curtis was indicted for having, while holding the office of county supervisor, corruptly and in violation of his official duty, voted for the payment of a claim against the county. An order dismissing the indictment having been erroneously entered, the court made a second order vacating the order of dismissal, from which defendant appeals. Affirmed.

Robert T. Devlin and C. T. Jones, for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The grand jury of the county of Sacramento presented this accusation against the defendant for having, while holding the office of supervisor of that county, corruptly and in violation of his official duty, voted for the payment of a claim against the county. Other accusations were at the same time presented against him for illegally voting for the appointment and payment of certain deputy assessors; and similar accusations against other supervisors were also presented by the grand jury. While these accusations were pending in the superior court of Sacramento county, the trial of one of them against the defendant, for illegally voting for the appointment and payment of a deputy assessor, was had, and resulted in an acquittal. On the next day, October 3d, one of the accusations (People v. Morrison, No. 1,403) was on the calendar of the court for trial; and the district attorney stated to the court that the testimony in the case would be the same, and the question the same, as in the case of People v. Curtis, which had just been tried; that there were a considerable number of such cases, and it would, under the facts and the law as ruled by the court on the trial of People v. Curtis, be impossible to convict the defendants. Upon this statement, and the motion of the district attorney therefor, the court directed the dismissal of all such cases. It does not appear that there was presented to the court any list or statement of the cases to which the order of dismissal was directed, but, after the order had been made, the clerk, at the request of the attorney for the defendant herein, entered in pencil, in his rough minutes, in 23 cases, including the present one, the following order: "The above-entitled action coming on regularly this day for trial, District Attorney F. D. Ryan and S. Solon Holl appearing in court as counsel for the people, and Robt. T. Devlin and Chas. T. Jones appearing for the defendant, upon motion of the district attorney it is ordered that the above-entitled action be, and the same is hereby, dismissed." On the 8th of October, and before the clerk had entered any of these orders in the regular minutes, the court made an order vacating the aforesaid order of dismissal so far as it related to the present case (and also five others), upon the ground that it was made through inadvertence and mistake. From this order the present appeal has been taken.

It is recited in the bill of exceptions that, in making the order for dismissal, the court understood from the statement of the district attorney "that the cases which he moved to dismiss were those only in which the defendants were accused of misconduct in having illegally voted for the payment of the salary of sundry deputy officials; that an examination of the accusations in six of the cases (including the present) shows that said cases are of a different character altogether from that of People v. Curtis, tried on the 1st and 2d of October; that the nature and character of such cases were not brought to the attention of the court, nor the clerk thereof, by the district attorney or any other attorney, and the court did not intend to dismiss, and did not dismiss, any of the last-mentioned cases; that the clerk, in making the entries in his rough minutes of the order of the court, received his instructions as to the particular cases from the attorneys for the defendants in those cases."

Under the facts here stated, the action of the court in vacating the order of dismissal must be affirmed. The power of a court to cause its records to correctly set forth the orders which it has actually made, as well as to set aside an order which it has made through inadvertence or mistake, is too well established to require argument (Hall v. Polack, 42 Cal. 218; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074; Kaufman v. Shain (Cal.) 43 Pac. 393; and, if the question of mistake or inadvertence is disputed, the decision of the judge upon any controverted fact is not open to review. In the present case the statement in the bill of exceptions that the motion to dismiss was based upon the ground that the other cases involved only the same questions as those presented in the case just tried is not controverted; and it follows, not only that the statement of the court that it did not intend to dismiss any other cases must be accepted as conclusive, but also that the entry by the clerk dismissing any other cases was made under a mistake on his part in failing to comprehend the scope of the order. When these facts were brought to the notice of the court, it became its duty, either at the instance of the district attorney or upon its own motion, without any suggestion from either party, to vacate and set aside the entry that had been made by the clerk.

The pencil order of dismissal which was originally made did not acquire any force by reason of the subsequent filing of a formal order attested by the hand and seal of the clerk, and indorsed by him as "filed October 3, 1895." It was found by the court that this document was prepared by the procurement of the attorney for the defendant, without the knowledge or authority of the court, and after the attorney knew of the order of October 8th vacating the entry of dismissal that had been made by the clerk October 3d, and that it was not made or filed until after October 8th. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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113 Cal. 35

## PEOPLE v. BROWN. (Cr. 109.)

(Supreme Court of California. May 27, 1896.)

CRIMINAL LAW—JUDGMENT OF CONVICTION—FINE—IMPRISONMENT—LIEN—EXECUTION.

1. Pen. Code, § 1205, which provides that "a judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine," applies only where there is no direct judgment of imprisonment coupled with the judgment of fine.

2. Under Pen. Code, § 1206, which provides that "a judgment that the defendant pay a fine constitutes a lien in like manner as a judgment for money rendered in a civil action," the judgment is a lien, if it be for a fine without the alternative of imprisonment, whether it be one of imprisonment and fine, or one simply of fine, not coupled with a judgment of imprisonment.

3. Under Pen. Code, § 1214, which provides that, "if the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil case," execution may issue, if there is a fine without the alternative of imprisonment, whether it be a judgment of fine coupled with a judgment of imprisonment, or one simply of fine without a judgment of imprisonment.

Department 1. Appeal from superior court, Fresno county; Stanton L. Carter, Judge.

Charles Brown was convicted of an assault with a deadly weapon. From an order denying his motion to recall and quash an execution issued to collect a fine imposed by the court as a part of its judgment, defendant appeals. Affirmed.

S. J. Hinds, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. This is an appeal from an order of the lower court denying defendant's motion to recall and quash the execution issued upon a judgment pronounced upon the verdict of the jury finding the defendant guilty of an assault with a deadly weapon; said execution having been issued with the intention of collecting the sum of $750, a fine imposed by the court as part of its judgment. Said judgment was to the effect that the defendant be punished by imprisonment in the county jail of the county of Fresno, state of California, for a period of one year, and that he pay a fine of $750, and, in default of the payment of the fine, that he be imprisoned in the said jail until said fine was paid, at the rate of one day for each two dollars of the fine. That portion of this judgment which provides that in default of the payment of the fine the defendant should be imprisoned until the fine be paid, at the rate of one day for each two dollars of the fine, is void. This court has repeatedly held that where a judgment of imprisonment has been rendered, and also a judgment of fine, there can be no imprisonment to satisfy the fine. Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372; People v. Hamberg, 84 Cal. 475, 24 Pac. 298; Lowrey v. Hogue, 85 Cal. 602, 24 Pac. 995. There is nothing to be found in Ex parte Green, 94 Cal. 387, 29 Pac. 783, which in any way militates against the principle declared by the foregoing authorities, as is contended by the attorney general. A case then presents itself where a judgment of both imprisonment and fine stands against the defendant, and in such a case may the fine be collected by forced sale and execution? The statute expressly authorizes a judgment of both imprisonment and fine, and, if in such a case the fine may not be collected by levy of execution and sale, it cannot be collected at all, for it is not probable that a defendant will voluntarily pay a fine in the absence of any penalty for its nonpayment; and, the law being that it is nonenforceable by imprisonment, it is a nullity, as far as practical results are concerned, unless it may be collected by a forced sale. And we will not give such a construction to the law, if it is reasonably susceptible of any other. We are then brought to an examination of the provisions of the Penal Code bearing upon the question at hand. Those sections read:

"Sec. 1205. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine.

"Sec. 1206. A judgment that the defendant pay a fine constitutes a lien in like manner as a judgment for money rendered in a civil action."

"Sec. 1214. If the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action."

It will be seen, by the authorities previously quoted, that section 1205 only applies where there is no direct and express judgment of imprisonment; that is, if there is a judgment of imprisonment coupled with a judgment of fine, then the fine is not enforceable by imprisonment. A fair construction of section 1206 is that if the judgment be for a fine, without the alternative of imprisonment, it constitutes a lien upon defendant's realty; and we think this construction equally sound whether the judgment be one of imprisonment and fine, or one simply of fine not coupled with a judgment of imprisonment. We likewise conclude the true meaning of section 1214 to be that, if there is a fine alone,—that is, a fine without the alternative of imprisonment,—then an execution may issue as in civil actions; and, as in section 1206, we think this is equally true whether the judgment be one of fine coupled with a judgment of imprisonment, or whether it be simply a judgment of fine without a judgment of imprisonment. By this construction the words, "if the judgment is for a fine alone," refer to a case where there is no alternative imprisonment to enforce the fine, and not to a case where there is a judgment of imprisonment coupled with the fine. By adopting this construction the sections all become a harmonious whole, and for every contingency contemplated by the legislative mind provision is made. For the foregoing reasons the order is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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113 Cal. 76

## PEOPLE v. MASON. (Cr. 107.)

(Supreme Court of California. May 28, 1896.)

GRAND LARCENY—ATTEMPT TO COMMIT—EVIDENCE.

Evidence that defendant, learning that the prosecuting witness had $4,000 deposited in his wife's name, gained his confidence, and took him into a lottery shop, where, after being induced by defendant to try his luck, he was allowed to draw a prize of $4,000, but was told, when he demanded it, that he must first show an equal amount of money; that defendant went with him to get the money, and after his wife, in whose name it was deposited, had drawn it, returned with them to the lottery shop at the time agreed on, where they found another man in charge, who said that the man in charge when the prize was drawn had gone to get the money; that this new man and also defendant told the wife that she must give the money to her husband, and go out of the shop, as women were not allowed in it; that witness and his wife, suspecting a trick, went away with their money,—is sufficient to support a conviction of attempt to commit grand larceny.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

William Mason was convicted of an attempt to commit grand larceny, and appeals from the judgment, and an order denying a new trial. Affirmed.

Reel B. Terry, for appellant. Atty. Gen. Fitzgerald and William S. Barnes, for the People.

GAROUTTE, J. The defendant was convicted of the offense of "an attempt to commit grand larceny." It is now insisted that the evidence is insufficient to support the verdict of the jury, and this brings us to a consideration of the sole question involved in the case, and that is as to the amount and character of evidence necessary to constitute the offense of attempt to commit grand larceny. It is practically admitted that, if the defendant had finally been successful in securing the money of the prosecuting witness, Manino, the offense would have been grand larceny. But his hopes and plans in that direction were never consummated; hence a larceny was not committed. And it is now insisted by defendant that his schemes, artifices, and acts looking towards his possession of Manino's money had not progressed to that point of constituting the offense of attempt to commit grand larceny when the prospective victim became alarmed, and defendant's labors went for naught.

The facts are interesting, though the tale has often been told in courts of justice before. Manino had $4,000 in bank, and was desirous of investing in the saloon business. The defendant, a stranger, casually met him, and suggested that he also would like to go into the saloon business, and proposed a partnership. A friendly acquaintance arose between them. Manino was compelled to leave the city for a few days. Upon his return, defendant immediately called upon him, and suggested the purchase of another place, upon better terms than the one they had previously had in view. They went to a distant portion of the city, and viewed the proposed purchase; and upon their return, when opposite 125 O'Farrell street, the following occurred, as shown by the testimony of the witness Manino: "He stopped and said: 'I have some tickets in a lottery, and I will go in and see if I have won anything.' We went in. There was a man behind a counter. The defendant produced some lottery tickets, and the man behind the counter, after looking at a printed list of numbers, said, 'You have won $110,' and handed the money to defendant. Defendant said, 'Give me $10 worth of tickets,' and then asked me to try my luck. I pulled out some cards or tickets from a pack handed me, and the man behind the counter said: 'You are very lucky. You have won $4,000, —$2,000 for you, and $2,000 for your friend.' I was very much excited, and said: 'Give me the money.' He said: 'It is a rule of this house not to give money to irresponsible people. You must show that you have an equal amount of money before you can get it.' I said: 'I will get the money. When will I come back?' He said: 'One o'clock.' I said: 'I am afraid that I can't be back by that time. Make it half past one.' I said: 'Come on, Miller [defendant], can you get your $2,000?' He said, 'That is all right; I have plenty of money,' and showed me some checks. We went as fast as we could to my home, and I told my wife to hurry up and come to the Hibernia Bank, and get the money, as I had won $4,000, and had to show that much. She changed her dress, and she, Miller, and I, and the old man John Ciaco started for the bank. Miller did not go into the bank with us. He waited outside. My wife drew the money, $4,000, and the cashier put it in a bag, and handed it to me, and I handed it to my wife. We started for O'Farrell street. My wife handed the money to the old man to carry. We hurried up and got to the place. The man who had been there in the morning was not there. There was another man there. I asked him where the man who was there in the morning was. He replied that he had gone to the bank to get the money, and would not be back until three o'clock. I asked him for a receipt to show that I had got back before one o'clock. He wrote a receipt that I was back before one. I again asked for the money. He told me to wait. My wife asked for a drink of water. He told her it was against the rules to have women in the house. He told her to give me the money, and go. Miller, the defendant, also told her. She said, 'I think there is some trick here, and I am going,' and told me to come on. Defendant, my wife, myself, and the old man went outside. I said: 'Miller, I think this is a trick, and, if it is, I will prosecute you.' He said: 'Oh, no; I know these people, and they treated us nicely this morning.'"

This recital of the facts makes it plain to a certainty that defendant was doing his best to defraud Manino of his money. Defendant was playing a confidence game, and "bunco" is its name. See definition of "bunco" in Century Dictionary. That Manino was not buncoed out of his money is attributable to his good wife, rather than to his good sense. If defendant had secured the possession of this money to the loss of Manino, it would have been grand larceny. Did he so attempt to secure the possession of it? If so, he is guilty as charged. That the acts he did in pursuance of a preconceived plan constituted an attempt we have no doubt. An "attempt" is defined as an effort or endeavor; an act tending towards the accomplishment of a purpose which exceeds a mere intent or design, and falls short of an execution of it. Am. & Eng. Enc. Law. Justice Blackburn said in Reg. v. Cheeseman, Leigh & C. 140: "There is, no doubt, a difference between the preparation incident to the offense and the actual attempt; but, if the actual transaction has commenced which would have ended the crime if not interrupted, there is clearly an attempt to commit the crime." In People v. Stites, 75 Cal. 570, 17 Pac. 693, the question as to what in law was sufficient to constitute an attempt was learnedly discussed; and in that case, upon facts which for legal strength are in no degree comparable to those presented by this record, the defendant was held guilty under the evidence of an attempt to commit a felony. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

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113 Cal. 72

## PEOPLE v. DUNLAP. (Cr. 144.)

(Supreme Court of California. May 28, 1896.)

PERJURY—INDICTMENT—SUFFICIENCY.

An indictment for perjury must state positively that the defendant was sworn, and that the person who administered the oath to him had authority therefor, as required by Pen. Code, § 966.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Martha Dunlap was indicted for perjury. From an order sustaining a demurrer to the indictment, the people appeal. Affirmed.

Atty. Gen. Fitzgerald and F. A. Dorn, for the People. Wilcoxon & Bouldin and Graves & Graves, for respondent.

HARRISON, J. The defendant was indicted for perjury in making a false statement of her property to the county assessor of the county of San Luis Obispo. A demurrer to the indictment was sustained, and the people have appealed from the judgment entered thereon.

Without considering all the objections made to the sufficiency of the indictment, the failure to state therein that the defendant was sworn or took an oath before any person authorized to administer the same was a sufficient ground for sustaining the demurrer. The indictment states that the defendant appeared before Charles O. King, the county assessor, and said King, as such assessor, "then and there exacted and required of said Martha Dunlap a statement under oath" of the property owned by her on the first Monday in March, 1895; that thereupon before said King, who was then the county assessor, and "had authority to administer such oath," the said Martha Dunlap "did then and there willfully, corruptly, falsely, and feloniously testify, declare, depose, swear, and certify" (giving the facts to which she made oath, and negativing their truth). Although it is stated in the indictment that the defendant "well knew that said statement and oath were false, fraudulent, untrue, and was a statement of material matter," and were "in a case in which said oath was by law properly administered," and "after having taken an oath that she would testify truly," she "willfully, falsely, and contrary to such oath corruptly and feloniously swore and testified to said false and material facts, as aforesaid," it is nowhere stated that she was sworn, or that an oath was in fact administered to her, or that she took any oath whatever; and, although it is stated that the assessor exacted from her a "statement under oath," and "had authority to administer an oath," and that her statement was before him "in a case in which said oath was properly administered," it is not stated that the assessor, or any other person, did in fact administer an oath to her. It is requisite to the sufficiency of an indictment that it shall state every fact and circumstance which is essential to constitute the offense charged, and that the statement of every such fact and circumstance be direct and positive. The want of such direct and positive statement cannot be supplied by any intendment or implication, and, if stated merely argumentatively, or by way of recital or inference, it is insufficient. In an indictment for perjury it must appear that the defendant was sworn, and that the person who administered the oath to him had authority therefor. This is apparent from the definition of the offense (Pen. Code, § 118), and also from the provisions in section 966, which direct that there be set forth in an indictment for perjury "in what court and before whom the oath alleged to be false was taken, and that the court or the person before whom it was taken had authority to administer it." Under a similar statute in New Hampshire it was held that an indictment which charged that the defendant "made and subscribed in open court, the said court then and there having competent and sufficient authority to administer an oath to said defendant, falsely, willfully, and knowingly the following false and corrupt oath," setting forth the matter sworn to (Rev. St. c. 217, § 4), was insufficient, for failure to allege that the defendant was sworn. State v. Divoll, 44 N. H. 140. In the opinion in that case reference was made to various authorities in which forms of indictment for perjury are given, all of which contain in some form the allegation that the defendant was sworn. The same ruling was made in U. S. v. McConaughy, 33 Fed. 168. See, also, 2 Bish. Cr. Proc. § 912; Whart. Cr. Law, § 1287. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

113 Cal. 88

## PEOPLE v. CUMMINGS. (Cr. 117.)

(Supreme Court of California. May 30, 1896.)

CRIMINAL LAW—INSTRUCTIONS—QUESTIONS OF FACT.

A statement in an instruction in a criminal trial that evidence has been introduced tending to show certain facts is not in violation of Const. art. 6, § 19, prohibiting courts from instructing with respect to matters of fact. People v. Vasquez, 49 Cal. 560, followed.

In bank. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

John Cummings was convicted of murder, and appeals. Affirmed.

W. M. Peck and A. A. Adair, for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The defendant was convicted of murder in the first degree, and was thereafter adjudged to suffer the penalty of death. From this judgment he has appealed, bringing the appeal before this court upon the judgment roll alone, without any bill of exceptions. The only error assigned in support of the appeal is that in giving the instructions to the jury the court made the following statement: "Testimony has been introduced before you tending to show that the defendant, John Cummings, and others, were engaged in the robbery of one T. C. Narramore, at the time and place mentioned in the information in this case, and that while so engaged, and in furtherance of the common purpose of defendant, Cummings and his associates did accomplish this robbery; and testimony has been introduced before you tending to show that the deceased, Narramore, was slain by the defendant, or by some of the parties with whom he was then engaged in the robbery." It is objected that the court thereby violated the provision of section 19 of article 6 of the constitution, and instructed the jury with respect to matters of fact. As the appellant has not brought up the evidence, we must assume that it fully sustained the statement by the court of what the evidence tended to show. The above instruction is identical in language with that which was approved in People v. Vasquez, 49 Cal. 560, and the reasons which are now presented against its correctness were then fully considered by the court, and deemed insufficient. The principle of the instruction was afterwards affirmed by the court in People v. Perry, 65 Cal. 568, 4 Pac. 572; Morris v. Lachman, 68 Cal. 109, 8 Pac. 799; and People v. Giancoli, 74 Cal. 642, 16 Pac. 510. We are satisfied that the judicial interpretation then given to this section of the constitution is correct, and upon the authority of those cases the judgment is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; McFARLAND, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 389

## STITES et al. v. GATER. (S. F. 45.)

(Supreme Court of California. June 2, 1896.)

EJECTMENT—PLEADING—ANSWER—ADMISSION.

In ejectment for 2.12 acres of land plaintiffs alleged they were owners, and that defendant excluded them from possession. Defendant's answer denied every allegation "except as hereinafter stated," and then admitted defendant was in possession of 1.65 acres, and that he withheld the same from plaintiffs; but denied the possession or withholding of the remainder. *Held*, that the answer did not admit that plaintiffs owned .47 of an acre of the land.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Ejectment by A. H. Stites and others against J. E. Gater. From a judgment for defendant, plaintiffs appeal. Affirmed.

Moreland & Norton (Rutledge & Pressley, of counsel), for appellants. Albert G. Burnett and J. R. Leppo, for respondent.

BRITT, C. Ejectment for 2.12 acres of land. The pleadings were unverified. Plaintiffs alleged that they are the owners of the land described in the complaint, and that defendant excludes them from the possession thereof. By his answer defendant denied generally "each and every allegation in said complaint contained except as hereinafter stated." He then expressly admitted himself to be in possession of 1.65 acres of the premises demanded by plaintiffs, and that he withholds the same from them, but denied the possession or withholding of the remainder. The court found that plaintiffs are not the owners of the lands claimed by them, or any part thereof, and rendered judgment in defendant's favor. Plaintiffs claim here that the findings and judgment contravene the pleadings, because, they say, the answer admits that plaintiffs own .47 of an acre of the land. The allegation of ownership in the complaint is put in issue by the general denial of the answer, and the denial is not qualified by the subsequent admissions. Plaintiffs were therefore put to their proofs as to all the land described in their complaint. The appeal is without merit, and the judgment should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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113 Cal. 91

## HOEFT v. SUPREME LODGE KNIGHTS OF HONOR et al. (S. F. 163.)

(Supreme Court of California. June 2, 1896.)

BENEFIT CERTIFICATES—PROOF OF ISSUANCE—DEFECTS—WAIVER—BENEFICIARIES—INTEREST—SUBSTITUTION PROCURED BY FRAUD—JUDGMENT—PRESUMPTIONS.

1. Where the record fails to show that a demurrer to a pleading was disposed of, it will be presumed, in favor of the judgment, that it was disposed of, especially if the demurrer is without merit.

2. In an action against a benefit association on its benefit certificate, to which stepchildren of plaintiff, as contestants, are joined as defendants, an admission by the association that the certificate was in fact issued, and payment of the amount thereof into court by it, operate as a waiver by all the defendants of proof of issuance and of any irregularities in the certificate.

3. Children, as beneficiaries in a certificate of membership of their father in a benefit association, acquire no vested interest therein by law till death of their father.

4. Where, by fraud, one procures his substitution as beneficiary in a benefit certificate, an action for the fraud will not lie against him by the original beneficiary.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Catherine Hoeft against the Supreme Lodge Knights of Honor and others on a benefit certificate. From a judgment for plaintiff, defendants appeal. Affirmed.

Scrivner & Schell, for appellants. Boyd, Fifield & Hoburg, for respondent.

HENSHAW, J. Appeal from the judgment given in favor of plaintiff upon the pleadings. Plaintiff, the widow of Henry Hoeft, sued defendant, a benefit association, to recover $2,000 upon a certificate issued in her name, at request of the insured member, Henry Hoeft. The defendant Supreme Lodge, for answer, paid the money into court, and asked that the children of Henry Hoeft be allowed to appear and contest. This was permitted, and the children—defendants and appellants herein—interposed a general demurrer to plaintiff's complaint, and thereafter filed an answer and cross complaint. The court, upon motion, gave plaintiff judgment upon the pleadings, and this appeal followed.

1. The objection that the court had no power to pass judgment until it disposed of the demurrer is sound as a proposition of

law, but untenable under this record. It does not appear that the demurrer was not disposed of, and, as error will not be presumed, it will be assumed that it was. Moreover, the demurrer was without merit. Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064.

2. It is contended that the answer, by its denials, joined issue with plaintiff upon certain of her allegations, and that the issues were material, and required evidence for their determination. The denial that the certificate was issued to plaintiff in accordance with the regulations of the order is disposed of by the admission of the order that the certificate was actually issued, and by its payment into court of the money due thereunder. The regulations of the order are for its own protection, not for the protection of the beneficiaries, and the order has power to waive a strict compliance with them. It is not denied that the certificate to plaintiff was in fact issued. McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865; Adams v. Grand Lodge, 105 Cal. 321, 38 Pac. 914; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657; Thomas v. Thomas, 131 N. Y. 205, 30 N. E. 61. The principle enunciated disposes of all of the denials of the defendants which are similar, e. g. that the insured did not sign in the blank space left for his signature, and did not comply with all the requirements and regulations of the order in procuring the issuance of the certificate of plaintiff.

3. The principal question presented is raised by the new matter pleaded by defendants in their cross complaint. They set forth that plaintiff is their stepmother. Originally their father—the insured—procured a certificate to be issued in the name of their mother, his then wife. Upon her death a certificate was issued in their favor. In the course of time he married plaintiff, and thereafter surrendered the certificate in favor of them, and caused the certificate under which plaintiff claims to be issued to her. The last change, it is averred, was accomplished through the fraudulent representations, undue influence, coercion and duress practiced and exercised upon their father by his wife, this plaintiff. The specific averments to support this charge are to the last degree meager and inconclusive; but, passing that, under an assumption of their sufficiency, we come to consider whether a cause of action is stated. If so, the judgment must be reversed; if not, it was properly given.

Defendants do not plead any contract with their deceased father, or any special equities which would deprive him of the right to make a change, but stand upon the ground that they may contest because the change was procured by fraud. But, if it was a fraud, did they have a right to complain? Clearly they had not, unless either by contract or in law they had some vested interest or right in the certificate which had formerly been taken out in their favor. They claim no such vested interest by contract. If it exists at all, then, it exists by operation of law. But such rights are either constitutional or statutory, and we are referred to no law which secures to them a right of action for such a cause. If they had a vested right in the certificate as such, then the insured himself, of his own volition, and without the fraudulent contrivance of a third person, could not substitute a new beneficiary. But this is not and cannot be claimed, for the contract is between the order and the insured. The beneficiary's interest is the mere expectancy of an incompleted gift, which is revocable at the will of the insured, and which does not and cannot become vested as a right until fixed by his death. If it is said that a devisee under a will has, during the life of the testator, a like naked expectancy, it may be freely conceded that it is so; but to the heirs and devisees is confirmed a right of action for fraud, etc., by the provisions of the Code. Otherwise they, too, would come within the scope of the general principle that a right of action for fraud is personal and untransferable. One cannot be defrauded of that in which he has no vested right. A vested right is property, which the law protects, while a mere expectancy is not property, and therefore is not protected. These views will be found supported without conflict by a multitude of authorities from which may be cited: Nibl. Mut. Ben. Soc. (2d Ed.) § 234a; Brown v. Grand Lodge, 80 Iowa, 287, 45 N. W. 884; Schillinger v. Boes, 85 Ky. 357, 3 S. W. 427; Robinson v. Association, 68 Fed. 825; Supreme Conclave v. Cappella, 41 Fed. 1; Lamont v. Grand Lodge, 31 Fed. 177; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125; Beatty's Appeal, 122 Pa. St. 428, 15 Atl. 861; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657. In our own state the cases of Swift v. Exchange Board, 67 Cal. 567, 8 Pac. 94; Order of Mutual Companions v. Griest, 76 Cal. 494, 18 Pac. 652; Bowman v. Moore, 87 Cal. 306, 25 Pac. 409; and McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865,—recognize the same general principles.

Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524, and the cases involving a like consideration, differ radically from the case at bar. There is no conflict in the decisions nor confusion in the principles. In the Jory Case the insured endeavored to change the beneficiary, and did everything possible to that end except to surrender the outstanding certificate. This he was prevented from doing by the fraud and contrivance of the beneficiary named therein, who refused to part with it. As between the two claimants to the fund, namely, the holder of the earlier certificate which the insured had in effect canceled, and the beneficiary last named, equity, not demanding impossibilities, and not permitting one to take advantage of his own wrong, decreed that the latter had the better right. In other words, it gave complete effect to the acts of the insured. In this case appellants ask to have the acts of the insured nullified,—an essentially different demand. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(113 Cal. 105)

## WARNER v. SOUTHERN PAC. CO. (Sac. 72.)[1]

(Supreme Court of California. June 4, 1896.)

MASTER AND SERVANT—LIABILITY FOR MALICIOUS ACT OF SERVANT—VINDICTIVE DAMAGES.

A railroad company is not liable for vindictive or punitive damages on account of a wanton or malicious act of a conductor of one of its trains towards a passenger in executing the authority given him, unless the malicious act was either authorized or ratified. It is at most only liable for the actual damages sustained.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Willis T. Warner against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. B. Campbell, C. C. Merriam, and R. B. Terry, for appellant. Mark Walser and Frank H. Short, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a new trial. The material averments of the complaint are that, while plaintiff was traveling on a railroad train of defendant from Fresno to Fowler, and after he had given to the conductor a proper ticket, the latter demanded of plaintiff a second fare, and applied to him abusive epithets, and forcibly ejected him from the car in which he was riding onto the platform, and, with other employés of defendant, assaulted and beat him, and threatened to throw him from the moving train, to his damage in the sum of $25,000; and that by reason thereof he was unable to attend to business for six days, and was compelled to employ a physician, to whom he incurred for medical services a bill of $5, and that his loss of time was of the value of $10. All these averments are denied in the answer, and it is also therein averred that plaintiff was intoxicated, boisterous, profane, etc., in the presence of the other passengers, including women and children, and made of himself an absolute nuisance, and that defendant's employés used no more force than was necessary to keep him quiet, and protect themselves and the other passengers. The evidence was conflicting as to some of the main facts. After the train started from Fresno towards Fowler, the plaintiff and some companions, among whom were three men named Griffin, Gray, and Metcalf, were collected around and near the stove in the rear end of the car. The evidence shows beyond doubt that some of this party were boisterous, and more or less intoxicated, and used loud, profane, and obscene language, to the great annoyance of the passengers, some of whom were ladies. Whether or not plaintiff personally was guilty of such conduct is a matter about which the witnesses differed. The plaintiff and Gray testified that plaintiff did not use any bad language prior to a certain personal conflict with the conductor, to be noticed hereafter, but plaintiff admitted that he did use such language after said conflict; while other witnesses—particularly Thompson, Patterson, Willow, and Waggener—testified that he used such language all the time, and kept it up until the train reached Fowler, and drew and flourished a knife. As to the personal conflict above referred to there is a very decided conflict of evidence. The plaintiff's testimony was, in substance, this: He was sitting on the coal box, with some other persons, including Griffin, Gray, and Metcalf, near him, when Gordon, the conductor, came through the car, taking up tickets. Griffin had no ticket, but gave the conductor a dollar, which he put in his pocket. Plaintiff then gave the conductor his ticket, which the former accepted, punched, and put in his pocket, and was about to go out of the door when Griffin asked him for his change. The conductor told Griffin to "keep his shirt on," and went out, but returned "in a minute or two," and gave him his change. He then turned to plaintiff, and said, "You have not paid your fare." Plaintiff, according to his statement, said, "I beg your pardon, I have," whereupon the conductor immediately called him a G——d d——d liar, and said that he would throw him off if he did not pay. Plaintiff said: "I don't wish to be thrown off. If that ain't satisfactory, I am willing to pay you a second time." But the conductor, without waiting to be paid the second time, caught him by the shoulder, and plaintiff, slipping, was drawn by the conductor through the door onto the platform, and there held down and beaten. Such are the main features of plaintiff's testimony, and as to the most important facts stated by him he was corroborated by Gray and Griffin, and to some extent by the witness Treece. The testimony of the conductor as to this personal conflict was radically different from that of plaintiff, and was substantially this: When he reached the end of the car he took tickets from plaintiff and two other men near the stove, Griffin giving him a ticket, and not money, and was about to go out of the door, when an employé of the defendant, who was traveling on the car, told him that he had missed a man behind the stove; and, turning back, he discovered Metcalf, and asked him for a ticket, and Metcalf said that he had given him one. The conductor told him that he had not, and he replied that he would not pay any more, whereupon the conductor informed him that he must pay or get off, and reached over, and took hold of Metcalf, and raised him up. At that moment Griffin grabbed the conductor by the shoulders, and either Griffin or plaintiff said that no d——d conductor could put his friend off the train. The conductor then let go of Metcalf, and a personal conflict occurred between the conductor and Griffin, which ended in both landing on the platform, Griffin being down, and the conductor on top of him; and, the former crying to be let up, the conductor did so, and went back into the car, where he then collected Metcalf's fare without further trouble. He then went out of that car, and did not return to it until after Fowler, where plaintiff got off, had been passed. According to his testimony, he never struck plaintiff, or laid hands on him, or touched him, or had any personal conflict with him whatever. In this testimony he was fully corroborated by Willetts, who was a brakeman following the conductor through the car; by Powers, who was also a brakeman, and was present and witnessed the occurrence; and by the witnesses Willow and Thompson, who had no business relation with the defendant, but happened to be passengers on the car when the difficulty occurred. All of these witnesses testified positively that there was no personal collision between the conductor and plaintiff, and that it was entirely between the former and Griffin. Upon the cross-examination of Griffin he admitted that he had verified a complaint in an action brought by himself against the defendant for damages sustained on this same occasion, which action was afterwards dismissed.

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[1] Rehearing denied.

Counsel for appellant strongly argue that the evidence—the outlines and substance of which are above given—is insufficient to sustain the finding of the jury that the conductor ever touched the plaintiff, or injured him in any manner whatever. They argue that the story of plaintiff is so improbable and unnatural that whatever reason there might be for believing it if it stood alone is entirely swept away by the testimony of the witnesses for defendant. And it is, indeed, somewhat difficult to believe that a conductor having any regard for his own interest and safety would refuse to receive an offer to pay fare by a passenger, and immediately commence an unprovoked attack upon him under the circumstances testified to in this case by plaintiff. However, we are not prepared to say that the evidence in favor of plaintiff was so slight as to warrant us in denying the power of the jury to base their verdict upon it. There was a sufficient conflict to put the determination of the issue within their province.

But the amount of damages allowed was grossly beyond all reasonable limit. There is no pretense that plaintiff suffered any serious injury. He complained of a bruised leg, but the testimony of his physician shows only trifling injury. In his complaint he claims only $10 for loss of time and $5 for his doctor's bill. Under the circumstances shown by the evidence, he certainly was not entitled to much for humiliation or injury to his dignity. Under any view as favorable to plaintiff as could be justly taken, the damages awarded should not have exceeded at the utmost limit a few hundred dollars. Yet the verdict was for $5,000. The excessive verdict was no doubt the result, to a great extent, of the erroneous instructions of the court, given in various forms, that the case was one in which punitive or vindictive damages might be awarded against the defendant. It is not to be supposed that the jury really thought that plaintiff had suffered actual damage to the extent awarded by the verdict. Indeed, counsel for plaintiff say that the verdict rests mainly upon "the gross and malicious conduct of the defendant toward" the plaintiff. And yet it is quite clear that "the defendant"—the employer of the conductor—was not guilty of any "gross and malicious conduct." It was a question formerly whether an employer could, under any circumstances, be held liable for even compensatory damages caused by the wanton and malicious acts of his employé. In the recent case of Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, it was held that the defendant was not liable for damages caused by the wanton and mischievous backing of a locomotive by an engineer with intent to frighten passengers on an approaching street car. Perhaps the rule now is—and we will assume it to be so for the purposes of this case—that the master is liable for actual damage caused by an act of the servant done in the execution of authority given by the master, although it was caused "by a wanton and reckless purpose to accomplish the master's business in an unlawful manner" (93 Cal. 562, 29 Pac. 234); but it is not the law that in such a case the master is liable for more than will compensate the injured person for the damage which he has sustained. The master is not liable in such a case for vindictive damages, or "smart money," unless he had either authorized the malicious act of the servant beforehand, or had ratified it afterwards. There are some authorities the other way, but the preponderance of adjudicated cases, and the entire force of the reasoning upon the subject, establish the law as above stated. The entire basis of the doctrine of vindictive damages is that the person himself who is sued has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty. If the driver of a merchant's delivery wagon should wantonly run over another person, it would be hard enough for the master to be held liable for all actual damage caused by the unlawful act of his servant; but to go beyond that, and allow a jury, in addition to compensating the injured party for his loss, to inflict further damages as a punishment for something which he did not do, would be to allow a gross outrage not sanctioned by any principle of justice.

The decisions outside of this state establishing the principle above declared are innumerable, but it is unnecessary to refer to them here in detail, because the leading cases on the subject are referred to and cited in the comparatively recent case of Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, in which the supreme court of the United States reviewed the whole subject, and held the law to be as hereinbefore declared. In that case the only question before the court was whether a railroad company could be charged with punitive damages for wrongful treatment of a passenger by a conductor; so that the whole attention of the court was directed to that one point. There a conductor had been guilty of grossly oppressive acts towards the plaintiff, who was a passenger, because the latter had offered tickets which the conductor deemed insufficient, and had subjected him to great humiliation; and counsel for defendant admitted at the trial that plaintiff "was entitled to recover actual damages." But the trial court instructed the jury that: "After agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal (and it was illegal), wanton, and oppressive;" and for giving this instruction, and for this alone, the judgment was reversed. Counsel for defendant in error, in the opening of his brief, said: "But one question arises upon the record, and that is, under the facts, is plaintiff in error liable for punitive damages?" and the court, at the commencement of its opinion, said: "The simple question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger." Therefore, the opinion in that case was an absolute, definite decision of the point, and not a mere statement of dicta about a question not necessarily involved. The opinion delivered by Mr. Justice Gray is quite long and exhaustive. We will make from it only a few quotations, to show its general character. The court, among other things, say: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent." Again, the court uses the language employed in Keene v. Lizardi, 8 La. 26, as follows: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justified in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of the factor or agent;" and then cites a large number of cases, including one from California, which are said to be "to the same effect." And again the court say that "the rule has the same application to corporations as to individuals." Again, the court say: "The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents." Again, the court say: "The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards chief justice of Rhode Island," in Hagan v. Railroad Co., 3 R. I. 88, and numerous quotations are made from the opinion of Justice Brayton, of which we take the following: "If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed where the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal, and make him particeps criminis of his agent's act." A quotation to the same effect is made from the court of appeals of New York; and the court say that: "Similar decisions, denying upon like grounds the liability of railroad companies and other corporations sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas and West Virginia." It is clear, therefore, that under the general authorities, including the decision of the highest court in the land, the law is established as heretofore declared.

Turning to our own state, we find that, with the single exception of some expressions in the opinion delivered in one of the departments in Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112, the decisions here have been in harmony with and declaratory of the principle above stated. The first cause involving the point is Wardrobe v. Stage Co., 7 Cal. 119. In that case the plaintiff was injured while on a stage coach of defendant, driven by defendant's servant, and the trial court instructed the jury that, if the stage was driven recklessly at the time of the disaster, "then they should find, not only the actual damages sustained by the plaintiff, but they should give additional damages, such as would be an example thereafter," etc., and the appellate court held such instruction to be erroneous, and for that reason reversed the judgment. In its opinion the court, after alluding to other matters, say: "In the second place, it is shown that the stage at the time of the accident was driven by the servant or agent of the defendant, and the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him." The court refers at length to the early leading case upon the subject in 3 Wheat. 546 (The Amiable Nancy), in which the opinion was written by Judge Story. In Turner v. Railroad Co., 34 Cal. 594, the plaintiff was wrongfully ejected from a car of defendant (a railroad corporation) by a conductor; and the trial court instructed the jury that the injury to plaintiff, if committed by the conductor willfully, etc., "entitled her to what is called 'exemplary damages,'" and the court for this reason, although the verdict was for only $750, reversed the judgment. Mr. Justice Crockett, in delivering the opinion of the court, after a full discussion of the principles involved, said: "Tested by these principles, it is obvious that in this case the defendant was not liable for any malicious and wanton conduct of the conductor. If liable at all, its liability must be confined to the actual damage which the plaintiff suffered. To render the defendant liable for punitive damages, it was incumbent on the plaintiff to show that the act complained of was done with the authority, either express or implied, of the defendant, or was subsequently adopted by the company. Hagan v. Railroad Co., 3 R. I. 88." Again, he says: "If her expulsion resulted from the malice of the conductor, or was accompanied by violence and personal indignity, the conductor is alone responsible for such damages as she may be entitled to for this cause beyond the actual damage resulting from the expulsion from the car, unless, as before stated, the company expressly or tacitly participated in the malice and violent conduct of the conductor. In other words, if the act of the conductor was wholly unauthorized [but, of course, done without the general scope of his authority] the company is liable for the actual damage, and the conductor alone for the punitive damages, if any." No other case can be found in the books which more fully and definitely declares the law to be as we have stated it. This case was referred to and approved in Wade v. Thayer, 40 Cal. 586. In Mendelsohn v. Lighter Co., Id. 657, which was an action for damage alleged to have been done to certain lumber of plaintiff, the trial court charged the jury "that, if the damage to the lumber was wantonly and maliciously caused by the defendant, the jury might give punitive damages"; but the judgment was reversed, because there was no evidence that the defendant had done or participated in any wanton and malicious acts; such acts, if done at all, having been committed by defendant's servants. The court said: "But whilst there was evidence tending to show that the damage to the lumber was caused by the malicious and wanton acts of the agents and servants of the defendant, I discover nothing in the record tending to prove that the defendant authorized or consented to the malicious conduct of its agents and servants, or approved it afterwards; and it is well settled that, though the principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, he is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal. In the case of Turner v. Railroad Co., 34 Cal. 594, we had occasion carefully to consider this question, and announced the rule to be as above stated, and have reaffirmed it in the case of Wade v. Thayer (decided at the present term) [40 Cal. 578]. I am therefore of opinion that the court erred in giving the fifth instruction requested by the plaintiff, there having been no evidence to support it. As the judgment must be reversed for this cause, I deem it unnecessary to notice the other errors assigned."

The foregoing cases establish the law in this state in harmony with the current of general authority, and they are not to be taken as overruled by what was said in the opinion in Gorman v. Southern Pac. Co., supra. In this latter case it was averred in the complaint that the plaintiff was wrongfully and with force expelled and ejected from defendant's train, and damages were prayed for in the sum of $10,000. The jury returned a verdict for plaintiff in the comparatively small sum of $500, and a close examination of the case will show that the only real question before the court was whether this small amount of damages was, independent of any question of punitive damages, so excessive as to warrant the court to set it aside. The trial court did not instruct the jury that they could give punitive damages, and we cannot see how the question of punitive damages was at all involved in the case. All that we know about instructions asked by the defendant and refused is contained in the sentence from the opinion of the commissioner delivered in department: "The instructions refused were asked upon the theory that the plaintiff could in no event recover more than his actual damages, and that such damages could not exceed the cost of a ticket from the point where he was expelled to the point of his destination, together with a reasonable allowance for the loss of time." Of course, these instructions were erroneous, because they involve the proposition that damages must be confined to the price of a ticket and loss of time, leaving out entirely injury to the feelings, humiliation, disgrace, etc. The question of punitive damages was not, therefore, necessarily involved. The whole case was decided in these words of the opinion: "We see nothing in this case to indicate that the jury acted under the influence of passion or prejudice, and, in our opinion, the verdict cannot be disturbed on the ground that the damages were excessive;" and what is said about vindictive damages is dictum. That the department did not intend to overrule or disturb the former decisions of this court upon the subject of punitive damages is apparent from the fact that no allusion was made to them.

There are some other minor questions in the case, but they are not likely to arise upon another trial, and we do not deem it necessary to extend this opinion by discussing them. The judgment must be reversed because the damages found by the jury were excessive, and because the trial court erroneously instructed the jury that the case was a proper one for punitive damages against the defendant. The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: HENSHAW, J.; TEMPLE, J.

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113 Cal. 181

## PEOPLE v. BUSBY. (Cr. 148.)

(Supreme Court of California. June 5, 1896.)

HOMICIDE—APPEAL—REINSTATEMENT.

Where a judgment in a murder case is affirmed, because there was no appearance for appellant, and no brief on file, the appeal will not be reinstated on the ground that his counsel was prevented by sickness from preparing a brief, and appearing in court on the day set for the hearing, unless he shows in his petition error in the record, or plausible claim of error, none appearing on examination thereof.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

One Busby, convicted of murder, appealed, and the judgment and order appealed from were affirmed without an examination of the record. He petitions the court to reinstate the appeal. Petition denied.

J. N. Davidson, L. F. Fisher, and P. E. King, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant was convicted of murder and sentenced to be imprisoned for life. His appeal was placed upon the calendar for the May term, but when the case was called there was no appearance in his behalf, and there was no brief on file. The judgment and order appealed from were therefore affirmed without an examination of the record. His counsel now petitions the court to reinstate the appeal, upon the ground that he was prevented by sickness from preparing a brief, or appearing in court on the day set for the hearing. We should feel compelled to accept this excuse as a sufficient ground for reinstating the appeal, if counsel had pointed out in his petition any error in the record, or any plausible claim of error. But no such claim is advanced, and upon an examination of the record the appeal appears to be devoid of merit. Petition denied.

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113 Cal. 142

## SILVER CREEK & PANOCHE LAND & WATER CO. et al. v. HAYES et al.

(Sac. 39.)

(Supreme Court of California. June 4, 1896.)

TRESPASS TO DITCH — CROSS COMPLAINT — SUFFICIENCY—RIGHT TO WATER.

1. In an action to enjoin defendant from diverting water from a ditch, and for damages for taking water therefrom and for injuring the banks thereof, a cross complaint alleging that defendant has possession and control of certain lands, and that the stream which flowed into the ditch passed through said land, is not sufficient to constitute a cause of action in the absence of an allegation that defendant had possession and control by right.

2. Nor is a paragraph sufficient in which it is alleged that defendant has a large amount of land which it is necessary to irrigate, and that the only waters available for that purpose are the waters of said stream, where it was not averred that the land was riparian to said stream, nor that it was part of the land described in the preceding paragraph.

3. Nor did such pleading allege facts sufficient to constitute a cross complaint.

4. A trespasser on public lands is for some purposes deemed the owner, but when one asserts riparian rights as against an upper appropriator of water he must show some right, inchoate or otherwise, to the land.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by the Silver Creek & Panoche Land & Water Company and others against W. J. Hayes and others to enjoin defendants from diverting waters from a certain ditch, and for damages for taking water therefrom, and for injuries thereto. From a judgment rendered in favor of defendants on the cross complaint, plaintiffs appeal. Reversed.

Frank H. Short and A. M. Drew, for appellants. Thompson & Pierce, for respondents.

TEMPLE, J. Plaintiffs, in their complaint, aver that the corporate plaintiffs own a certain canal or ditch, of which the individual plaintiffs are in possession as lessees, and that without permission of plaintiffs, or any of them, defendant wrongfully entered upon the same, and without right took water therefrom, and injured the banks thereof, and threatens to continue to enter upon it and to take water therefrom, and will so enter and divert and use water therefrom, and injure and destroy the embankments and head gates thereof. And particularly on a day named he did enter in and upon the canal, and, with intent to injure and break said canal, raised the head gates nearest defendant's residence, intending that the waters should injure and destroy the canal. They further aver that defendant will, unless restrained, enter upon the canal, without right, and divert water therefrom, and injure and destroy, tear down, and remove the embankments and head gates thereof. They ask that defendant be enjoined from these acts, and for damages. The defendant answered, and also filed a cross complaint. Plaintiffs demurred to the cross complaint for want of sufficient facts, and on the trial objected to evidence in support of the claim of defendant asserted in the cross complaint on the same ground. The demurrer and the objections were overruled, and the court gave judgment to plaintiffs for all of the relief demanded by them, and then awarded to defendant all the relief asked by him. From the judgment in favor of defendant, and from an order refusing plaintiffs a new trial as to the issues tendered by the cross complaint, plaintiffs take this appeal.

By the demurrer the point is made that the cross complaint does not state a cause of action at all, and that it does not state facts sufficient to constitute a cause of action for a cross complaint in this action. Both points are well taken. The cross complaint nowhere shows by statement of facts that defendant owns or holds by right any lands which are riparian to Panoche creek. He avers that he owns three lots in section 16, and has possession and control of three other lots, and that said creek flows "through the natural channel thereof, over and across the lands of defendant, as aforesaid." This is true, though the creek only flows over the three lots of which he is possessed, and which he controls. He does not aver that he possesses or controls by right, and the presumption is that this allegation is as strong as he could make it. The presumption, therefore, is that he has taken possession of the other three lots without right, and that the water only flows over these lots in which he has no right. A trespasser on public lands is for some purposes deemed the owner, but when one asserts riparian rights as against an upper appropriator of water he must show some right, inchoate or otherwise, to the land.

In another paragraph of the cross complaint it is averred that defendant has a large amount of land which it is necessary to irrigate, and the only waters available for that purpose are the waters of Panoche creek. It is not intimated in any way that this large tract of land is part of the lots described, or that it is riparian to Panoche creek. In short, in the cross complaint the defendant does not show any right to the waters of Panoche creek. But, if the cross complaint can be held to state a cause of action which might be the basis of an independent suit, it does not state a cause of action which is the proper subject of a cross complaint in this case. The relief sought in the cross complaint does not defeat, overcome, or affect plaintiffs' cause of action or lessen or modify the relief to which plaintiffs are entitled. If this proposition can be tested by the result, it is fully shown by the fact that plaintiffs and defendant were each awarded all the relief they sought.

Nor does the cause of action set up arise out of the transaction set out in the complaint, nor is it connected with the subject of the action. The transaction is the alleged trespass of the defendant, and, if the phrase "subject of the action" refers to the rights involved, only the claim of plaintiffs to their ditch was involved. No right to water is asserted, nor was it necessary for plaintiffs in order to make a case to show any. The court so held in giving them the relief demanded, while finding that they had no right to water in the creek. The trespass charged did not consist in destroying or injuring the dam or other means by which the water was diverted from the creek, nor in diverting the water in the creek to other uses, but was an injury to the embankments of the ditch, and a taking of the water from the ditch itself. Had the alleged trespass consisted in an attempt to prevent the flow into the ditch from the stream, possibly the assertion of a right to have the water flow would be considered; but no such defense could be made here. The cause of action set up by plaintiffs and the rights asserted by defendant have no reference to each other. True, there was water in the ditch, and the evidence shows that it came from Panoche creek. But the fact that defendant had a superior right to the water flowing in the creek would not justify him in destroying the ditch, or in taking what water he needed from the ditch at points where it passed over or near his land. The court is directed to modify the judgment by striking out the judgment in the cross complaint in favor of the defendant, and also by awarding to plaintiffs their costs.

We concur: McFARLAND, J.; HENSHAW, J.

113 Cal. 221

## BLOOD v. LA SERENA LAND & WATER CO. (No. 19,510.)

(Supreme Court of California. June 6, 1896.)

Corporations—Seal—Unauthorized Act of Officers—Ratification.

1. Where a seal which had not been formally adopted by a corporation was used for the first time in the execution of instruments afterwards in question, the finding that it had become the common seal of the corporation by use is sustained by a showing that it had afterwards been employed as the seal of the corporation in all transactions requiring the impress of a seal.

2. That a resolution was passed at the preliminary meeting of stockholders, before the organization of the board of directors, is insufficient to support a finding that an instrument thereby attempted to be authorized was duly and regularly executed.

3. Where the execution of a note and mortgage could have been authorized only by a resolution of the board of directors, equivalent to an authority in writing, within Civ. Code, § 2309, a corporation can ratify an unauthorized execution by its president and secretary only in the manner that would have been necessary to confer original authority for the act ratified, as provided by section 2310, and not by an exercise of ownership over the property for the price of which the note and mortgage were executed. McFarland, J., dissenting.

In bank. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by James A. Blood against La Serena Land & Water Company to foreclose a mortgage. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thos. McNulta and Chapman & Hendrick, for appellant. R. B. Canfield and J. W. Taggart, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The complaint is a pleading in the usual form to foreclose a mortgage alleged to have been executed by defendant corporation to plaintiff. Defendant answered, denying the execution of the instruments, and likewise filed a cross complaint, a general demurrer to which was sustained.

Upon the trial the following facts were disclosed: One James A. Blood was the owner of a ranch containing about 350 acres. In the year 1887 he authorized his nephew, James A. Blood, Jr., a real-estate broker, to make a sale of this ranch at the price of $105,000, agreeing to pay him a commission of $5,000 for effecting the sale. Blood, Jr., proceeded as a "promoter" to organize a corporation for the purpose of purchasing this land, platting, subdividing, and selling it. Under these circumstances, the La Serena Land & Water Company was organized as a corporation. After it had filed its articles of incorporation, but before any meeting of its directors was held, the subscribers to the capital stock of the corporation, of whom Blood, Jr., was one, in meeting, agreed upon the purchase of the Blood ranch, and to that end authorized the payment by Blood, Jr., to plaintiff of one-half of the purchase price of the ranch. Upon receipt of this sum, plaintiff was to execute to the corporation his deed for the land, and, in return, the corporation was to make and deliver to him its note and mortgage for the remaining one-half of the purchase price. Thereafter the directors met and organized. They made no formal adoption of a corporate seal, but seem to have instructed their president to procure such a seal. They adopted no resolution looking to or touching upon the purchase of the Blood ranch, or the execution of the note and mortgage. Payment to plaintiff of the one-half of the purchase price was, however, made by Blood, Jr., pursuant to the instructions which he had received at the stockholders' meeting, which payment consisted of about $40,000 in gold coin, and stock of the corporation of the estimated value of $12,500. Upon receipt of this, plaintiff executed to the corporation his deed for the land, and, in return, received a note and mortgage for the sum of $52,500. Both the note and the mortgage were executed in the name of the corporation by James L. Barker, its president, and James A. Blood, Jr., its secretary. Barker and Blood were, in fact, respectively, president and secretary of the corporation. The note and mortgage also bore impress of what purported to be the common seal of the corporation. Blood, Jr., as one of the original subscribers, received some shares of the stock, and other shares were made over to him by Blood, Sr., representing the commission of $5,000 which he was to receive for effecting the sale. It appears that the stockholders of the corporation knew that the purchase price of the land was to be $105,000, and were satisfied to make the purchase for that sum, and upon the indicated terms. It is not so clear that they knew that their associate, Blood, Jr., was to have received a commission from Blood, Sr., for effecting the sale. Blood, Jr., by his own testimony, acted for the incorporators in the matter of the purchase. How far he acted for them does not clearly appear. It also is uncontradicted that he acted for the seller, Blood, Sr. The corporation entered upon and took possession of the land, exercising general acts of dominion and ownership over it. It was surveyed and platted. Orchards were cut down; springs developed; certain portions of it sold; and deeds for those portions executed by the corporation in its own name, Blood, Sr., joining therein. Interest was paid upon the mortgage for a time, and, by a later convention between the corporation and the mortgagee, the produce of the ranch was afterwards taken in lieu of interest. Finally, the corporation having failed to meet the terms of the contract, this action was instituted.

The court found that the note and mortgage were duly executed by the corporation. It also found that the contract of note and mortgage was duly ratified by the corporation, and decreed foreclosure accordingly. The finding that there was a due execution of the note and mortgage, if understood to mean that there was due authority for their execution at the time they were made, is not supported by the evidence. Plaintiff, by the introduction of the note and mortgage, proof of the corporate seal, and of the names of the officers executing the instruments on behalf of the corporation, established, it is true a prima facie case of due execution; but it was only a prima facie showing, and one subject to be overthrown by proof of the fact that original authority was lacking.

Appellant first contends that the evidence of plaintiff failed in showing that the seal employed upon the instruments was in fact the common seal of the corporation. It is true that one offering a paper purporting to be the instrument of a corporation under seal is called upon to make proof that the seal employed is the corporate seal, but the earlier strictness of proof in this regard has been much abated by later decisions; and it is sufficient if plaintiff can show either that the seal is the regularly adopted common seal of the corporation, or that it is the seal which without such formal adoption is and has been habitually used as such. In the present case it appeared that the seal was not regularly adopted, and also that it was used upon the instruments in question for the first time in the history of the corporation. But it was further shown that it had been afterwards employed as the seal of the corporation in all transactions requiring the impress of such a seal, and we are of opinion that there was a sufficient showing to warrant a finding that it had become the common seal of the corporation by use. Plaintiff thus established his prima facie showing of regular and due authorization; but it was a showing which could be overcome, and in this case it was in fact overcome by proof that no resolution authorizing the making of this contract was ever adopted by the managing board of the corporation, its board of directors. The only authority upon which the president and secretary acted was the resolution passed at the preliminary meeting of stockholders, before organization of the board of directors; and that such authorization was insufficient to support a finding of due and regular execution is a proposition scarcely requiring authority in its support. Gashwiler v. Willis, 33 Cal. 12; Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373. The defect in this instance did not arise from a mere failure to record a resolution duly passed, which was the question considered in Schallard v. Navigation Co., 70 Cal. 144, 11 Pac. 590, but in a showing that such a resolution was never in fact adopted.

But was the contract, originally defective and voidable for lack of power and authorization, afterwards ratified by the corporation? It is so found by the court. Can the finding be sustained? It is a general principle that a corporation, like an individual, may ratify and validate any unauthorized act, the doing of which it could in the first instance have authorized and empowered. What conduct and proceedings will constitute and amount to a ratification is a question which the courts have been called upon to decide with great frequency. In the literature of the law which is thus full upon the subject there has often been little inclination displayed to distinguish between ratification and estopped in pais. The facts are usually set forth at length, and the conclusion is reached and expressed that such conduct amounts to ratification; and indeed, where the form which the ratification must take is not governed by statutory rules, it may and usually does matter little whether the acts of a principal are said to be such as to constitute a ratification, or to be such as to constitute an estoppel. By either name he is held equally bound. But the distinction between the two is, nevertheless, well defined; and where, as in this state, the mode of ratification is governed by statute, it becomes important and necessary to distinguish them. Acts and conduct amounting to an estoppel in pais may in some instances amount also to ratification; but, on the other hand, ratification may be complete without any of the elements of an estoppel. The elements of an estoppel in pais have for so long been settled in this state that it is superfluous even to refer to the leading cases of Boggs v. Mining Co., 14 Cal. 279, and Martin v. Zellerbach, 38 Cal. 300. The requisites and form of ratification, however, are entirely within the provisions of the Code. "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Civ. Code, § 2309. "A ratification can be made only in the manner that would have been necessary to confer original authority for the act ratified, or, where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." Id. § 2310. Ratification is thus a question of legal cognizance, while estoppel in pais addresses itself to equity. "Ratification" under our Code, is a legal term, with a well-defined and specific meaning, and to use it interchangeably with "estoppel," or with the verbs "to adopt" or "to confirm," must result and has resulted in unfortunate confusion. One instance out of many may be cited to point what has been said. In the syllabus to Borel v. Rollins, 30 Cal. 408, is the following: "Ratification by Acts Constituting Estoppel in Pais. The principle that an unauthorized act of an attorney in fact, acting under a power required to be under seal, must be confirmed by an instrument under seal, does not prevent the principal from ratifying by an act which operates as an estoppel in pais." Had the words "confirmed" and "ratifying" been transposed in the foregoing, the language would have been accurate and unobjectionable. But, if the act in fact has been ratified, the ratification is sufficient, and there is no need of invoking the doctrine of estoppel. It is only where the acts fall short of legal ratification that the necessity of calling upon the doctrine of estoppel exists. A reference to the text of the opinion in that case at once discloses this, for it is there found that there was no ratification, but that there was an estoppel, the court saying: "It may be said * * * that, as the authority to execute deeds upon partition must be under seal, there can be no parol ratification without authority under seal. This is certainly the doctrine of the law, but it is also a doctrine that an act which operates as an estoppel in pais, such as accepting the benefit of the partition attempted to be made, and dealing with the property allotted to the principal by the partition as his own, by disposing of it by deeds, confirms the partition made by the attorney without legal authority."

Now, while ratification may be proved under a plea of due execution (Goetz v. Goldbaum [Cal.] 37 Pac. 646), yet the evidence in this case falls short of proving it, and more strongly tends to establish an estoppel. As in the case of Borel v. Rollins, supra, it showed a certain confirmation by the corporation of the unauthorized acts of its president and secretary. The land was taken; control exercised over it; portions of it were sold. There was even a certain recognition of the corporation's indebtedness by a payment of moneys for interest upon the mortgage debt, though it is claimed that this payment was made, not by the corporation, but by certain individual shareholders therein. Many acts of knowledge and adoption might be instanced, but they singly and collectively fall short of the Code requirements for ratification. The corporation, in the first instance, could have authorized the execution of this particular note and mortgage only by a resolution of its board of directors (the equivalent of a writing) duly assembled in meeting, which resolution, either by itself or taken with its by-laws, would have authorized the president and secretary not only to make a mortgage, but would have set forth the rate of interest and the agreement to pay in gold coin. The authority of the agent to make any mortgage must be in writing. Civ. Code, § 2309. The agreement to pay the 10 per cent. must be in writing (Id. §§ 1917, 1918), and the requirement to pay in gold coin as well (Id. § 1913). The contract of mortgage, with these terms and conditions, could only be ratified in the manner that would have sufficed to confer original authority. Such a ratification plaintiff failed to show (Salfield v. Reclamation Co., 94 Cal. 546, 29 Pac. 1105); and this, aside from the consideration of the knowledge or lack of knowledge of the corporation of the interest and dual relationship of Blood, Jr., from the inception to the consummation of the transaction, for the acts did not constitute a ratification, whether the corporation possessed this knowledge or did not. As has been intimated, they more strongly tend to establish against the corporation an estoppel in pais. Such an estoppel was, however, neither pleaded nor found. We do not mean to be understood to say that, under the peculiar facts of this case, it was necessary for plaintiff so to have pleaded. Plaintiff went into court in the belief that he held a note and mortgage duly executed to him. He established a prima facie showing to that effect. In turn, he was met by a counter showing of lack of due authorization, and undertook to meet this by evidence of subsequent ratification. The same evidence, however, treated as evidence by way of estoppel, was admissible, without pleading estoppel, to raise an equitable barrier against defendant's proof of want of authority. Had plaintiff, in the first instance, been called upon to rely upon an estoppel in pais in order to maintain his action against defendant at all, it would have been necessary, of course, for him so to have pleaded. But such was not his cause of action. He successfully makes out a prima facie case, and may, without pleading it, use the evidence in estoppel to prevent the corporation from maintaining what, as against its acts, would be an unjust and unwarranted defense.

Whether or not the acts of the corporation are sufficient to raise such an estoppel is not now a question for determination. It would involve, not the review of findings made by the trial court upon the question (for the trial court made none), but would necessitate the making in this court, in the first instance, of such findings. This we have neither the right nor the disposition to do. But as, under the facts here disclosed, such findings are necessary to the proper determination of the rights of the litigants, a new trial must be ordered. Upon such trial it may be determined what position Blood, Jr., occupied in relation to the corporation,—whether he was merely a mouthpiece to deliver messages, or whether he was chargeable with the high good faith exacted of all who stand in a relation of trust. It may also be determined whether or not the corporation knew or was chargeable with knowledge of the interest of Blood, Jr., and of the fact that he was to receive a commission from the seller. In short, there may be explicitly set forth the acts and conduct of the corporation which may be claimed to estop it from contesting the validity of the note and mortgage. Thereafter, should an appeal be taken to this court, the question will be here properly under review.

So far as this decision goes, it is but a determination that the findings of due execution of the note and mortgage, and of ratification thereof, are not supported by the evidence, and cannot stand. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

McFARLAND, J. I dissent, and adhere to the opinion delivered in department. 41 Pac. 1017. Section 2310 of the Civil Code must be construed, and has always been construed, by this court, in connection with the principle declared in section 1589, that "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting"; and in section 2311, that "ratification of part of an indivisible transaction is a ratification of the whole." Of course, there is a certain distinction between ratification and estoppel in pais; that is, the word "estoppel" applies to certain acts and conditions to which the word "ratification" could not be appropriately applied, and vice versa. Strictly speaking, estoppel is where a man is bound by his own act, and ratification where he is bound by his acceptance of the act of another. The common example of estoppel, where the owner of property stands by and sees it sold without disclosing his title, could not well be designated as ratification; and so, when a man consents to and indorses the unauthorized contract of his agent by accepting the benefits of the contract, and acting upon it as if it had been authorized, the proper designation of such conduct is ratification, and not estoppel, although the latter term is sometimes applied to it. But, whether it be called "estoppel" or "ratification," it binds the person thus indorsing the agent, whether such person be a natural one or a corporation. This is the well-established doctrine. See Gribble v. Brewing Co., 100 Cal. 67, 34 Pac. 527, and cases there cited. That the evidence in the case at bar showed such consenting and indorsing conduct on the part of the appellant is beyond question; and, in my opinion, the judge of the court below properly found it to be "ratification." If he had called it by the less appropriate name of "estoppel," it would have meant, under the circumstances of this case, exactly the same thing. And if, under the construction given to section 2310, there can be no valid ratification by conduct or acts in pais of a contract which should have been originally in writing, then, surely, such attempted ratification cannot be made good by calling it estoppel. In my opinion, the judgment should be affirmed.

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(5 Cal. Unrep. 391)

## NEIHAUS et al. v. MORGAN et al. (S. F. 244.)

(Supreme Court of California. June 2, 1896.)

MOTION TO DISMISS—WHEN AUTHORIZED—MECHANICS' LIENS—CLAIM OF LIEN—JUDGMENT—SUFFICIENCY.

1. A motion to dismiss an action tried to the court, on the ground that plaintiff has neglected to have judgment entered for more than six months after decision, is not authorized by Code Civ. Proc. § 581, where neither party is entitled to judgment at the time, because written findings have not been prepared and approved by the judge, or waived by the parties.

2. Code Civ. Proc. § 1187, prescribing what facts must be stated in the recorded claim of a mechanic's lien, inter alia, requires a statement of claimant's "demand after deducting all just credits and offsets," but does not require a statement that the materials furnished and used were furnished "to be" used in the buildings. *Held*, that the claim of lien need not contain such statement.

3. A claim of lien on two buildings stated that the reasonable value of the materials furnished by plaintiffs for each house was $182.70, no part of which had been paid, and that the sum of $365.40, "in gold coin of the United States," was still due on such buildings, after deducting all just credits and offsets. *Held*, that the claim was not open to the objection that it did not state the amount of plaintiffs' demand after deducting all just credits and offsets, because of the quoted words.

4. In an action to enforce a mechanic's lien on two buildings, the decree was that plaintiffs have a valid lien on the houses and lot for the sums found due them; that the sheriff sell the property, and from the proceeds of the sale pay plaintiffs the sums found due them, viz. $365.49 on account of their claim, $50 for attorney's fees, and $45.60 for their costs; and that he bring the surplus money, if any, into court, to abide its further order. *Held*, that the decree was not open to the objection that it was unintelligible, and incapable of being executed by the sheriff.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Neihaus Bros. & Co. against Mattie Morgan and others to enforce a mechanic's lien. From a decree for plaintiffs, and an order denying a new trial, defendant Mattie Morgan appeals. Affirmed.

Ben Morgan, for appellant. Philip Teare and T. F. Graber, for respondents.

VANCLIEF, C. The appellant, Mattie Morgan, wife of defendant Benjamin F. Morgan, being the owner of a lot in the town of Berkeley, county of Alameda, having a frontage of 100 feet on Channing Way, and extending therefrom 304½ feet, entered into a written contract with defendants Higgins, Davidson & Co., by the terms of which the latter agreed to build two dwelling houses on said lot, and to furnish all the materials therefor, and the former agreed to pay for the building of said houses $6,000, by certain installments, the last of which installments was to be paid when both houses should be completed. A memorandum of the contract was filed with the recorder of Alameda county before the commencement of the work, but did not state nor show that 25 per cent., or any part of the contract price for the building of said houses, or either of them, was made payable at least 35 days after the final completion of the work on said houses, or on either of them, or at any time after such completion, but did show that the final payment was to be made when and as soon as both houses should be completed, and all bills paid and liens waived. This action was brought to enforce a lien on said houses and lot for the reasonable value of materials alleged to have been furnished by plaintiffs at the request of Higgins, Davidson & Co. and appellant, to be used, and which were used, in the construction of said houses, which reasonable value is alleged and found to have been $365.40, and also to enforce two other similar liens for materials furnished,—one in favor of Oscar Mayer for $100, and the other in favor of Henry Andrew for $306.60,—the demands secured by which had been assigned to the plaintiffs. The trial court found in favor of plaintiffs on their claim of $365.40 for materials furnished by themselves, but in favor of the appellant on the two demands which had been assigned to plaintiffs, on the ground that the claims of lien for the assigned demands had not been filed in the recorder's office within thirty days after the completion of the houses. A final decree in accordance with these findings was entered, from which, and from an order denying a new trial, the defendant Mattie Morgan appeals.

1. Immediately after trial the cause was submitted to the trial court on briefs thereafter to be filed. Thereafter, on May 20, 1893, that court, in the absence of plaintiffs' attorneys, orally announced its conclusions of law, which the clerk entered in the minutes as follows: "It is ordered that judgment be, and the same is hereby, entered for plaintiffs, foreclosing lien of plaintiffs filed by them for $365.10 and costs, and $50 for attorney's fees; and it is further ordered, adjudged, and decreed that the prayer of plaintiffs for judgment on the assigned claims of Messrs. Andrew and Mayer be, and the same is hereby, denied." No order nor request was made that the attorneys for either party draw findings, and no written findings were made or filed, and no formal judgment entered, within six months after the entry of said minute order of May 20, 1893. After the expiration of six months from the entry of said minute order, Mr. Ben Morgan, as attorney for the defendant Mattie Morgan, moved the court to dismiss the action "on the ground that said plaintiff has neglected to demand and have judgment entered for more than six months from the date of the decision, he being during all of said time entitled thereto." The court denied this motion, and the attorney for defendant excepted. Thereafter written findings of fact and conclusions of law were filed, in accordance with which a formal decree was then entered enforcing the lien for the sum of $365.40, without interest, and for costs. Counsel for appellant contends that the denial of the motion to dismiss the action was error for which the judgment should be reversed, and, as authority for this, relies upon the sixth division of section 581, Code Civ. Proc. It has been held by this court that the sixth division of section 581 is not mandatory, and that the exercise of the discretionary power of the court in granting or denying a motion to dismiss an action for the cause therein mentioned will not be disturbed, except for an apparent abuse of such power. Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121; In re McDevitt, 95 Cal. 17, 30 Pac. 101; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515. The only showing of negligence on the part of plaintiffs' attorneys, in addition to the facts above stated, is the affidavit of defendant's attorney "that on or about the 25th day of May, 1893, Philip Teare, one of the attorneys for the plaintiffs, informed deponent that the above-entitled cause had been decided by the court, but that his associate, Mr. T. F. Graham, was dissatisfied with said decision"; thus showing merely that plaintiffs' attorney had notice of the minute order above stated about five days after it was made, and that he was dissatisfied with it. On the part of plaintiffs, the affidavits of their attorneys are to the effect that, after the announcement of the conclusions of the court, they applied to the judge to reconsider the evidence, and the law applicable thereto, before making written findings, and that the judge had promised so to do; that, unless he changed the conclusions of law as expressed in said minute order, they had intended to move for a new trial; that a few days before the motion to dismiss the action, they had prepared written findings, which, by request of the court, they submitted to defendant's attorney, who did nothing with them; and that they had understood that it was the duty of the judge to draw the written findings, unless he elected to request attorneys to draw them, and did not understand that they were entitled to have a judgment entered before such findings were filed. Moreover, it does not appear that the defendant was, or could have been, injured by the delay. No interest upon the demand upon which plaintiffs recovered was allowed before judgment, which judgment was entered after the motion to dismiss was denied, and not nunc pro tunc. The only pretense of injury is that the lien upon defendant's property was prolonged. But this was due to the default of the defend-

ant, who might have discharged the lien by payment at any time. Furthermore, it is not perceived that the delay was not caused by the negligence of defendant equally with that of plaintiffs. As written findings were not waived, neither party was entitled to demand the entry of a judgment until such findings were prepared, and approved by the judge. Why had not the defendant an equal right with plaintiffs to urge and promote a speedy preparation of findings, if she desired so to do? It appears that both parties were dissatisfied with the conclusions of law orally announced by the court. Plaintiffs were defeated on two of the three counts of their complaint, embracing more than half of their demand; and therefore the conclusions of law announced were apparently as favorable to defendant as to the plaintiffs, and the defendant was, equally with plaintiffs, entitled to have the judgment entered. But however this may be, since it does not appear that either party was entitled to demand the entry of judgment at any time before the motion to dismiss the action, that motion was not authorized by section 581 of the Code of Civil Procedure, and for this reason alone was properly denied.

2. It is claimed by appellant that, although it is stated in plaintiffs' recorded claim of lien that they furnished certain material actually used in the buildings, it is not therein stated that such materials were furnished "to be used" in said buildings, and for this reason that the claim of lien is void. Section 1187, Code Civ. Proc., prescribes what facts must be stated in the recorded claim. Among other things, it requires a statement of the claimant's "demand after deducting all just credits and offsets," but does not require a statement that the materials furnished and used were furnished "to be used" in said houses. Under section 1183, however, it has been held that a complaint for the enforcement of a lien for materials furnished must contain an averment that the materials were furnished to be used in the construction, etc. Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Cohn v. Wright, 89 Cal. 86, 26 Pac. 643. In this case it is alleged in the complaint that the plaintiffs "furnished * * * all the doors, window sashes, and glass, window weights and window cords, used and to be used in the said construction of, and now actually in and a part of, said two frame dwelling houses or structures, at the special instance and request of said defendants Higgins, Davidson & Co., and that the reasonable value of the same was and is $365.40, and that no part thereof has been paid." None of these allegations was sufficiently denied, and there was no demurrer to the complaint. The cases cited by appellant relate only to the complaint, and not to the recorded claim of lien.

3. It is contended that the recorded claim of lien does not state the amount of plaintiffs' demand "after deducting all just credits and offsets." The claim of lien states that the reasonable value of the materials furnished by plaintiffs for each house was $182.70, no part of which had been paid, and "that the sum of $365.40, in gold coin of the United States, is still due and owing upon said buildings, after deducting all just credits and offsets." The specific objection to this is that the demand is measured by United States gold coin. But surely this statement of plaintiffs' demand was sufficiently definite, since United States gold coin is lawful money, by which all values of property or labor may be accurately measured in any part of the United States. Read in connection with all other parts of the claim, this statement of plaintiffs' demand is clearly sufficient. Under it the plaintiffs were entitled to prove and recover, as they did, $365.40, in lawful money of the United States. Neither the complaint nor the judgment restricts the recovery to any particular kind of money. Nor was the property ordered to be sold for gold coin. In this connection it is objected that the claim of lien stated only the contract price of the materials. But it also stated the reasonable value thereof, and the court found such reasonable value, and the judgment is in conformity with the finding in this respect.

4. It is claimed that the judgment "is unintelligible, and incapable of being carried out by the sheriff," because it is not stated which of the defendants shall pay the amount found due the plaintiffs. A sufficient answer to this is that there is no personal judgment against any one of the defendants. The judgment, in substance, is that the plaintiffs have a valid lien upon the houses and lot for the sums found due them; that the sheriff sell the property, and from the proceeds of the sale pay plaintiffs the sums found due them, viz. $365.49 on account of their claim, $50 for attorney's fees, and $45.60 for their costs; and that he "bring the surplus money, if any, into court to abide its further order." Surely the sheriff can execute this decree.

5. It is contended that the finding that the claim of lien was filed for record within 30 days after the buildings were completed is not justified by the evidence. The plaintiffs' claim of lien was filed for record September 17, 1890, and the court found that the buildings were completed on August 20, 1890. This finding appears to be supported by a preponderance of the conflicting evidence.

Other points made by appellant are not sufficiently plausible to merit special consideration. I think the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(113 Cal. 168)

## BENHAM v. CONNOR. (No. 15,898.)[1]

(Supreme Court of California. June 5, 1896.)

PLEADING—INSUFFICIENT ANSWER—VERIFICATION.

1. In an action by the indorsee of a note, an answer which alleges no defense except a counterclaim consisting of an alleged cause of action against the payee of the note, and fails to allege whether such cause of action arose before the transfer of the note or before defendant had notice of such transfer, was insufficient, and a judgment for plaintiff on the pleadings was properly rendered.

2. Where the complaint in an action upon a note is verified, the answer must also be verified, under Code Civ. Proc. § 446.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by A. M. Benham against M. W. Connor. There was judgment for plaintiff on the pleadings, and defendant appeals. Affirmed.

Morrison, Stratton & Foerster, for appellant. Olney, Chickering & Thomas and Chickering, Thomas & Gregory, for respondent.

BELCHER, C. This action was brought to recover the amount due on three negotiable promissory notes, each of which was separately set out in the complaint, and alleged to have been executed by the defendant, and to have been indorsed by the payee thereof to the plaintiff. The complaint was duly verified. In due time the defendant filed an unverified answer to the complaint, containing a general denial of all its allegations, and setting up as a counterclaim an alleged cause of action against the payee of two of the said notes. Thereafter the plaintiff served notice on the defendant that on the 29th day of April, 1892, he would move the court to strike from the files the said answer, and for judgment on the pleadings, upon the ground that the said document was unverified, and was sham, and irrelevant. On April 28th the defendant served on the attorneys for the plaintiff a properly verified amended answer, but they refused to admit service of the same. This answer contained no denials whatever, but set up the same counterclaim as that found in the original answer, and also a second counterclaim, consisting of another alleged cause of action against the payee of the said two notes. On April 29th defendant filed his amended answer among the papers in the case, without obtaining any leave of the court to serve or file the same. Thereafter, on the same day, plaintiff's motion came up for hearing, and the fact of the service and filing of the said amended answer was then brought to the knowledge and attention of the court by counsel for defendant. After due consideration, the court granted the motion for judgment on the pleadings, and judgment was accordingly entered in favor of the plaintiff as prayed for. From that judgment the defendant has appealed, and it is claimed that the facts above stated show errors in the action of the court which entitle him to a reversal.

This claim cannot, in our opinion, be sustained.

1. The Code provides that when the complaint is verified the answer must also be verified, except in certain specified cases, of which this is not one. Code Civ. Proc. § 446. The original answer was not verified, and for that reason counsel for appellant concede that plaintiff would have been entitled to judgment on the pleadings if no other answer had been filed. The only question, then, is as to the amended answer. Assuming that that answer can be considered, it will be observed that it sets up no defense whatever to one of the notes sued on, and the only defenses to the other two notes are the alleged counterclaims. And it will also be observed that there is no averment or anything to indicate that either of the causes of action set up as a counterclaim arose before the assignments of the said notes to the plaintiff, or before defendant had notice of such assignments. But if the said causes of action did not in fact arise before defendant had notice of the assignments to plaintiff, then it is clear that they could not be availed of as counterclaims or offsets against plaintiff's demand. Id. § 368; Pom. Code Rem. §§ 162–166, and cases cited. It was incumbent upon the defendant to set out all the facts showing that his alleged causes of action constituted valid counterclaims, but this he failed to do. As pleadings are construed most strongly against the pleader, it is apparent that the amended answer raised no issues which could be considered in the case. It was not error, therefore, for the court to grant the motion for judgment on the pleadings. Felch v. Beaudry, 40 Cal. 439; Hemme v. Hays, 55 Cal. 337; Loveland v. Garner, 74 Cal. 298, 15 Pac. 844; San Francisco v. Staude, 92 Cal. 560, 28 Pac. 778.

2. In view of what has been said it is unnecessary to consider the question whether, without leave of the court, the amended answer could be filed and made a pleading in the case. The judgment should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

113 Cal. 119

## DONOHOE v. TRINITY CONSOL. GOLD & SILVER MIN. CO. et al. (Sac. 30.)

(Supreme Court of California. June 4, 1896.)

MECHANIC'S LIEN—EMPLOYMENT—PROOF OF AUTHORITY OF AGENT.

Under Code Civ. Proc. § 1183, giving mechanics' liens for labor done at the instance of the owner of a building or his agent, and further providing that "every contractor * * * or other person having charge of any mining or of the construction * * * of any building, or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter," proof that a person acted as superintendent of the property of a mining company incorporated in another state, and claimed to be such superintendent, purchasing machinery, and having charge of all work done on the property, is sufficient to establish, prima facie, the agency of such person for the owner.

Department 2. Appeal from superior court, Shasta county; Edward Sweeny, Judge.

Action by Patrick Donohoe against the Trinity Consolidated Gold & Silver Mining Company and others. Judgment for plaintiff, and defendant Bank of Shasta County appeals. Affirmed.

Clay W. Taylor and J. Chadbourne, for appellant. Thos. B. Dozier, for respondent.

HENSHAW, J. Appeal from the judgment, and from the order denying a new trial. Plaintiff's action was to foreclose a lien for the value of labor performed upon the mining claim of the Trinity Mining Company. The bank was made defendant, as claiming some interest in the property, which interest, it was averred and not denied, was subordinate to plaintiff's lien. The mining company suffered default. The bank answered, admitting all of plaintiff's allegations, saving that it denied plaintiff's employment, his labor, its value, and nonpayment. The labor, its value, and nonpayment were proved, and no question arises upon any of these matters. Plaintiff had alleged that he was employed as a miner by one Bernard McCourt, the duly-authorized foreman and agent of the mining company. Upon the trial, he undertook to establish this by proving that McCourt was appointed foreman by one Champion, who was the superintendent in charge, under authority of the Trinity Consolidated Company. This company, it is admitted by the pleadings, was incorporated under the laws of the territory of Utah, with its principal place of business in Ogden. The admissibility and sufficiency of the evidence to establish these agencies of Champion and McCourt are made the contention upon this appeal, presented under objections to the reception of the evidence, and also by attacks on the findings based upon it. The evidence adduced by plaintiff was the following: The plaintiff testified that McCourt employed him. McCourt was acting as foreman, and McCourt himself and Champion, the superintendent, both told him that McCourt was foreman. Champion acted as superintendent, and told witness that he was superintendent. He had no other knowledge that Champion had been authorized to act as superintendent by the company. McCourt testified that he was employed to act as foreman by Champion, and did so act, with authority to employ and discharge laborers. He employed plaintiff as a miner. Champion was superintendent. Acting as superintendent, he purchased and shipped quartz-mill machinery to the mine, caused a 10-stamp mill to be erected, and crushed the ore extracted from the mine in this mill. Champion also posted notices about the mine and on the mill to the effect that the Trinity Company was the owner of the property. He knew of Champion's authority only from statements and from his actions as superintendent. James E. Isaacs testified that Champion had repeatedly told him he was managing agent and superintendent of the corporation. He had examined the record of conveyances of property, and of proceedings in a suit against the company brought by the defendant Shasta Bank. This suit was for money had and received. The complaint averred that Champion was the vice president and managing agent, and, as such, was doing business by authority and direction of the Trinity Company. In this action the Shasta Bank accepted a waiver of the issuance of a summons and an acknowledgment of service of the amended complaint on behalf of the Trinity Company, defendant therein, from Champion, who described himself "as managing agent and superintendent" of the corporation, and upon this admission entered the default of the mining company, took judgment, and sold the property. It is admitted that the Utah company did own the property. There was introduced in evidence the record of a lien filed by Champion against the company for a sum due him for services as superintendent and managing agent. There was introduced records of location of water ditches and rights, and mining claims made by the company through Champion, its agent. Nothing further was established by plaintiff; and the evidence indisputably fails in showing direct authority from the company to Champion, or a direct ratification of Champion's acts. The situation, then, amounts to this: A foreign corporation owns mines in this state. In its name, work is commenced upon these mines. Its so-called "superintendent" buys costly machinery; constructs a mill; extracts and reduces ore; employs miners, millmen, and laborers; takes up water rights and mineral claims; enters into contracts; borrows money; acknowledges service of process in a civil action to collect this money; and in general, by word and act, holds himself out and conducts himself as the duly and regularly appointed superintendent of the company.

It is unquestionably true that an agency may not generally be established by the declarations and acts of the alleged agent; but, without discussing the question whether this evidence would be sufficient to establish an ostensible agency by reason of the failure of the mining corporation to exercise ordinary care (Civ. Code, § 2317), it is clear that, under the provisions of our mechanic's lien law, evidence of these acts and declarations is permitted to establish prima facie such agency. Section 1183 of the Code of Civil Procedure gives to the miner a lien for labor done at the instance of the owner of the building or his agent; "and every contractor, sub-contractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for purposes of this chapter." These open declarations and continued acts of Champion and McCourt were thus admissible in evidence under this section to show the person in charge of the mining. By the rule of evidence declared by section 1183, this showing, if not dispelled or overcome, prima facie established the agency. It is quite true that the owner or other person in interest might overthrow this by proof of his want of knowledge and nonemployment of the alleged agent, coupled with a showing that he had exercised ordinary care in the premises; but in this case no one seeks to overcome it. The mining company made default, and the bank's claim is also founded upon the sufficiency of the agency of Champion, the very identical agency which, against this miner with a claim of $84 for labor, it is disputing and seeking to overthrow. No counter evidence having been introduced, it follows that the evidence of plaintiff, standing uncontradicted, supports the findings of the court. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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5 Cal. Unrep. 397

## MORGAN v. RIGHETTI et al. (S. F. 234.)

(Supreme Court of California. June 5, 1896.)

ACTION AGAINST SEVERAL AS PARTNERS — RECOVERY AGAINST ONE.

Under Code Civ. Proc. § 578, declaring that judgment may be given against one of several defendants, two persons being sued on an alleged partnership debt, and it being found that they are not partners, but that the debt is the individual debt of one of them, judgment may be rendered against him.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by E. H. Morgan against E. Righetti and another, as partners. Judgment for plaintiff against said E. Righetti, and said defendant appeals. Affirmed.

Frank M. Stone and Reel B. Terry, for appellant. Joseph Kirk, for respondent.

HAYNES, C. This appeal is from a judgment in favor of the plaintiff against E. Righetti, one of the defendants, upon the judgment roll. The only question upon this appeal is whether in an action against two as partners, upon an alleged partnership liability, a recovery may be had against one of the defendants; the court finding that the defendants were not partners, but that appellant is individually liable for the indebtedness alleged in the complaint, and for which judgment was entered against appellant, E. Righetti, alone.

At common law, in an action against two or more defendants upon an alleged joint contract or liability, the judgment was required to be against all the defendants, or in favor of all. But this rule was changed by section 145 of the practice act, which was afterwards adopted in hæc verba as section 578 of the Code of Civil Procedure. That section reads as follows: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." The question here involved was decided under the practice act adversely to appellant in Rowe v. Chandler, 1 Cal. 167, Lewis v. Clarkin, 18 Cal. 399, and People v. Frisbie, Id. 402; and we must assume that said section of the practice act was re-enacted in the Code with the construction given it in those cases; and in Shain v. Forbes, 82 Cal. 577, 583, 23 Pac. 198, those cases are cited and followed. See, also, Loan Co. v. Hall (Cal.) 42 Pac. 962. These cases should be held conclusive of the question presented upon this appeal. We have carefully examined the cases cited by appellant, and find all of them broadly distinguishable from those we have cited above. In none of them, except Weinreich v. Johnston, 78 Cal. 254, 20 Pac. 556, is section 578, Code Civ. Proc., mentioned, and in that case it was said that section did not apply. The judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

113 Cal. 196

## GREGORY et al. v. DIGGS et al. (Sac. 20.)

(Supreme Court of California. June 6, 1896.)

INJUNCTION—ACTION AT LAW—RESTRAINING.

Where plaintiff has sued in a justice court which has complete jurisdiction of his case, but has not jurisdiction sufficiently broad to enable it to entertain defendant's counterclaim, which grows out of the same transaction, and involves the same precise issue, so that the determination of plaintiff's case could be pleaded as a bar to defendant's, defendant can enjoin further proceedings, and have the case determined in a court having jurisdiction of the whole controversy.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Eugene J. Gregory and another against M. H. Diggs and others to enjoin proceedings in a justice court. From a judgment on a demurrer to the complaint, and from an order refusing an injunction, plaintiffs appeal. Reversed.

Armstrong & Bruner, for appellants. E. B. Merling and C. W. Thomas, for respondents.

TEMPLE, J. In this case a demurrer was interposed to the complaint, which having been sustained, the plaintiffs refused to amend. This appeal is taken from that judgment, as well as from an order refusing an injunction. Appellants have very little to say in their points in regard to the demurrer, further than that it is not pretended that their complaint does not state a cause of action, and that the burden on that question is on the demurring party. The respondents do not allude to the subject. Looking at the complaint and the demurrer, I see no valid point against the sufficiency of the complaint. As the matter is not discussed, the judgment upon the demurrer is therefore reversed.

The only question considered in the briefs has reference to the order refusing the injunction. It appears that plaintiffs purchased from defendants certain potatoes, which were warranted to be merchantable and suitable and fit for the market in Denver. Plaintiffs paid the purchase price except the sum of $132. For this sum suit was brought against plaintiff in the justice court. Appellants appeared, and answered, setting up a counterclaim for $500 damages for violation of the warranty. This plea was stricken out by the justice, on the ground that he had no jurisdiction, the demand being for more than $300. Plaintiffs then brought this action in the superior court, and asked that the justice be enjoined from proceeding with the case pending before him, but that the entire matter may be litigated in the superior court. In the complaint, plaintiffs claim damages in the sum of $525 for the alleged violation of the contract of sale; and, if their right to an injunction is sustained, the effect will be to compel the plaintiff in the justice's court to plead his demand in the superior court as a counterclaim, and to permit the whole controversy to be there tried. If plaintiffs are entitled to this remedy, it is solely upon the ground that, under the peculiar circumstances of the case, the jurisdiction of the justice court is too limited to afford them relief. They cannot be required to remit a portion of their demand to enable them to put in a counterclaim of which the justice has jurisdiction; and a judgment entered in the justice court by default or consent would probably be a bar to the suit for damages in the superior court. But, whether this would be the case or not, the entire issue is one which the practice here authorizes the parties to have determined upon one trial, and evidently that cannot be done in the justice court. This is a well-known ground of equitable jurisdiction. It is not a case in which a party is entitled to some remedy which only a court of equity can give, and which, having obtained jurisdiction for one purpose, will proceed to adjudicate upon the whole controversy; nor is it a case where a court of equity will interfere to prevent a multiplicity of suits. The demand of the plaintiffs and that of the defendants only involve legal issues; but the defendant Diggs has brought his action in a court which has complete jurisdiction of his case, but has not jurisdiction sufficiently broad to enable it to entertain a counterclaim of the other party,—a counterclaim which grows out of the very transaction upon which Diggs' claim is founded; and neither can get relief without having the claim made by the adverse party passed upon. In such case, I think, plaintiffs are clearly entitled to the relief sought. If the counterclaim sought to be set up did not grow out of the same transaction, and did not involve a trial and determination of the same precise issue, so that the determination of one case could be pleaded as a bar to the other, the case would be different. Nor do I think the power to enjoin proceedings in such a case is likely to be abused. A bond must be given upon the issuance of the injunction; and, if it is wrongfully done, the party will be taxed for costs and damages. By such a bond, the demand made by the plaintiff in the justice court may be secured. The judgment and the order refusing the injunction are reversed.

We concur: BEATTY, C. J.; HENSHAW, J.

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113 Cal. 172

## PEOPLE v. FAUST. (Cr. 105.)

(Supreme Court of California. June 5, 1896.)

CRIMINAL LAW—INTOXICATING LIQUORS—SALE TO INDIANS—INFORMATION—EVIDENCE.

1. Under Pen. Code, § 397 (as amended in 1893), providing that "every person who sells or furnishes * * * intoxicating liquors to any Indian is guilty of a felony," an information charging that defendant did "willfully and unlawfully sell and furnish intoxicating liquor

* * * to two Indians," etc., is sufficient, without naming the Indians.

2. The information charges but a single offense.

3. It will be judicially noticed that Susanville is the county seat of, and situated within, Lassen county.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

P. J. Faust was tried for selling intoxicating liquor to Indians, and from the judgment of conviction appeals. Affirmed.

E. V. Spencer and F. C. Spencer, for appellant. Atty. Gen. Fitzgerald, for the People.

BRITT, C. It is provided by section 397 of the Penal Code, as amended in 1893, that "every person who sells or furnishes * * * intoxicating liquors to any Indian is guilty of a felony." Defendant in this case was tried and convicted under an information charging that he did on August 17, 1895, at the county of Lassen, "willfully and unlawfully sell and furnish intoxicating liquor, to wit, whisky, to two Indians," contrary to the form of the statute, etc. He contends on this appeal that the information was not direct and certain as to the offense charged (Pen. Code, § 952), in that it failed to name the Indians to whom the liquor was furnished. The question is not free from difficulty, and, though decisions on cognate subjects are numerous, there is much conflict. Black, Intox. Liq. 464. Wharton states the prevalent opinion to be that the name of the purchaser need not be averred in an indictment for retailing liquors without license, though he thinks that on principle, supported by several cases, the name of the vendee should be specified, if known, or the fact that he is unknown should be alleged. Cr. Law, § 1510. And Mr. Bishop, in guarded language, expresses a similar view. St. Crimes, § 1037. The matter of legal reason involved is whether the offense is charged with sufficiency of detail to enable the accused to prepare for his defense, and to denote and characterize the transaction so that the judgment will operate as a bar to a second prosecution founded thereon. See People v. McKenna, 81 Cal. 158, 22 Pac. 488. The offense denounced by the statute consists in furnishing intoxicating liquor to any Indian,—not to those of a special description, as minors, habitual drunkards, etc.,—so that defendant needed not to be apprised of their names, as a means of ascertaining whether they belonged to an interdicted class of Indians; and as to the use of the judgment as a bar to another prosecution, since the identity of the offense involved in a plea of former acquittal or conviction rests ultimately in parol proofs, even when the indictments are alike (People v. Lockwood, 6 Cal. 205; 1 Bish. Cr. Proc. 816; Whart. Cr. Ev. 593), we apprehend that little aid in this regard would be furnished by designating the Indians by name, especially as the names of California Indians are seldom a matter of notoriety among the white population. In Com. v. McClellan, 101 Mass. 34, the defendant was charged with cruelly beating a certain horse. The court said: "Nor is it necessary to describe the horse particularly, for the sake of distinguishing it from other horses, in order to protect the defendant from a second prosecution for the same offense. If he is again prosecuted for the offense, he may plead this conviction, and establish the identity of the cases by evidence, the burden being on him." We think the present information must be considered sufficient.

Appellant argues that more than one offense is charged in the information, because he is thereby accused of furnishing liquor to two Indians; but obviously the act charged is single, just as when, by a single act, larceny is perpetrated of two or more coins, or other chattels. Whart. Cr. Pl. 254.

It is claimed that on the trial there was a variance between allegation and proof, in that the evidence showed that the liquor was furnished, if at all, to one Indian only. Conceding to the exigence of the argument that such a variance would be material, we think none appears. The evidence tended to show that the two Indians were together in a barroom, and that one of them gave defendant money with which he purchased a bottle of whisky at the bar. Both Indians repaired to a convenient rendezvous, where defendant met them, and he there designedly placed the bottle within their reach, or delivered it into the hand of the one from whom he received the money. Both then drank from the bottle, though not in defendant's presence. These facts, unexplained as they were, justify the inference that liquor was furnished to two Indians. It is said, also, that the persons who received the liquor were not proved to be Indians, but we think the evidence on that subject was ample to support the verdict. There is an objection that the venue of the offense was not proved. The evidence showed that it occurred at Susanville, and it is judicially noticed that Susanville is the county seat of, and situated within, Lassen county. People v. Etting, 99 Cal. 577, 34 Pac. 237. The judgment and order denying defendant's motion for new trial should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying defendant's motion for new trial are affirmed.

113 Cal. 177

## PEOPLE v. GUSTI. (Cr. 98.)

(Supreme Court of California. June 5, 1896.)

CRIMINAL LAW—INTOXICATING LIQUORS—SALE TO INDIAN—INFORMATION.

Under Pen. Code, § 397, as amended in 1893, which provides that "every person * * * who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian, is guilty of a felony," an information charging that defendant, April 20, 1895, "at and in the county * * *, did willfully, unlawfully, and feloniously furnish, and cause to be furnished, intoxicating liquor," etc., does not charge two offenses, since to "furnish and cause to be furnished" constitute but one and the same act.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

N. Gusti was indicted for selling intoxicating liquor to an Indian. A demurrer to the information was sustained, and, the district attorney declining to file a new one, defendant was discharged, and his bail exonerated. From a judgment on the demurrer, and the order discharging defendant, the people appeal. Reversed.

Atty. Gen. Fitzgerald, for the People. Burnett & Leppo, for respondent.

BELCHER, C. Section 397 of the Penal Code, as amended in 1893, provides: "Every person * * * who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian, is guilty of a felony." An information was filed against the defendant which charged as follows: "The said N. Gusti, on the 20th day of April, A. D. 1895, at and in the county of Sonoma, state of California, did willfully, unlawfully, and feloniously furnish, and cause to be furnished, intoxicating liquor, to wit, wine, to an Indian, to wit, Molinda Dugan, contrary to the form, force, and effect of the statute," etc. A demurrer to the information was interposed upon the ground that it charged two offenses, to wit, "the offense of furnishing intoxicating liquor to an Indian, and the offense of causing to be furnished intoxicating liquor to an Indian." The court below sustained the demurrer, and ordered the district attorney to file a new information. This he declined and failed to do for more than 30 days, and thereupon the court ordered that the defendant be discharged, and his bail exonerated. From the judgment on the demurrer, and the order discharging defendant, the people appeal.

Of course, an indictment or information must charge but one offense (Pen. Code, § 954), and if it charges more than one it is subject to demurrer upon that ground. The question then is, did the information here charge two offenses? We do not think it did. It is a well-settled rule of law that "when a statute enunciates a series of acts, either of which separately, or all together, may constitute the offense, all of such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." People v. Gosset, 93 Cal. 641, 29 Pac. 246; People v. Harrold, 84 Cal. 567, 24 Pac. 106; People v. Frank, 28 Cal. 507; People v. Shotwell, 27 Cal. 394. If the defendant furnished the intoxicating liquor, he caused it to be furnished; and, if he caused it to be furnished, he in legal effect furnished it himself, and was criminally responsible for the act. Pen. Code, § 31. Mr. Wharton, in his work on Criminal Pleading and Practice (ninth edition, section 228), states the law as follows: "Though the language of the statute be disjunctive, e. g. burned or caused to be burned, and the indictment charge the offense in the conjunctive, e. g. burned and caused to be burned, the allegation, as has been noticed, is sufficient. The same rule applies where the intent is averred disjunctively. In either case the superfluous term may be rejected as surplusage. And it has been held that, when the words of the statute are synonymous, it may not be error to charge them alternatively." Again, in section 251 of the same work, the author says: "When a statute, as has already been observed, makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, it has in many cases been ruled they may be coupled in one count. Thus setting up a gaming table, it has been said, may be a distinct offense. Keeping a gaming table, and inducing others to bet upon it, may constitute a distinct offense. For either, unconnected with the other, an indictment will lie, yet when both are perpetrated by the same person at the same time they may be coupled in the same count." So it is admissible to charge "several statutory phases of making, forging, and counterfeiting, of causing and procuring to be falsely made, forged, and counterfeited, and of willingly aiding and assisting in the said false making, forging, and counterfeiting. It is admissible, also, to charge that the defendant 'administered, and caused to be administered,' poison," etc. And see cases cited. The above authorities are, in our opinion, decisive of the question in hand. Respondent cites and relies upon the case of People v. Cooper, 53 Cal. 647. In that case the indictment charged "that on the 15th day of January, 1878, the defendant was the cashier and secretary of the Santa Cruz Bank of Savings and Loan; that, as such cashier and secretary, he, together with the president of the corporation, 'did execute, sign, and verify by their oaths a certain sworn statement'" (setting out the statement); and "that on the 25th day of the same month they published the statement in a newspaper." The court said, "The making and the publishing of the statement are charged in the indictment as two distinct acts, which it is alleged were performed at different times, and each of these acts is declared to be a felony." Under these circumstances the court very properly held that the indictment charged two offenses, and was obnoxious to a demurrer upon that ground. That case is not in point here. The defendant in the case at bar is not charged with furnishing liquor to an Indian at one time, and with causing it to be furnished at another time. So far as appears, it was one transaction, and all performed at the same time. The judgment and order appealed from should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

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(113 Cal. 163)

### SMELTZER v. MILLER, County Auditor.
(S. F. 249.)[1]

(Supreme Court of California. June 5, 1896.)

Taxation—Publishing Delinquent Tax List—Contract.

Pol. Code, § 3766, as amended March 28, 1895 (St. 1895, p. 326), provides that the board of supervisors "must" contract for publishing the delinquent tax list with the lowest bidder after 10 days' notice of the letting of the contract. Section 3764 requires the tax collector to publish the delinquent list by June 5th. *Held* that, on failure of the supervisors to contract for publishing the list, the tax collector was not authorized to do so.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by M. J. Smeltzer against George S. Miller, auditor of Monterey county. There was a judgment for defendant, and plaintiff appeals. Reversed.

John K. Alexander and Geo. A. Dougherty, for appellant. P. E. Zabala, for respondent.

VANCLIEF, C. The plaintiff, as a citizen and taxpayer of said county of Monterey, brought this action to enjoin the defendant auditor perpetually from drawing his warrant upon the county treasurer in favor of one W. J. Hill for the payment of his claim against the county for having published the delinquent tax list for the year 1894-95, which claim, for the sum of $466.65, had been formally allowed by the board of supervisors of that county. The court sustained a general demurrer to the complaint, dissolved the temporary injunction, and rendered judgment in favor of defendant. Plaintiff appeals from the order dissolving the injunction, and from the judgment.

Whether or not the court erred in sustaining the demurrer is the only question involved or presented, and this is reduced to the question whether the complaint shows that the demand of Hill for having published the delinquent list was not a lawful charge against the county. The claim of Hill was for having published the delinquent list four weeks immediately preceding June 20, 1895, as to which the complaint contains the following: "Plaintiff avers that said publication of said delinquent tax list or roll, if made, was and is entirely unauthorized by any law or order or ordinance, and without any right or authority whatever; that no advertisement for or notice of the letting of any contract therefor was made or given by the board of supervisors of said county, or at all; that no contract therefor was made by said board of supervisors with said Hill, or any one else, or at all; that said Hill was not, nor was any one else, the lowest or any bidder for the publication of said delinquent tax list; that no proposals therefor were asked for or received by said board of supervisors, or any one else; that no contract therefor was awarded to the lowest or any bidder by said board of supervisors, or by any one, or at all; that the publication of said list by said W. J. Hill, if made, was voluntary, and without any right, authority, or validity whatever; that said claim of said W. J. Hill, based and founded thereon as it is, is illegal, and constitutes no legal or valid claim or demand against the county of Monterey, and, if paid, will wrongfully and unlawfully increase the burden of taxation on this plaintiff and on and of all other taxpayers of said county." It is further alleged, in substance, that the defendant has declared and threatened that he will draw his warrant on the treasurer in favor of Hill for said sum of $466.65, and will do so unless enjoined by order of the court. No further statement of the contents of the complaint is necessary, since it is not claimed to be otherwise defective than in that it does not show that Hill's demand was not a lawful and valid charge against the county.

I think the court erred in sustaining the demurrer. The tax collector had no authority to contract for the publication of the delinquent list. Section 3766, Pol. Code, as amended March 28, 1895 (St. 1895, p. 326), provides: "The publication [of delinquent list] must be made once a week for three successive weeks in some newspaper, or supplement thereto, published in the county, and the board of supervisors must contract for such publication with the lowest bidder, and after ten days' public notice that such will be let. The bidding must be by sealed proposals. If there is no newspaper published in the county, then by posting a copy of the list in three public places in each township." Section 4046 of the same Code provides that "boards of supervisors in their respective counties have jurisdiction and power * * * (21) to contract for the county printing." Section 4047 of the same Code contains the following provisions: "The supervisors must contract for: (1) All county printing. * * * And all contracts must be made with the lowest bidder, and after ten days' public notice that such contract will be let. The bidding must be by sealed proposals." The complaint shows not only that there was no advertisement for bids, and no bids made for the publication of the delinquent list, but that the board of supervisors made no contract with Hill, nor with any other person, for the publication of said list, and that Hill had no contract with any person for the publication thereof. The only answer to this by counsel for respondent is that, inasmuch as the board of supervisors failed to perform its duty to advertise for bids and to make the contract as required by law, the duty to contract for the publication of the delinquent list devolved upon the tax collector, since section 3764, Pol. Code, required him to publish such list on or before the 5th day of June of each year. This argument is fully answered in the case of Times Pub. Co. v. Alameda Co., 64 Cal. 469, 2 Pac. 246, wherein all the above cited sections of the Political Code (as they then stood) were considered and construed. The only amendment of either of those sections affecting this case is that of section 3766, made March 28, 1895 (St. 1895, p. 326), which makes that section more favorable to the appellant than it was in 1884, when the Case of Times Pub. Co. was decided. As it then stood, it did not expressly say "the board of supervisors must contract for such publication," as it does since said amendment. In the case cited this court said: "The duty of preparing the delinquent tax list for publication and of causing it to be published therefore devolved upon the tax collector; but he could not provide for its publication, unless it had been let to the lowest bidder by sealed proposals, after ten days' public notice (section 3766, Pol. Code); and he had no authority to let such a contract, because the publication was part of the county printing, for which boards of supervisors in their respective counties were authorized to contract." Speaking of the sections of the Political Code above cited, the court further said: "Reading them together, it seems to be manifest that the legislature intended to give the power of contracting for the county printing to the boards of supervisors of the respective counties, and not to a county or township officer." It is to be observed, however, that the decision in the case cited was based solely upon those sections of the Political Code above cited, as the action was commenced before the enactment of the county government act; and that the question again arose after the passage of that act in the case of Publishing Co. v. Whitney, 97 Cal. 283, 32 Pac. 237, wherein the sole question was "whether or not, under the laws of this state, it is the duty of the tax collector to publish the delinquent tax list * * * in such newspaper as has tendered the lowest bid to do such advertising." In this later case, after referring to the case of Times Pub. Co. v. Alameda Co., supra, this court called attention to that part of twenty-fifth section, subd. 23, of the county government act, which reads as follows: "The board of supervisors shall annually fix the price at which the county shall be supplied with job printing and blank books, and also the price of all county advertising; and each county officer shall procure such blank books, job printing and advertising at a price no greater than is so fixed, and certify the bills therefor to the board of supervisors;" and said: "This changes the rule as declared in section 3766, Pol. Code, and the board of supervisors, of their own motion, now are to fix the price of county advertising, * * * without advertising for bids or sealed proposals. When that duty is performed by them, the tax collector must 'procure' some newspaper to do the advertising; not by any bid which may have been made, but at the price previously fixed by the board of supervisors, in their discretion." Thus it was held that the above-quoted provision of the county government act repealed by implication so much of section 3766 of the Political Code as was inconsistent therewith; citing Mendocino Co. v. Bank of Mendocino, 86 Cal. 255, 24 Pac. 1002, and Ex parte Benjamin, 65 Cal. 310, 4 Pac. 23. If section 3766, Pol. Code, was thus wholly or partially repealed, surely the amendment and re-enactment of that section in the form above set out, of March 28, 1895, likewise repealed so much of the county government act as was inconsistent therewith. Besides, the amendment makes it more specific to the intent that "the board of supervisors must contract for such publication" of the delinquent list. As to all other county printing, the county government act probably governs, since section 3766, Pol. Code, applies only to the delinquent tax list. I think the judgment and order appealed from should be reversed.

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[1] Rehearing denied.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

113 Cal. 147

## VANDERHURST v. THOLCKE et al. (S. F. 152.)

(Supreme Court of California. June 5, 1896.)

NUISANCE—TREES ON SIDEWALK—DETERMINATION OF CITY AUTHORITIES—REVIEW.

The determination of the common council of a city (given by the city charter the care and control of the streets, with power to define, prevent, and remove nuisances) that trees two to five feet in diameter, standing in the center of a sidewalk twelve feet wide, constitute a nuisance, cannot be reviewed.

Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by William Vanderhurst against J. W. Tholcke and others. Judgment for plaintiff. Defendants appeal. Reversed.

J. J. Wyatt, for appellants. Parker & Sargent, for respondent.

VAN FLEET, J. This action was brought to enjoin the authorities of Salinas city from cutting down or removing, as an obstruction and nuisance, certain shade trees standing and growing on the sidewalk in front of plaintiff's premises, within the corporate limits of said municipality. The material facts found by the court are: That plaintiff's premises (which are on a corner) front on Pajaro and Alisal streets, two regularly established public streets of said city, under the control and management of the authorities thereof, having curbed and graveled sidewalks some 12 feet wide. The trees in question were set out by plaintiff many years since, and have now grown so that their trunks are from 2 to 5 feet in diameter, and with a height of about 50 feet, and they stand in a row almost in the center of the sidewalk—15 of them on Alisal, and 10 on Pajaro, street. That the city council has ordered the removal of the trees, as presenting an obstruction to public travel, and a nuisance. And that defendants and appellants (one of whom is the superintendent of streets of said city, and the other chairman of the street committee of the common council thereof) are threatening to carry said order into execution. It was further found, upon evidence admitted against the objection of defendants that the same was immaterial and incompetent, that said trees are of great use and benefit to plaintiff, and beautify and protect his premises; and that they are of public utility and benefit in furnishing shade from the heat of summer, and shelter from wind and storm, and serve to beautify the streets, etc.; and it is found that there is sufficient room and passageway for travel along said walks on each side of said trees. And, apparently as a conclusion and deduction from these last special and probative facts, the court found that the trees are not an obstruction to the use of the said streets or sidewalks, and do not constitute a nuisance. Judgment was entered restraining the removal of the trees, from which and an order refusing a new trial the defendants appeal.

It is contended that the finding that the trees do not constitute an obstruction or nuisance is without competent support, and this is the material question arising, since, without the aid of that finding, the judgment cannot stand. We are of opinion that this contention must be sustained. Under the charter of Salinas city, the common council is given the general care, custody, and control of the streets, with power to lay out, open, alter, vacate, improve, cleanse, and repair the same; to make regulations for the protection of health, safety, order, and cleanliness of the city; and to define prevent, and remove nuisances. Charter of Salinas City (St. 1875–76, p. 98.) Under this grant of power there can be no question that the city authorities can, and it is their duty to, cause the removal of anything constituting an obstruction to the streets and sidewalks (the latter being a part of the street), and abate it as a nuisance, since anything which is an obstruction to the free use of a public street constitutes a public nuisance. Pen. Code, § 370; Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688; Marini v. Graham, 67 Cal. 130, 7 Pac. 442. This power, indeed, is not questioned; but it is contended that the determination of the city authorities in the premises is not conclusive, but is open to review by the courts, and that it was competent for the court to take evidence upon the question as to whether or no the trees in question constituted an obstruction to the free use of the streets, and hence a nuisance. But the rule would seem to be that in an instance, where the thing may or may not, in its nature or circumstances, constitute an obstruction, the determination of the city authorities, in the absence of fraud or oppression or circumstances disclosing a manifest abuse of their discretion, is conclusive, and not open to question by the courts. North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 207; Roanoke Gas Co. v. City of Roanoke (Va.) 14 S. E. 665; Chase v. City of Oshkosh (Wis.) 51 N. W. 560. Mr. High, in his valuable work on Injunctions (volume 3, § 593), says: "Courts of equity are averse to interfering with the exercise of the discretion or judgment of public officers in matters committed to their care; and where municipal or town authorities are charged by law with the care of highways, and are empowered to remove obstructions therefrom, equity will not pass in review upon their judgments as to what constitutes an obstruction." And, in Beach on Public Corporations (section 1234), the author, speaking of the same character of obstruction as the one under consideration, uses this language: "A city may, without notice to an abutting landowner, remove shade trees which have been growing on the sidewalk of a public street, if they constitute an obstruction to public travel; and whether or not such trees are an obstruction must be determined by the proper city authorities, and their determination cannot be reviewed by the courts, unless they have clearly abused their discretion. It is not necessary, in order that trees shall constitute an obstruction so as to authorize their removal, that they should interrupt or stop travel."

In this instance we think it very clear, under the undisputed facts disclosed, that the question was one upon which the determination of the city council must be held final. As we have seen, the trees in controversy were very large, and, standing immediately in the center of the sidewalk, necessitate the public travel passing along the narrow edges or spaces left on either side thereof, instead of having the enjoyment of the entire width and surface of the walks to which it is entitled. Such an obstruction constitutes a nuisance per se. Chase v. City of Oshkosh, supra. It was not essential to the power of the city to remove the trees that they should completely obstruct the walk, or take up the entire width thereof. The degree of obstruction justifying their removal is a question for the city, in the absence, as we have said, of an abuse of discretion. The public is entitled to the free and unobstructed use of the entire street and sidewalk for purposes of travel, subject only to the reasonable and proper control of the municipality (24 Am. & Eng. Enc. Law, 33, 34; Ex parte Taylor, 87 Cal. 91, 25 Pac. 258; Beach, Pub. Corp. supra); and that it cannot enjoy this right with the obstruction presented by these trees, situated as they are, is beyond question. When it became established, therefore, that the city council had determined that the trees constituted an obstruction to public travel such as to require their removal, the court should not have proceeded to review such action, and the evidence admitted for the purpose was wholly incompetent, and did not legally tend to sustain the finding based thereon. The mere form of the order declaring the trees a nuisance, and requiring their removal, was immaterial. An ordinance was not required for the purpose, and the order in question is clearly sufficient as a direction and authorization to the superintendent of streets to remove the obstruction. The judgment and order are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

113 Cal. 153

## MURPHY v. CLAYTON et al. (S. F. 191.)

(Supreme Court of California. June 5, 1896.)

RESULTING TRUSTS — RIGHTS OF BENEFICIARY AGAINST ADMINISTRATOR AND CREDITORS OF TRUSTEE.

The beneficiary of a resulting trust in an undivided half of land, arising from title to land being taken in the name of a husband, while the purchase price was paid half by him and half by her, can claim such half against his administrator and general creditors, though the estate be insolvent; they not being purchasers, the law of fraudulent conveyances not being applicable, and she not being estopped, though after the conveyance the property, with the knowledge and consent of the wife, remained in the apparent sole possession and ownership of the husband, and his financial standing was based in part on the fact that the property stood in his name, and his indebtedness was contracted without notice to his creditors of his wife's equity; no act, conduct, or admission of hers by which the creditors were induced to give him credit being shown, and it not even being shown that they knew the title stood in his name, or that means were taken by them to ascertain the true state of the title.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Ann Murphy against Edward W. Clayton, administrator of D. J. Murphy, deceased, and another. Judgment for plaintiff. Defendant Clayton appeals. Affirmed.

Kittredge & Kraft and Rhodes & Barstow, for appellant. Geo. W. Lewis (J. H. Campbell, of counsel), for respondent.

VANCLIEF, C. This is an action to establish a resulting trust in land. The cause was tried by the court, without a jury. Defendant Clayton, administrator, etc., appeals upon the judgment roll.

The following is a condensed statement of the findings of fact: The land described in the complaint was conveyed to D. J. Murphy on the 31st day of August, 1887, upon the consideration of $23,000 then paid by said D. J. Murphy and the plaintiff jointly; plaintiff paying one-half thereof, namely, $11,500, from her separate property and estate. From the date of said conveyance till on or about the 20th day of June, 1893, when said D. J. Murphy died, said land was of record in his name. Said conveyance was made to him with the knowledge and consent of plaintiff. From the date of said conveyance to the time of his death the premises remained in the apparent sole possession and ownership of said Murphy, and was managed and dealt with by him as apparently the sole owner thereof, with the plaintiff's knowledge and consent. The plaintiff (his mother) and the defendant Kate Murphy (his wife) were his only heirs at law. The defendant Clayton, by an order of court duly made on the 21st day of July, 1893, was appointed administrator of the estate of said D. J. Murphy, and from thence hitherto has been the duly qualified and acting administrator of said estate. Upon qualifying, he took possession of, and still holds, the whole of said land, claiming that it is a part of said estate. A notice to creditors was duly published on the 27th day of July, 1893. Within 10 months thereafter, claims against said decedent, aggregating $90,000, were presented and allowed by said administrator and the judge of the court. Said estate is insolvent if the half of the property claimed by the plaintiff be excluded therefrom. The financial standing and credit of said D. J. Murphy were good, and were based on his real estate holdings and other properties standing in his name, including the premises in dispute; and his indebtedness was contracted without notice to his creditors of the plaintiff's secret equity in said premises.

The consideration for the land having, at the time of the purchase, been paid (half of it by appellant's intestate, and half of it by the respondent), and the title taken by the former, a resulting trust arose in the land in favor of respondent for the undivided one-half thereof, that proportion being an aliquot part of the consideration. Olcott v. Bynum, 17 Wall. 44; Buck v. Swazey, 35 Me. 48; Woodside v. Hewel, 109 Cal. 484, 42 Pac. 152; Somers v. Overhulser, 67 Cal. 237, 7 Pac. 645; Davis v. Baugh, 59 Cal. 573; Case v. Codding, 38 Cal. 193; Dikeman v. Norrie, 36 Cal. 101; Hidden v. Jordan, 21 Cal. 99; Osborne v. Endicott, 6 Cal. 149; Perry, Trusts, § 127 et seq.; 2 Pom. Eq. Jur. § 1038, and numerous authorities there cited.

It is insisted by the appellant that he, as the representative of the creditors of the deceased debtor, can assert the priority and superiority of their claims over the secret equity of the plaintiff, under the rule declared in Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579. In that case the apparent right and title of the debtor were sold under execution upon an indebtedness arising from a deficiency remaining after a sale in foreclosure. It was there held that "a judgment creditor purchasing at his own sale, equally with a third party making a purchase under the execution, is protected against latent equities of which he had no notice"; meaning, of course, of which he had no notice at the time of the sale. Further, at page 583, 97 Cal., and page 579, 32 Pac. it was said: "The plaintiff cannot be said to be in a better position than she would have been had she held an unrecorded conveyance of the property. It was in her power for many years to have enforced her equitable right to the property; but having failed to do so until a sale thereof, and recording of the evidence of such sale under an execution against her husband, who was the ostensible owner thereof, and in whose name the title was recorded, she comes too late to ask for relief against one clothed with the legal title and an equal equity." The decision proceeds upon the principle that the execution creditor, because he purchased the property without notice of the latent equity, was protected by the provisions of section 1107 of the Civil Code. That section gives a bona fide purchaser or incumbrancer, without notice, the right to hold against a prior purchaser having an unrecorded deed. The principle is familiar. In Bass v. Wheless, 2 Tenn. Ch. 535, it was held that, unless a purchaser has notice of the resulting trust, he takes the property freed of the equity of the cestui que trust, and that the advance of money on a mortgage is pro tanto a sale, "and gives such a mortgagee, to the extent of the money advanced, all the rights of a bona fide purchaser for value and without notice." So, also, in Haggard v. Benson, 3 Tenn. Ch. 278. In Catherwood v. Watson, 65 Ind. 576, it was held that the resulting trust must give way to the creditor, who purchased the property under execution, because of a statute of that state which reads: "No such trust, whether implied or created, shall defeat the title of the purchaser for a valuable consideration, and without notice of the trust." A resulting trust, being a purely equitable interest, is cut off and destroyed as against all bona fide purchasers or mortgagees from the trustee for a valuable consideration and without notice. 2 Pom. Eq. Jur. § 1043; Lehman v. Lewis, 62 Ala. 129; Flynt v. Hubbard, 57 Miss. 471. In Scott v. Umbarger, 41 Cal. 419, it is decided that one who purchases land from another who acquired the title fraudulently, and thereby became a trustee, in order to protect himself must have been ignorant of any of the facts constituting the fraud, not only at the time of his purchase, but when he paid the purchase money and obtained his deed.

It is claimed here that the appellant stands in the relation of an incumbrancer by reason of his administratorship, which gives him a right to the possession of all of the decedent's estate for the purposes of administration and for the payment of debts, which right of possession has been recognized as a lien by this court in Beckett v. Selover, 7 Cal. 238, Brenham v. Story, 39 Cal. 186, 188, and Smith v. Olmstead, 88 Cal. 586, 26 Pac. 521. But it will be observed that in all these cases, as well as in the sections of the Code of Civil Procedure applicable to the estates of deceased persons, the possession and lien mentioned relate to the estate of the decedent, and not to that which he held in trust for others. The decedent, D. J. Murphy, was the owner of but a moiety of the property, the other moiety belonging to the respondent. Neither the appellant nor any creditor of the decedent stands in the relation of purchaser or mortgagee of the property. Counsel for appellant does not mention any case which extends the doctrine of the cited cases, or applies section 1107 of the Civil Code to mere creditors who have not advanced money on mortgage or purchased at a sale; and I have been able to find no such case, and am of the opinion that the decision in Riley v. Martinelli, supra, cannot be considered applicable here.

The question remains: Does the finding that the conveyance was made to D. J. Murphy, and that from the date thereof to the time of his death he was in the apparent sole possession and ownership, managing and dealing with the property as his own, with respondent's knowledge and consent, coupled with the finding that his credit was based, in part, upon the fact that the property stood in his name, and his indebtedness was contracted without notice to his creditors of respondent's equity, estop the respondent and cut off that equity? I do not think the facts found tend to establish such estoppel. They show no act, conduct, or admission upon the part of the respondent by which the creditors were induced to give credit to the decedent. They do not show even that any of the creditors knew that the title to the property stood in his name, or that means were taken by any of them to ascertain the true state of the title. In Lux v. Haggin, 69 Cal. 266, 10 Pac. 674, the court said: "To constitute the estoppel, the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. Boggs v. Mining Co., 14 Cal. 279; Stockman v. Irrigation Co., 64 Cal. 57, 28 Pac. 116; Morrill v. Water-Power Co., 26 Minn. 229, 2 N. W. 842. To constitute such an estoppel, it must also be shown that the person sought to be estopped has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved. Brown v. Bowen, 30 N. Y. 519; Plumb v. Insurance Co., 18 N. Y. 392." Equity does not favor estoppels, and I see no reason why this case should not be determined according to the verity of the fact. Perry, Trusts, § 416. In Lord v. Bishop, 101 Ind. 334, where a husband received money from his wife's mother to be invested in lands for the wife, and took title in his own name, and held it 33 years, and then, when in debt, put the title in his wife, having during that time paid the taxes, and by his labor cleared and improved the land, it was held that equity would not subject it to the payment of his debts. The court said: "Taking the title in his own name made the husband as much her trustee as though he had received the money directly from his wife's hand. It was not for the husband to take to himself the benefaction which the mother intended to bestow upon her daughter, and his creditors can stand in no better attitude than he stood himself. Bank v. Kimble, 75 Ind. 195; Perry, Trusts, § 127. "That the husband spent his time and labor in clearing and improving the land, and that he paid the taxes, does not alter the case. The fact remains that it was his wife's land, and he could not improve it away from her." It is true that in that case the husband took the title in his own name without his wife's knowledge or consent; but that fact does not seem to have been considered important. The wife had had ample time to ascertain the fact, and to have the legal title transferred to herself. The reasoning of the court in Breeze v. Brooks, 71 Cal. 169, 9 Pac. 670, and 11 Pac. 885, more nearly applies to this case than that of any other case I have found. The decree of the court below adjudged that a deed made by John Brooks to his brother and co-defendant, Patrick Brooks, was fraudulent and void; and that Patrick took the legal title thereunder in trust for John and his successors in interest; and that he holds the same in trust for the plaintiffs, who were creditors of John and purchasers at a sheriff's sale of the land conveyed, under a judgment in their favor against John. The court said: "From the findings, it plainly appears that John had nothing except a naked legal title. Patrick had paid all the money for the land, and John, therefore, held it in trust for him. * * * John never, so far as Patrick knew, asserted any title adverse to Patrick's; and Patrick's right to assert his claim thereto was not barred, and John only conveyed to Patrick that which belonged to him. The findings negative the idea that the plaintiffs, in giving credit to John, relied on any statement of Patrick that John owned the land; nor is it there intimated that they examined the records of deeds * * * to find out what they disclosed in reference to John's title, or relied on them in any way to induce the credit which they extended to John. They seem to have relied on the facts that John lived on the land, claimed it in his conversations with them as his, and that he was insolvent, and Patrick knew it. * * * Therefore, it does not appear that the deed from John to Patrick was made to hinder, delay, or defraud creditors. It was simply made to reinvest Patrick with the legal title to his own land." Held, that the purchaser at execution sale got no title, "as a purchaser at such sale can get no title save that of the judgment debtor," and that the findings, therefore, did not justify the decree. See the same case, upon a second appeal, reported in 97 Cal. 72, 31 Pac. 742. There is nothing illegal or against public policy in the mere fact that a party equitably entitled to real property permits the legal title to remain in another. Resulting trusts are fully recognized by our law, and every one is presumed to know the law. Clarke v. Dutcher, 9 Cow. 681–684; Gas Co. v. Brickwedel, 62 Cal. 642. I think the judgment of the court below legally results from the findings of fact, and therefore should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

113 Cal. 129

## PEOPLE ex rel. ELLERT, Mayor, v. COGSWELL et al. (S. F. 133.)

(Supreme Court of California. June 4, 1896.)

TRUSTS—PUBLIC CHARITY—POWER OF STATE—PERPETUITY—ELEEMOSYNARY PURPOSES—IMPEACHING DEED.

1. The state, as representative of the public, may maintain an action to enforce, or prevent the mismanagement of, a public trust, such as is created by the conveyance of property to trustees, authorized by St. 1885, p. 49, for the founding or maintenance of an institution of learning.

2. It is essential to the validity of a charitable trust that the beneficiaries should be designated as a class only, leaving the numbers and individuals to be determined by the trustees in its administration.

3. The word "eleemosynary," in its modern and legal meaning, is interchangeable with "charitable," and the creation of a perpetuity by a conveyance of property in trust for the founding of an educational institution, as is authorized by St. 1885, p. 49, is not in violation of the constitutional provision which forbids perpetuities "except for eleemosynary purposes," though the institution is to be for the benefit of "the boys and girls of California," and not alone for those who are poor.

4. The burden of proof is on one attacking the validity of the deed of a married woman, which it is admitted she executed and acknowledged, to impeach the certificate of the notary, the recitals of which are in due form.

5. Where no power of revocation is reserved in a conveyance of property in trust for a public use, the trust does not fail, nor the property revert, by an abandonment or abuse of the trust by the trustees, but in such case the state may invoke the powers of a court of equity to correct the abuse.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by the state, on relation of L. R. Ellert, mayor, against Henry D. Cogswell, Caroline Cogswell, and others. Judgment for plaintiff, and defendant Caroline Cogswell appeals. Affirmed.

W. T. Baggett, for appellant. Rodgers & Paterson, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Defendants Henry D. Cogswell and his wife, Caroline E. Cogswell, upon March 19, 1887, executed to certain trustees, themselves among the number, a deed of trust to real estate in the city and county of San Francisco. The trust was created under the provisions of the act of the legislature entitled "An act to advance learning, the arts and sciences, and to promote the public welfare by providing for the conveyance, holding and protection of property, and the creation of trusts for the founding, endowment, erection and maintenance within this state of universities, colleges, schools, seminaries of learning, mechanical institutes, museums and galleries of art." St. 1885, p. 49. The nature, object, and purposes of the trust were declared to be the erection and maintenance of a polytechnic college for the purpose of giving the boys and girls of the state of California a practical training in the mechnical arts and industries, the better to fit them to engage in the different pursuits of life. The trustees, including the defendants Cogswell, accepted the trust upon the day of the execution of the deed, and thereafter as a board managed and conducted its affairs. The defendants Cogswell attended the meetings of the board, and participated in its deliberations and acts.

The present action was brought by the state upon the relation of L. R. Ellert, mayor of San Francisco, to have the trust decreed valid, and for relief against certain acts and abuses of the defendants Cogswell and other defendant trustees, which acts, it is alleged, were designed to hinder the management of the trust, and to frustrate its purpose and defeat its object. The nature of these acts need not be specified, as an amicable stipulation was afterwards entered into, which eliminated these matters as issues in the case. Under this stipulation the action was dismissed as to one of the alleged recalcitrant trustees, other trustees were appointed to fill existing vacancies in the board, the Polytechnic College was to be reopened, and the defendant H. D. Cogswell consented to the entry of a judgment against himself decreeing that the deed created a valid and operative public trust. By this stipulation the rights of the wife, Caroline, were protected, and her claims and contentions reserved for adjudication. In the action she answered and filed a cross complaint. By her answer she raised the question of the validity of the trust, and by her cross complaint she pleaded that her hearing was imperfect, and that she did not know that she had signed the deed, nor did she understand its full meaning and import. It was read to her by the notary, but she failed to hear or comprehend it. There was no one present to advise her as to the meaning of the deed and its effect, or to inform her of her rights. She thought the papers were for the purpose of "establishing a school for those of small means," and believed she was merely signing for the incorporation of the college, and was simply accepting the trust as trustee. She discovered, while the paper was being read to her by the notary, that it purported to be a deed of some kind, because she heard him read descriptions of land; but she did not know in what way it concerned her, or that she had signed that particular paper. She trusted her husband, who deceived her in the matter. She had never had independent advice, and did not know that under the law the conveyance, which was of community property, was inoperative unless she joined therein. Had she known, she would not have executed it. She also pleaded that the trust is in contravention of the constitutional inhibition against perpetuities. The answer to this cross complaint was a denial and a plea of the statute of limitations. Defendant Caroline Cogswell also demurred to the complaint, and her demurrer was overruled.

The only ground of demurrer inviting consideration is that the state is not a party in interest, and therefore has not capacity to sue. The objection is not sound, and the demurrer was properly overruled. This action is based upon averments of a public trust. It is brought to remedy abuses in the management of this trust. It is not only the right, but the duty, of the attorney general to prosecute such an action. The state, as parens patriæ, superintends the management of all public charities or trusts, and in these matters acts through her attorney general. Generally speaking, such an action will not be entertained at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been changed in this state. Even in those states, such as Massachusetts, where by special statute the attorney general is instructed to prosecute such actions, it is declared that the statute does not narrow or diminish in this regard the common-law powers incident to the office. Parker v. May, 5 Cush. 336. The principle and rule are thus succinctly stated in Attorney General v. Compton, 1 Younge & C. Ch. 417: Where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the crown should be entitled to intervene by its officers for the purpose of asserting, on behalf of the public generally, the public interest and the public right, which probably no individual could be found effectually to assert even if the interest were such as to allow it. 2 Kent, Comm. (10th Ed.) 359; Lewin, Trusts, § 665; 1 Daniell, Ch. Prac. § 13; Perry, Trusts, § 732.

2. It is next contended that the trust designating for its beneficiaries "the boys and girls of California" is void for uncertainty, because the trustees are not empowered to designate what boys and girls, and, if all applied, the trust would be impossible of execution. It should scarcely be necessary to observe that when the class has been designated this very vagueness and uncertainty and indefiniteness as to individuals and numbers is a necessary and essential element to the creation of a valid charitable trust. Perry, Trusts, § 710; Estate of Hinckley, 58 Cal. 488. It is in discussing such trusts that the supreme court of the United States says in Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327: "They may, and indeed must, be for the benefit of an indefinite number of persons, for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of the administration to be settled by trustees under the superintendence of a court of chancery."

3. It is claimed that the trust is void as creating a perpetuity which does not come within the exception of the constitution which forbids perpetuities "except for eleemosynary purposes." Herein it is argued that "eleemosynary" pertains exclusively to almsgiving; that alms are given to the poor; and that this trust is generally for "the boys and girls of California," and not specifically for the poor boys and girls. From this the claim is made that the constitution never meant to permit perpetuities for strictly educational purposes, or the word "eleemosynary" would never have been used. It may at once be said that the trust creates, and is intended to create, a perpetuity. It may further be said that the beneficiaries under it are not limited to the poor. But is it for these reasons any the less an eleemosynary trust? It is quite true that the word "eleemosynary" comes to us from the Greek word meaning "alms," but, while it is always interesting to note the origin and first meanings of words, this knowledge is frequently more curious than valuable; while to insist that the original meaning shall govern the word in its modern use and acceptation is very rarely permissible. It is in this way interesting to note that "sycophant" comes from Greek words meaning "fig informer"; but it would scarcely be contended to-day that a man could not properly be called a sycophant unless he had dealings in figs. In short, words by use are sometimes degraded, sometimes ennobled; sometimes narrowed in meaning, sometimes broadened. "Eleemosynary" has come in the law to be interchangeable with the word "charitable." A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor. It may, but it need not, look to the care of the sick or insane. It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. It is impossible to enumerate specifically all purposes for which an eleemosynary trust may be created. The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper object of an eleemosynary trust. As was said by this court in People v. Association, 84 Cal. 114, 24 Pac. 277: "The enforcement of charitable

uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity; and, where new necessities are created, new charitable uses must be established. The underlying principle is the same; its application is as varying as the wants of humanity." The objects and purposes of the present trust are purely charitable. The mode of effectuating the charity by the erection and maintenance of a polytechnic college is clearly set forth. The salaries of the professors, teachers, and instructors are to be paid out of the trust funds. Suitable college buildings are to be provided. Tuition is to be absolutely free so long as the resources of the trust will permit, and when a tuition fee is charged it is only to aid in maintaining the institution. Nothing is reserved for profit or gain. All goes to the spread of technical knowledge, and to the gratuitous instruction in the mechanic arts of the boys and girls of the state. Such a trust is in conformity with the act of 1885, and that act in no way contravenes the provisions of section 9, art. 20, of our constitution. Dartmouth College v. Woodward, 4 Wheat. 518; Vidal v. Girard's Ex'rs, 2 How. 127; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327; American Academy, etc., v. President, etc., of Harvard College, 12 Gray, 582; Whicker v. Hume, 7 H. L. Cas. 124; President of United States of America v. Drummond, 33 Beav. 449.

4. The next point urged is that the evidence does not support the finding that Mrs. Cogswell duly made, signed, executed, and delivered the trust deed. It was admitted by appellant that Mrs. Cogswell's acknowledgment to the deed was in due form. The consideration is thus limited to the question of fact as to whether or not the provisions of section 1186 of the Civil Code were complied with by the notary before he affixed his certificate. The evidence upon this whole subject is conflicting. That of Mrs. Cogswell is sufficiently well epitomized in the foregoing summarization of her cross complaint. Upon the other hand, there was ample evidence to warrant the court in holding that she did understand the trust deed, and did freely execute it, without the imposition of any fraud or deceitful contrivance. There is upon this point the direct evidence of Thomas B. Bishop, who drew the instrument, and carefully read it aloud to her in the presence of others named as trustees, who had assembled in his office for the purpose of accepting the trust. He also informed her that it was necessary for her to be examined apart from her husband by the notary, in order that she might make a legal acknowledgment. Nothing indicated her lack of understanding of the instrument. Dr. Cogswell testified that his wife understood that property was to be donated by them for a school. "It was understood that I was not to include the Ohio street property. I did not tell her that we were going to put the Ohio street property in. That came in rather suddenly on me, and when she objected to it I said, 'That is a mistake.' I was afraid she would create a scene." Her objection when the deed was read was only to the including of this piece of property. Charles D. Stone testified that he was present at the reading of the instrument, and heard it read to Mrs. Cogswell. "When Mrs. Cogswell objected to the Ohio street property being put in, I said they would have it, or have control of it, as long as they lived, and it is so specified in the deed. When that part of the deed was read, Mrs. Cogswell turned to the doctor and said, 'I did not know you were going to put in the homestead,' or something to that effect. * * * I have since heard Mrs. Cogswell say that she thought it was a good thing the school was started; that she did not like it in the first place, but, after it was going, that they had done a good thing, a good work. * * * I never heard any complaint that she had been deceived until after they talked about the suits to recover the property." Mrs. Arnold was also present. She heard the deed read distinctly and carefully, and heard Mrs. Cogswell's objection to inserting the Ohio street property. After the execution Mrs. Cogswell asked the doctor why he had not told her that the deeds were to be signed that day. James G. Kennedy testified that Mrs. Cogswell told him after the college was open that she at first was not in favor of the work, but now she was thoroughly in favor of it, and was glad the deed was made. Mrs. Cogswell retired with the notary, King, to a room apart from her husband. King testified, in answer to interrogatories by the court, that he did not know she was deaf; that he read the paper carefully and deliberately, and took her acknowledgment when he "was satisfied that she fully understood the contents of the paper. * * * I sat down alongside of her, and told her that this was a deed, and the purport of it, and read it to her, and she assented to the acknowledgment." Some claim is made by appellant that the execution is void because Mrs. Cogswell was not asked by the notary whether or not she wished to retract it. The burden of proving want of due execution of an instrument admittedly signed and bearing a certificate of acknowledgment admittedly in due form was upon appellant. Upon the claim of appellant in this regard it is sufficient to say that there is no evidence in the case that she was not so asked. The notary's attention is not directed to the point; he is not questioned concerning it. The whole argu-

ment is based upon absence of evidence which it was appellant's duty to furnish, and which she failed to furnish, to overcome the presumptions attaching to a deed thus duly signed, and bearing a certificate of acknowledgment in lawful form.

Appellant's attacks upon other findings of the court do not require special consideration. Some of the findings were immaterial to the controversy by reason of the stipulation of the parties; the only important issues left for determination being those of the legality of the trust and of appellant's execution of the deed. What has been said renders unnecessary any consideration of the questions of her estoppel by laches and acquiescence, and the bar of the statute of limitations.

Other findings are against the averments of defendants' answer that the trust had been abandoned by the trustees; that they had made an improper lease of the trust property, and had violated their trust; that the trust had become impracticable, and that, therefore, the property had reverted, and should, in equity, be decreed to have reverted, to the founders. A trust in this state is not extinguished, nor does the property revert, for any of these reasons. If the trustees abandon, or in any way abuse, their trust, equity will correct the abuses, and remove the offenders. A trust is extinguished by the entire fulfillment of its object, by its object becoming impossible, or by its object becoming unlawful. Civ. Code, § 2279. No one of these contingencies has arisen, and the court was right in finding that the object of the trust had not become impracticable. The founders had reserved no power of revocation (Civ. Code, § 2280), and the acts complained of were mere abuses, which, in the absence of an express condition to that effect, did not work a reversion, but merely warranted the interposition of equity for their correction. Perry, Trusts, § 744; Brown v. Society, 9 R. I. 177; Barr v. Weld, 24 Pa. St. 84; Stanley v. Colt, 5 Wall. 119; Attorney General v. Town of Dublin, 38 N. H. 459; Sanderson v. White, 18 Pick. 328. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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113 Cal. 201

## PACIFIC UNDERTAKERS v. WIDBER, Treasurer. (S. F. 288.)

(Supreme Court of California. June 6, 1896.)

COUNTIES — BURIAL OF INDIGENT — INCURRING INDEBTEDNESS EXCEEDING INCOME.

A claim under a contract between petitioner and the board of supervisors, by which petitioner was to bury the indigent dead for the fiscal year at a certain sum for each burial, is within Const. art. 11, § 18, declaring that no county shall "incur any indebtedness * * * in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year without the assent," etc., and therefore cannot be paid from the income of a succeeding year, it not being an obligation imposed by law, though St. 1860, p. 272, gives the supervisors authority to allow and order paid out of the general fund such sums as may become due for burying the indigent dead, and Pen. Code, § 292, imposes the duty of burying the dead, first on relatives, next on the coroner, and next on those charged with the support of the poor, and section 293 provides that every person omitting to perform such duty shall be guilty of a misdemeanor, and liable in treble damages to the person performing the duty.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Petition by the Pacific Undertakers for writ of mandate to A. C. Widber, treasurer. Judgment for petitioner. Defendant appeals. Reversed.

H. T. Creswell, for appellant. Wheaton, Kalloch & Kierce, for respondent.

McFARLAND, J. The Pacific Undertakers, a corporation, filed a petition in the superior court for a writ of mandate commanding A. C. Widber, treasurer of the city and county of San Francisco, to pay certain demands against said city and county amounting to $83.03, which had been regularly allowed and audited. The prayer of the petition was granted, and Widber appeals.

The demands were presented to the treasurer on June 26, 1893, and were for services rendered in burying indigent dead during the months of April and May, 1893; but the general fund of the treasury was entirely exhausted, and there was no money of the fiscal year ending June 30, 1893, to pay said demands, and there has not since been any money of said fiscal year to pay the said demands. However, since the 1st day of July, 1893, there has been, and at the time of the filing of the petition there was, sufficient money of the income and revenue of subsequent fiscal years with which to pay said demands. Respondent contends that the nature and character of the demands here sought to be enforced exempt them from the operation of the provision of section 18, art. 11, of the state constitution, that no county, etc., shall "incur any indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent" of the electors expressed at an election, etc., as construed in Gas Co. v. Brickwedel, 62 Cal. 641, and subsequent cases on the subject. But the contention cannot be maintained. To sanction it would be to open the door to a rush of claims that would practically sweep away the entire constitutional provision in question. The demands here involved arose out of a contract between the petitioner and the board of supervisors, by which the former was to bury the indigent dead for one year, commencing July 1, 1892, and ending June 30, 1893,—the close of the fiscal year,—at a certain sum for each burial. The contract was made after an advertisement for bids, such as is required by law in the letting of contracts for services, goods, wares, etc., the petitioner being the lowest responsive bidder. By an act of the legislature of April 27, 1860 (St. 1860, p. 272), the board of supervisors was given, among other powers, authority "to allow and order paid out of the general fund such sums as are now due or may become due for burying the indigent dead." By section 292, Pen. Code, the duty of burying the body of a deceased person is imposed on certain relations in an enumerated order, and, if there be no such relation, then upon the coroner who held an inquest on the body, and, if there be no such coroner, then "upon the persons charged with the support of the poor in the locality in which the death occurs," and, if all these "omit to act," then upon the tenant or owner of the premises where the death occurred or the body is found. Section 293 provides that "every person" upon whom the duty rests who omits to perform it within a reasonable time is guilty of a misdemeanor, and is liable to the person who performs the duty in treble the expenses incurred by the latter in making the burial. And it is contended by petitioner that under these statutory provisions the demands here sought to be enforced are obligations imposed by law within the ruling of this court in Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, and therefore not within the declaration made in the Brickwedel Case, supra, that "each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." But this position is not tenable. In Lewis v. Widber the question involved was the salary of a public officer, whose office had been created and his salary fixed at a definite, certain sum per month by an act of the legislature. The demand for the salary sought to be enforced there was not the result of any contract by the municipality, nor was it an indebtedness or liability incurred by the municipality, and for that reason it was held not to be within the limitation of the clause of the constitution under consideration. We there said: "It is quite apparent, however, that this clause of the constitution refers to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred; that is, an indebtedness which the municipality has created, or a liability resulting in whole or in part from some act or conduct of such municipality. * * * But the stated salary of a public officer fixed by statute is a matter over which the municipality has no control, and with respect to which it has no discretion; and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It therefore is not an indebtedness or liability incurred by the municipality within the meaning of said clause of the constitution." But in the case at bar the demand sought to be enforced was not fixed by the legislature. It arose directly out of the contract of the municipality, and was an indebtedness which it expressly incurred. It is, no doubt, the general duty of the municipal government to see that the bodies of deceased persons are properly disposed of, just as it is its general duty to do many other things necessary to public health, decency, comfort, and convenience. The sections of the Code above referred to are only declarations of a duty already existing, and which belongs to every municipality. The manner in which dead bodies shall be disposed of, the person or persons by whom they shall be buried, the amount which shall be paid for the work, etc., are all left to the discretion of the municipal authorities. Like all other expenditures necessary for the general welfare, and not fixed by statute, the amounts of the demands here in question are the result of a contract made by the board of supervisors, and therefore constitute a liability incurred by the municipality. They are, therefore, within the provision that no indebtedness shall be incurred "in any manner or for any purpose" exceeding, etc. If they are without that provision, then it is difficult to see how indebtedness incurred for any services or commodities necessary for the public welfare could be held to be within it, or how the constitutional limitation could be kept from being frittered entirely away. The judgment appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

(113 Cal. 247)

## SOUTHERN PAC. R. CO. v. PAINTER.

(No. 19,532.)

(Supreme Court of California. June 6, 1896.)

UNITED STATES LANDS — GRANTS — FINAL DETERMINATION OF RIGHTS THEREUNDER— JUDICIAL NOTICE.

1. The determination by the supreme court of the United States in an action between the United States and plaintiff (relative to certain lands within the limits, both of the grant to plaintiff by Act Cong. March 3, 1871, and the grant to the Atlantic & Pacific Railroad Company by Act Cong. July 27, 1866) that Act 1871 gave plaintiff no right to any of the lands included within the limits of both grants, "finally determined" plaintiff's rights under Act 1871 to other lands within the limits of both grants, within an agreement for sale thereof by plaintiff to defendant, stipulating that, "in case it be finally determined that patents shall not issue" to plaintiff, money paid by defendant shall be returned. Van Fleet and McFarland, JJ., dissenting.

2. A state court will take judicial notice of an opinion of the court of the United States that an act of congress granting lands gave no rights to lands included both within the limits of its grant and the grant of a prior act of congress. Van Fleet and McFarland, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Southern Pacific Railroad Company against Painter, as administrator. Judgment for defendant. Plaintiff appeals. Affirmed.

J. D. Redding and J. S. Mosby, for appellant. A. R. Metcalfe and Anderson & Anderson, for respondent.

HARRISON, J. The plaintiff entered into two several contracts with the defendant's intestate August 18, 1887, for the sale to the latter of two certain sections of land in the county of Los Angeles. The land described in the agreements was claimed by the plaintiff as a portion of a grant to it by the United States by virtue of the act of March 3, 1871. At the date of the agreements, no patent had been issued therefor, and each of the agreements contained the following covenant: "In case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part all moneys that may have been paid to it by him on account of any such tract as it shall fail to procure patent for." The defendant's intestate paid to the plaintiff 20 per cent. of the purchase money, with one year's interest upon the remainder, at the execution of the agreements, and, by their terms, was to pay the balance of the purchase money, with interest thereon at the rate of 10 per cent. per annum, on or before August 18, 1892. No other payments having been made, the plaintiff, after the maturity of the agreements, brought the present action to compel their performance, or, in case the defendant failed so to do within a specified time, for a sale of the land in satisfaction of the amounts unpaid upon the agreements, and for a foreclosure of the defendant's right therein. In the answer to the complaint, the defendant denied all liability to the plaintiff, and pleaded as a counterclaim the above payment to the plaintiff by his intestate at the execution of the agreements, the aforesaid covenant of the plaintiff, and alleged that it had been finally determined by the supreme court of the United States and by the land department of the United States that patent should not issue from the United States to plaintiff for said tract of land, nor for any part thereof. At the trial it was stipulated that the two sections of land were claimed by the plaintiff under the act of congress of March 3, 1871; and that it had no other title or claim thereto save that derived under said act; and that the said two sections are within the limits of the grant to the Atlantic & Pacific Railroad Company by the act of congress of July 27, 1866, and also within the limits of the grant to the plaintiff by the aforesaid act of congress of March 3, 1871. The court found that it had been finally determined that plaintiff was not entitled to any patent for the lands described in the agreements, and rendered judgment for the defendant upon his counterclaim. The plaintiff has appealed.

In U. S. v. Railroad Co., 146 U. S. 570, 13 Sup. Ct. 152, and in another case between the same parties, 146 U. S. 615, 13 Sup. Ct. 163, the right of the plaintiff herein by virtue of the act of March 3, 1871, to any of the lands which were included in the grant by congress to the Atlantic & Pacific Railroad Company under the act of July 27, 1866, was considered by the supreme court after a full and elaborate argument thereon; and that court held that by the act of 1866 the title to these lands passed to the Atlantic & Pacific Railroad Company, and was held by that corporation until the act of forfeiture, passed July 6, 1886; that as the act of March 3, 1871, had no effect upon lands that had been previously granted, it did not include any of the lands within the limits of the grant to the Atlantic & Pacific Railroad Company under the act of 1866; that by the act of forfeiture passed July 6,

**1886, the lands became public lands, and that the plaintiff herein never had title of any kind to said lands. It is contended by the plaintiff that, notwithstanding this decision of the supreme court, it is not liable under its covenant aforesaid to repay the moneys received by it on the contracts in question, for the reason that the decision in that case was with reference to other lands than those involved herein, and that its liability under the covenant cannot arise until it has been finally adjudged, in a proceeding in which these particular sections are the subject of controversy, that it has no right to a patent therefor.** It would, however, be giving too narrow and technical a meaning to the expression "finally determined," as used in the agreements to hold that it is the equivalent of "finally adjudged," or that it was the intention of the parties thereto that the money should not be repaid until it had been determined, in a proceeding to obtain a patent for the particular sections of land described in the agreements, that the plaintiff is not entitled to a patent therefor. The lands in question were but a small fraction of a very large tract claimed by the plaintiff under the same title. The plaintiff had made numerous contracts of the same character as the ones in question. The application for a patent was to be made by the plaintiff. Its right to a patent for these lands involved its right to any of the lands which were within the limits of the grant to the Atlantic & Pacific Railroad Company, and depended upon the determination of that question. It is but reasonable to hold that it was the intention of the parties to the agreement that, whenever that question was "finally determined," —that is, determined by a tribunal whose decision would be a final determination of the question,—the plaintiff's liability under the covenant would be also determined; and that, if that question was determined adversely to the plaintiff, it would thereupon repay the money. In the case of U. S. v. Railroad Co., supra, the question for determination was the right of the plaintiff herein to any of the lands within the limits of the grant to the Atlantic & Pacific Railroad Company under the act of July 27, 1866; and the court then held that it had no right to any of those lands, and that the act of 1871 gave no right thereto. Upon the stipulation in the present case that the lands described in the agreements are within the limits of the grant of July, 1866, and that the plaintiff has no title or claim thereto save that derived under the act of March 3, 1871, the superior court had no alternative than to apply the law as thus declared by the supreme court of the United States, and to hold that the question of the plaintiff's right to a patent for said lands had been finally determined adversely to the plaintiff. The supreme court of the United States is the ultimate tribunal for interpreting and determining the effect of an act of congress, and all other courts are bound to take judicial knowledge as well of its interpretation of the act as of the act itself. The interpretation and construction of an act of congress by the supreme court is determinative of the law which congress has enacted, and is binding upon the judiciary of the several states as well as of the United States; and the courts of the several states take judicial notice of the opinions of the supreme court of the United States, and of the law as declared therein, in the same way and to the same extent that the superior courts of this state take judicial notice of the opinions of this court. The judgment and order are affirmed.

We concur: GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

VAN FLEET, J. I dissent. The contracts sued on are in all respects similar to those involved in the case of Pacific Co. v. Allen (No. 15,714, recently decided) 44 Pac. 796; and the material facts are the same as in that case, except as herein noted.

The case was submitted upon an agreed statement of facts, the substance of which was as follows: The plaintiff's only claim to the land in question was under the act of congress of March 3, 1871, granting lands to it for its branch line. The said lands lie within the limits of that grant, and also within the limits of the grant made by the act of congress of July 27, 1866, to the Atlantic & Pacific Railroad Company, at the crossing of the lines of said railroads as definitely located. That the lands are unsurveyed, and no steps have been taken by plaintiff to obtain a patent for the same. "That there is now pending, and was pending at the time that case, reported in 146 U. S. Reports, page 570 [13 Sup. Ct. 152], was decided, a suit in the circuit court of the United States," brought by the United States against the parties to this action, for trespass on said lands, and to quiet the title thereto. That the defendant's intestate took possession of said lands, but that defendant has exercised no acts of ownership over the same. The court found that plaintiff never owned and never had any interest in the lands, and is not ready, willing, or able to perform the agreements in question, and never will be able to perform the same, and further found: "That it has been finally determined by the supreme court of the United States, and by the land department of the United States, that patent shall not issue from the United States to plaintiff" for any of the lands in question.

We held in the case No. 15,714, above referred to, that the plantiff was entitled to recover in such an action, unless it had been "finally determined" that a patent should not issue to plaintiff. The only question now to be determined, therefore, is whether the finding of the court here that such final determination has been had is justified by the evidence. There is no evidence in the case other than that contained in the agreed statement, and I fail to find in that statement any evidence of any determination, final or otherwise, that patent shall not issue to plaintiff. Counsel for respondent refers to the case of U. S. v. Railroad Co., 146 U. S. 570 [13 Sup. Ct. 152], in which case, they say, the supreme court of the United States decided that the Southern Pacific Railroad Company has "no title of any kind" to the lands within the overlapping limits of the two grants above referred to. It is not contended that the particular lands here in question were involved in the issues of that case; but counsel contend, under the authority of Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, and other cases, that the judgment in that case concludes the plaintiff, by way of estoppel, from claiming title to any lands within those overlapping limits, and therefore amounts to a final determination that patent shall not issue to plantiff for the lands in question. The question thus raised is one of great delicacy. This court is, in effect, asked to say that the supreme court of the United States cannot reconsider its views on that question, but must, should the question of the title to these lands come before it, hold itself absolutely concluded by its former decision in a case involving entirely different lands. We should hesitate long before assuming thus to set bounds to the power of that court; but the exigencies of this case do not, in my judgment, require any decision of that question. Under these contracts, the defendant is bound to make the payments agreed upon, unless it has been "finally determined" that a patent shall not issue. Whatever our views may be as to the effect of the decision referred to, it is, at least, possible that the supreme court of the United States may hold, when the question comes before it, that plaintiff is entitled to a patent for these lands. It is evident, then, that the decision is not a final determination of the question here involved. At the most, it could only be used to show what that final determination will be when rendered; but it is not, in itself, a determination that patent shall not issue for the lands involved in this action. But, if that were not so, still defendant cannot avail himself of that case; for there is no evidence in the record that any such judgment was ever rendered as would bind the plaintiff even by way of estoppel. It is true that the agreed statement incidentally refers to a "case reported in 146 U. S. Reports, page 570" [13 Sup. Ct. 152]; but no facts are stated showing that the plaintiff was actually a party to that suit, or what the issues therein were, or whether the court had any jurisdiction of the parties. Still less is it shown that the defendant here was a party or privy to that suit, or would be bound by the judgment therein. Such a loose, incidental mention of a decision by an appellate court is not evidence on which a finding of estoppel by judgment should be predicated.

But counsel for respondent contend that the judgment in that case is an "official act of the judicial department of the United States," of which this court must take judicial notice, under subdivision 3, § 1875, Code Civ. Proc., and that the 146th volume of the Reports of the Supreme Court of the United States is an "appropriate book of reference," to which this court may resort for that purpose. If that be so, a great and hitherto unnoticed change in the rules of evidence has been wrought by the section referred to. According to that construction, a party relying on a judgment of any court of this state, or of the United States, may abstain entirely from producing the record, or, indeed, any evidence of such judgment, and may require the court to ascertain the fact for itself. But section 1905 of said Code expressly requires such records to be proved by the production of the original or of a certified copy thereof; and, as that section is contained in the chapter of the Code upon this very subject, its provisions must prevail as to that subject over those of section 1875, which is contained in another chapter of a more general scope. Pol. Code, § 4482. It is therefore not necessary to determine here precisely what are the "public and private official acts of the judicial departments of this state and of the United States," referred to in section 1875. If these words include the judgment of a court in an action inter partes, and the various steps in the action leading up to that judgment, that section would so far conflict with section 1905, and the latter must prevail. It should be further noted that, if the defendant in this action was not a party to the suit in question (and there is no evidence that he was a party thereto), he would not be estopped by the judgment therein, and would be entitled, in the pending suit mentioned in the agreed statement, to claim that a patent should issue to plaintiff for his benefit. In that event it is certainly possible that such patent may yet be issued. Defendant is therefore not entitled to rely upon any supposed estoppel as between the United States and plaintiff. In any point of view, then, the finding in question is unsupported by evidence.

The finding that plaintiff never will be able to perform its agreement, for the reason that it has no title or interest in the lands in question, is also unsupported by the evidence. The question of plaintiff's title, in a general sense, is wholly irrelevant. Plaintiff contracted to convey, not the title it had, nor a title to be pronounced good by a court, but such title as the United States should thereafter convey by its patent. The contract, by its terms, was to continue in force until it should be finally determined that patent should not issue. That determination can be made only by some competent tribunal of the United States; and it is not for any court of this state to say, in an action like the present, how that question will or should be determined.

For these reasons I think the judgment and order should be reversed, and the cause remanded for a new trial.

I concur: McFARLAND, J.

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113 Cal. 282

## In re WHITE.

(Supreme Court of California. June 16, 1896.)

Injunction Pendente Lite—Jurisdiction.

In an action for divorce the court has jurisdiction, in a proper case and on a proper showing, to grant an injunction pendente lite, restraining plaintiff from alienating his separate property.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Petition by George E. White for a writ of habeas corpus for the purpose of obtaining his discharge from custody under a judgment finding him guilty of contempt in violating an injunction made pendente lite in an action by him for divorce. Writ discharged.

Carl Spelling and Alexander Laidlaw, for petitioner. Walter H. Linforth and W. H. Baggett, for respondent.

PER CURIAM. Petitioner was adjudged guilty of contempt in disobeying and violating the injunction of the court made pendente lite in the action of divorce entitled "George E. White v. Frankie White." The injunction restrained petitioner from alienating his separate property. The only jurisdictional question involved turns upon the power of the court to issue such an injunction in a divorce proceeding pending the litigation. We entertain no doubt that in a proper case, and upon a proper showing, this may be done. High, Inj. §§ 1393–1395; Bish. Mar. & Div. §§ 1106, 1107, and notes, where cases are collated. Whether or not the injunction in this case was warranted by the circumstances, or was an abuse of the discretion of the trial judge, is a question which cannot be considered in this proceeding. The restraining order being within the jurisdiction of the court to make, it follows that the prisoner must be remanded. Writ discharged, and prisoner remanded.

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113 Cal. 258

## RUSSELL v. PACIFIC RY. CO. et al. (COBB et al., Interveners. No. 19,573).

(Supreme Court of California. June 8, 1896.)

Corporations — Statutory Liability of Stockholders—Enforcement in Foreign State.

1. Where a statute creates a liability against the stockholders of a corporation, and prescribes a remedy for its enforcement, that remedy is exclusive.

2. In such case the liability cannot be enforced in a foreign state.

3. A statute of Illinois making stockholders liable for the debts of the corporation to the amount of their stock remaining unpaid, and providing that whenever any action is brought to recover against a corporation it shall be competent to proceed against any one or more stockholders at the same time, as in case of garnishment, etc., creates a special remedy, which cannot be enforced in California.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Creditors' bill by Edward W. Russell against the Pacific Railway Company and others, in which S. B. Cobb and others filed a complaint in intervention. From a judgment for defendants, and from an order refusing a new trial, said interveners appeal. Affirmed.

E. Walker, W. P. Gardiner, and Allen, Cowrey & Miller, for appellant Russell. S. C. Hubbell and T. Z. Blakeman, for interveners. Chapman & Hendrick, J. D. Bicknell, and Bicknell & Trask, for respondents.

TEMPLE, J. The plaintiff brings this action as a judgment creditor of the Pacific Railway Company, in his own behalf and for other creditors of the corporate defendant and of the Los Angeles Cable-Railway Company, for the appointment of a receiver, for the sale of its property, and that the sum due from stockholders of the Pacific Railway Company on their stock, so far as necessary, may be called in. Numerous stockholders resident in California are made defendants. A complaint in intervention was filed in behalf of numerous persons who claim to be creditors of the Pacific Railway Company in various amounts. These creditors have no joint or common interests whatever, but claim the right to thus join under the provisions of a statute of the state of Illinois, which was proven at the trial. February 10, 1891, Charles H. Morse in the superior court of Cook county, Ill., recovered a judgment against the Pacific Railway Company for a sum of money, and caused an execution to be issued on said judgment, which was afterwards returned nulla bona. Afterwards, upon the averment of the insolvency of the corporation, said Morse caused a receiver to be appointed for said corporation by the said Illinois court. On the 20th day of January, 1891, plaintiff recovered a judgment in the superior court of Los Angeles county against the Pacific Railway Company for the sum of $1,058.48, and thereafter commenced this action, and has procured a receiver to be appointed to impound the assets of the Pacific Railway Company. It is averred, and practically found, that the corporation is utterly insolvent. Judgment was entered for the defendants, and the interveners, having made a fruitless application for a new trial, now appeal both from the order refusing a new trial and from the judgment.

One reason urged by the respondents why the appeal should not be sustained is that, as they contend, an action of this character cannot be maintained in this state; that is to say, it is a special remedy given by the statute of Illinois, and can be enforced nowhere else. The law of the state of Illinois, as found by the court, is as follows: By the eighth section of the act under which the Pacific Railway was incorporated it was provided that: "Each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stocks shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee until the said stock be fully paid. Whenever any action is brought to recover against the corporation, it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment. Every assignee or transferree of stock shall be liable to the company for the amount unpaid thereon to the extent and in the same manner as if he had been the original subscriber." Laws 1871–72, p. 299. By section 25 of the same statute it is further provided that under certain circumstances a creditor who has obtained a judgment against the corporation, and whose execution has been returned nulla bona, may bring suits by joining the corporation against the persons who were stockholders at the time or in any way liable for the debts of the corporation, to compel each stockholder to pay his pro rata share of such debts, or liabilities to the extent of the unpaid portion of the stock after exhausting the assets of the corporation. Further, it authorized courts of equity, on good cause shown, to dissolve the corporation, and close up the corporate business, and to appoint a receiver, who shall in all cases be a resident of the state of Illinois. Counsel for appellants admit that the proceedings provided for in the twenty-fifth section can be taken only in the state of Illinois. It is a special remedy, providing for contribution among the stockholders, and a possible dissolution of the corporation and a winding up of its business. They contend, however, that the eighth section merely creates a liability, which is in the nature of a contract liability, and which is enforceable wherever the stockholder can be found. The general rule upon this subject is very well established. Where a statute creates a right and prescribes a remedy for its enforcement, that remedy is exclusive. Where a liability is created which is not penal, and no remedy is prescribed, the liability may be enforced wherever the person is found. The procedure will, however, be entirely governed by the law of the forum. If the law creating the liability provides for a particular mode for enforcing it, the mode limits the liability. If it be a contract, the parties here contracted with the understanding that they can be held liable in no other way. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757. And such a liability cannot be enforced in another state. Young v. Farwell, 139 Ill. 326, 28 N. E. 845; Bank v. Rindge, 154 Mass. 203, 27 N. E. 1015; Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932; Jessup v. Carnegie, 80 N. Y. 441; Erickson v. Nesmith, 4 Allen, 233. By the eighth section of the Illinois statute, above quoted, a special remedy is provided, and, not only so, but plainly it was intended that it should be the only remedy. By the first clause, apparently, an absolute liability is imposed upon the stockholder for the debts of the corporation to the extent of the amount unpaid upon his stock. If this were all, the liability would be primary, and could be enforced without suing the corporation, and without reference to its solvency. In fact, nowhere in this section is it made of any consequence whether the corporation is solvent or insolvent, or whether or not it has assets which could be reached by ordinary writ. The next clause, however, expressly limits the collection of the debt to the mode prescribed, which is by garnishment. And this may be done whether the amount unpaid has been called in or not. Whether this can be done after the assets have been impounded by the appointment of a receiver for the purpose of liquidation will depend upon the laws of Illinois. It is said that it has been there held that it can be done by what is called "equitable garnishment." It would not be so here. The unpaid subscription would, with other assets, pass to the receiver, to be collected and disbursed under the direction of the court. The Illinois remedy cannot be imported here.

I think the question has been passed upon by the courts of Illinois in Pease v. Union, 1 Ill. App. 287, which was a proceeding under the eighth section. The court said: "It will be seen by the terms of this statute a new remedy is provided for the creditors of corporations by providing that 'whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time, * * * as in case of garnishment.' There has been some discussion between counsel in the case as to the proper form of procedure by the usee, Miller, to avail himself of this new remedy. There has been no judicial construction of this statute that we are aware of, and we are left to determine just what the mode of proceeding contemplated by the legislature was. We think the language employed in the statute is unambiguous, and, fairly interpreted, means that a creditor of a corporation may bring suit in any of the usual forms of action for any indebtedness due to him from such corporation, and, upon suing out summons, may, by virtue of this statute, sue out at the same time a garnishee summons, directed to any of the stockholders of such corporation whose subscription to the capital stock thereof is wholly or in part unpaid; and by the service of such garnishee summons upon such stockholder prevent his further payment for such stock to the corporation, but hold the same in abeyance, to await the result of the trial of the original cause; and when a recovery is had (if at all) the garnishee may be then compelled to respond to such judgment creditor instead of paying his said indebtedness to the corporation. This is briefly and substantially the proceeding which we think the state authorizes at the instance of a creditor of a corporation." This language is unambiguous, and shows the construction given to the statute by the courts of Illinois. Independently of this ruling we should have no difficulty in reaching the conclusion that the Illinois statute does not create a liability which can be enforced here. The interveners, therefore, have no standing as litigants in the case, and the order and judgment are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

113 Cal. 238

COOPER v. MILLER et al. (No. 18,333.)

(Supreme Court of California. June 6, 1896.)

TAXATION — IRRIGATION DISTRICT — ASSESSMENT AND LEVY—PLEADING—EJECTMENT—FINDINGS.

1. Under St. 1887, p. 40 (Irrigation Act) § 18, subd. 3, providing the manner of assessment of city and town lots, it is proper to assess contiguous lots owned by one person, and used together, and on which is a building covering a part of each lot, together, as one parcel.

2. That a levy by the board of directors of an irrigation district, for the purpose of paying interest on the district bonds, and also for current expenses of the district, are both embraced in the same order, the amount for each purpose being stated, does not render the levy invalid.

3. While an election authorizing it is a condition precedent to a valid levy for special purposes under section 41 of the irrigation act, it is not necessary that the order of the board of directors making the levy should recite such election.

4. In ejectment based on a tax deed, where it is essential to plaintiff's case to prove each fact going to establish the validity of his deed, an allegation in the answer of payment of the tax before sale of the property does not create a material issue, requiring a finding thereon, the fact being covered by a finding as to the validity of the deed.

In bank. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Action by H. M. Cooper against William Miller and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. M. Alberry, K. Alberry and Edwin Swinford, for appellants. W. C. Belcher and J. W. Good, for respondent.

GAROUTTE, J. This is an action of ejectment to recover possession of certain town lots. Plaintiff's claim of title is based upon a tax deed executed by the tax collector of Central irrigation district, upon a sale for a delinquent tax levied by the board of directors of said district. Defendants appeal from the judgment and order denying their motion for a new trial, and claim that the assessment, levy, sale, and deed made thereunder are void. Section 30 of the irrigation act (St. 1887, p. 40) provides: "The matter recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved is prima facie evidence that—First, the property was assessed as required by law; second, the property was equalized as required by law; third, that the assessments were levied in accordance with law; fourth, the assessments were not paid; fifth, at a proper time and place the property was sold as prescribed by law, and by the proper officer; sixth, the property was not redeemed; seventh, the person who executed the deed was the proper officer." Invoking these provisions of the statute, plaintiff introduced his deed in evidence as establishing a prima facie case of title in himself, and rested. It is claimed that the assessment is void because the five town lots were assessed in one parcel, with one valuation upon the whole parcel, and one valuation for the improvements upon the entire parcel. The lots were also sold in one parcel for the nonpayment of the tax. Section 18 of the irrigation act provides that the assessor must assess: "All the property in the district, and must prepare an assessment-book with appropriate headings, in which must be listed and specified in separate columns under the appropriate head: * * * Three. City and town lots, naming the city or town, and the number of lot and block, etc., and the improvements thereon."

Is this assessment void as violative of the foregoing requirements of the law? The provisions of this act as to the manner and character of the assessment are duplicated from the provisions of the Political Code pertaining to assessments levied for the purposes of state and county taxation; and defendants, to support their contention, rely upon various decisions of this court made in the construction of those provisions of the Political Code. The principal case may be said to be Terrill v. Groves, 18 Cal. 149. There the assessment was held to be void. But that case is widely variant in its facts from the case at bar. There town lots in two distinct and separate blocks, not even contiguous, while valued separately, were carried out upon the roll in a lump assessment, and a single tax charged up against the lots as a whole. In addition to these salient facts, upon one lot there were improvements, and the tax upon these improvements was charged against all the land. In People v. Morse, 43 Cal. 534, it was held that an entire block or a half block owned by a single individual might be assessed in one parcel, and this notwithstanding the blocks were divided into lots; and, in sound reason, there is no more cause for assessing a block of land owned by one party in lots, than there is in assessing a section of land owned by a single individual in 80 or 160 acre tracts. The land involved in this litigation consisted of five lots, with a frontage of 25 feet each, adjoining, and all belonging to the defendant Miller. A livery stable was situated upon these lots, and extended over and upon each of them. Upon such a state of facts, we are clear that for the purposes of taxation the entire five lots should be held to be but a single parcel of land, and so assessed. With a building resting upon them all, any other kind of assessment would be improper. To divide the improvement into fifths, and assess an undivided one-fifth thereof upon each lot, would be a practice not contemplated by the law. To hold that the statute requires that the land upon which the Palace Hotel of this city, or any other large building, is situated, should be assessed by lots, and the improvements assessed and apportioned in undivided parts to each lot, would be to declare an absurdity existing in law, where there is no reason whatever for it. The case of Weaver v. Grant, 39 Iowa, 294, is directly in point upon this question, and by its syllabus declares: "The use and nature of the property must determine whether or not several lots assessed to one owner, and sold en masse, should be regarded as one lot. Where two lots were occupied and used for one purpose, the buildings being partly on each, it was held that they might be sold for taxes together."

The board of directors of the district is empowered. by section 22 of the act, to levy assessments to pay interest upon the bonded indebtedness, and by section 41 the board of directors is also authorized to levy assessments for special purposes therein named. Upon October 1, 1889, the board passed the following order and resolution: "Whereas, the assessment roll of Central irrigation district for the year 1889–90 has been completed, and the assessment on the property mentioned therein equalized, and there being two hundred and ninety-two bonds of the district, of the par value of five hundred dollars each, now outstanding, on which the annual interest from July 1, 1889, to July 1, 1890, aggregates the sum of $8,760, it is by the board of directors of said district now here ordered that an assessment sufficient to raise the annual interest on the aforesaid outstanding bonds, and to defray the expenses of the care, operation, management, repair, and improvement of such portions of the canal and works as are completed and in use, including the salary of officers and employés, be, and the same is hereby, levied and ordered collected on each one hundred dollars on the assessed valuation of the property of the Central irrigation district for district purposes as aforesaid, for the second fiscal year 1889–90, as follows, to wit: For bond fund, thirty cents; for general fund, twenty cents; total assessment, fifty cents on each one hundred dollars." It is now claimed by defendants that the aforesaid order is void, upon the ground that a double levy, or a levy for a double object and purpose, is joined in one order of the board. There is nothing in this objection. It is plainly apparent from the order what action was taken by the board. There was no reason why a levy for two different objects could not be incorporated in one order, and here the amount and character of each levy are fully and clearly set forth.

It is claimed that the levy for special purposes was in excess of the power of the board, inasmuch as the electors of the district, at an election held for that purpose, had not authorized the board to make it. It is conceded that if no election was held that fact would be fatal to the validity of this levy. Tregea v. Owens, 94 Cal. 313, 29 Pac. 643. But defendants offered no evidence whatever upon the question of an election, and, plaintiff having established a prima facie case by the introduction of his deed, in the absence of other evidence we are bound to assume that an election as authorized by law was held, for the deed is made by statute prima facie evidence that the assessments were levied in accordance with law.

It is claimed that the order of the board of directors in making the levy contains no recital that an election had been previously held, and, therefore it must be assumed that no election was held. While it is true that the election is a condition precedent to the making of a valid levy by the board, yet there is no statute requiring the order of levy to recite the fact of a previous election, and, on principle, there is no reason why it should do so. If such recital was contained in the order, it would not be conclusive upon the owner of the land assessed. He could still go behind it, and show its falsity. It is the fact of the election, and not a statement in the order that an election was held, which gives the board power to make the levy. Unless some provision of law required such a recital to be set out in the order making the levy, the absence of it is no evidence that an election was not held, authorizing the board to act in the premises. Although the election is a condition precedent to the making of the levy, there are many other conditions precedent of equal importance and gravity, as that the property must be assessed as required by law, or the property must be equalized as required by law. No levy would be valid unless these things were done, yet a recital of them in the order would not conclude inquiry as to the truth or falsity of the recital. These views are fully supported by People v. Hagar, 49 Cal. 229. Counsel cite a few Michigan cases as supporting his contention. We think they fail to reach the mark, but, aside from that, there is no such rule of law.

It is insisted that the collector's deed, when offered in evidence by plaintiff, should have been rejected as invalid, upon the ground that the assessment of the entire five lots as one parcel of land rendered it void. We have disposed of this objection in discussing the first proposition advanced. A great portion of the examination of the witness Welch related to the manner and character of the assessment of other property situated within the district. Such evidence was clearly objectionable as immaterial, and, as to the other matters upon which he was questioned, we see no error in the record.

The complaint in this case is the simple and ordinary complaint in ejectment. The answer contains a denial of ownership, and, among other things, alleges that the assessment was fully paid and discharged prior to the sale. At the trial, evidence was introduced upon this question of payment, and defendants now claim that the allegation in the answer of payment created a material issue, and that the trial court has failed to make any finding of fact thereon. This contention is unsound. The allegation of payment is not a material allegation in the pleading. Payment or nonpayment was a mere matter of evidence. Under the general denial, defendants were entitled to prove payment of the assessment, and, such being the fact, the allegation was not material or necessary. Plaintiff introduced his deed, and thereby established the fact, prima facie, that the assessment was not paid. It was a material part of his case to show nonpayment, and he showed it by an introduction of the deed. When the court made a finding of fact that plaintiff was the owner of the land, it necessarily followed that the deed was a valid deed; and, finding that the deed was a valid deed and carried title, it necessarily found as a fact that the assessment had not been paid prior to the sale. Ownership was the ultimate fact to be tried, and, under a general denial, defendants might prove any fact going to show that plaintiff had no right of entry at the commencement of the action. The allegation of the answer that defendant had paid the assessment, and all other kindred allegations contained in the answer, only amounted to a denial of plaintiff's title. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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(113 Cal. 264)

## PEOPLE v. ALDEN. (Cr. 111.)[1]

(Supreme Court of California. June 9, 1896.)

FORGERY — MISSPELLING OF NAME — EVIDENCE — JUDGMENT OF ANOTHER COURT.

1. The fraudulent and felonious indorsement of the name of the payee of a certificate of deposit thereon by another is forgery, although the name is misspelled.

2. The fact that a judgment roll may have been removed from the office of the clerk of the court where entered in violation of law does not affect its admissibility as evidence in another court.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

J. W. Alden was convicted of forgery, and appeals. Affirmed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of forgery, and appeals from the judgment, and from an order denying his motion for a new trial. The evidence warranted the jury in finding these facts: That appellant unlawfully got possession of a certain certificate of deposit for $140, made by the California Savings & Loan Society, and payable to the order of "Chas. R. Woodward" on the return of the certificate properly indorsed; that he falsely and feloniously, and for the purpose of fraudulently procuring the money mentioned in said certificate, forged on the back thereof the name "Chas. R. Woowared"; that he then gave the certificate, thus in appearance properly indorsed, to an acquaintance named Perrine, who was in the employment of Armes & Dallam, a business firm in San Francisco, and asked him to get it cashed, as he (appellant) did not want to lose time; that he told Perrine that the money was his, but had been paid to Woodward for him, and Woodward had deposited it, and taken a certificate in his (Woodward's) own name, and had indorsed it; that Perrine turned it over, and saw that it was indorsed, but did not notice the difference in spelling between the name indorsed and the one in the body of the instrument; that Perrine took the certificate to the bookkeeper of Armes & Dallam, and asked him to cash it; that the bookkeeper referred the matter to Mr. Armes, one of the firm, who, seeing it indorsed, supposed it was all right, and indorsed it with the firm name, and gave a check for the amount, whereupon the bookkeeper paid the $140 to Perrine, who gave it to appellant, who upon the next day left the state. In a day or two, the false indorsement was discovered, and appellant was afterwards arrested in Oregon.

Appellant moved to dismiss the information; demurred to the information; objected to certain evidence; moved the court to instruct the jury to acquit; asked certain instructions, which were refused; and made a motion in arrest of judgment. In all said matters the rulings of the court were adverse to appellant, and he took exceptions to the rulings; but it is unnecessary to notice them separately, for, upon examination, they are all found to rest upon the proposition that the facts above recited do not make a case of forgery, on account of the difference in the spelling in the indorsement of the last part of the name "Chas. R. Woodward." This proposition cannot be maintained. The fraudulent purpose and the felonious intent to commit a forgery are as clearly manifested and as completely executed as they would have been if the spelling of the forged name had been entirely correct, and the doctrine of idem sonans fully applies.

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[1] Rehearing denied.

The case was tried in the city and county of San Francisco; and the prosecution, for the purpose of contradicting and impeaching the appellant, who had testified as a witness, was allowed to introduce, over appellant's objection, an original judgment roll in a case which had been tried and decided in the county of Santa Clara; and counsel for appellant argues that this was error, because, as he contends, this record was illegally taken from the office of the county clerk of Santa Clara county, as no order of court allowing its removal was shown,—contrary to the provision of section 1950 of the Code of Civil Procedure. This position is not tenable. Whether or not the record was removed from Santa Clara county to San Francisco without authority may, perhaps, be a question of some consequence to the person who removed it, but is of no consequence in the case at bar. Its competency as evidence in the San Francisco court in no way depended upon the means by which it was brought there.

We see no other point necessary to be noticed. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

113 Cal. 286

## LOFTUS v. FISCHER. (S. F. 34.)

(Supreme Court of California. June 17, 1896.)

Jury—Right to Demand Jury Trial—Evidence—Trial—Reopening Case for Further Testimony—Review on Appeal—Conflicting Evidence—Taxation of Costs.

1. In an action to reform a written contract, and to restrain defendant meanwhile from disposing of the subject-matter of the contract, plaintiff is not entitled to a jury trial.

2. On plaintiff's cross-examination as to the value of certain mining stock, a paragraph of a complaint verified by him in another suit was admitted, because it contained an averment as to such value, and plaintiff was allowed to explain fully what he meant by the averment. On redirect examination, plaintiff's counsel offered the entire complaint, which offer was refused, though the court consented to receive any other portion of the complaint which would explain or modify the part admitted. *Held* no error.

3. The court need not reopen a case for the taking of further evidence, the existence and materiality of which were known to the party offering it before the case was closed.

4. Sup. Ct. Rule 11, allowing the costs of obtaining the clerk's certification to the transcript to be taxed to respondent on his refusal or failure to certify to the correctness of the transcript within five days after its presentation to him for that purpose, was merely intended to give respondent the opportunity to protect himself from the payment of such costs in case appellant is successful, and does not permit costs to be cast on him for such refusal where the appeal does not succeed.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Edward C. Loftus against Jacob A. Fischer to reform a written contract. From an order denying a motion for a new trial, an appeal directly from the judgment having been decided adversely to plaintiff (106 Cal. 616, 39 Pac. 1064), plaintiff appeals. Affirmed. Motion by appellant that the costs of obtaining the clerk's certification to the transcript be taxed to respondent. Denied.

Jas. L. Crittenden, for appellant. Scrivener & Schell and Wheaton, Kalloch & Kierce, for respondent.

HENSHAW, J. In the opinion of this court rendered upon the appeal from the judgment (Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064), the facts are fully set forth, and need not here be repeated.

1. It was not error for the court to refuse a continuance on account of the absence of the witnesses Behlow and O'Gorman. Defendant made the admission as to the evidence of these absent witnesses which is contemplated by section 595 of the Code of Civil Procedure; and the affidavit containing all that it was proposed to prove by them was admitted in evidence at the trial upon plaintiff's offer.

2. It was not error to refuse plaintiff a jury trial. The action was a simple proceeding in equity to reform a contract, and meanwhile to restrain defendant from disposing of certain mining stock, the subject-matter of the contract, and held by him in pledge. Société Française v. Selheimer, 57 Cal. 623; Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

3. Of the numerous exceptions taken to the rulings of the court in rejecting or admitting evidence, it is sufficient to say, as to most of them, that the rulings were correct, or that the subjects of inquiry were immaterial and collateral matters. The rulings, even if technically erroneous, could not have injured appellant. The complaint contained a mass of averments redundant and superfluous to the cause of action stated. Under these unnecessary averments, a vast amount of evidence was introduced, which was entirely immaterial to the legitimate issues of the case. The court gave the widest latitude to counsel upon either side, both in their direct and cross examinations. All of the business affairs of the corporation (or partnership), whether bearing upon the transaction in dispute or not, were gone into and discussed with tiresome iteration. That a little more or less evidence was admitted or excluded cannot have worked injury when the evidence itself was upon questions collateral to matters collateral to issues immaterial. But, touching specifically upon one or two

of the many rulings complained of, it was not error for the court to refuse admission in evidence to all of the complaint in the case of Behlow v. Fisher. This complaint had been verified by plaintiff. Upon cross-examination, and while being interrogated as to the value of the stock of the corporation at a certain time, a paragraph in this complaint which contained an allegation of its value was offered and admitted in evidence. Witness was allowed to, and did, explain fully what he meant by this averment, and all about the value of the stock. Upon redirect examination, plaintiff's counsel offered all of that complaint "to explain the portion admitted." The court very properly said, in ruling that the portion offered was admitted as showing the value of the stock, "If there is any portion that the other side think will show how or why that was, it is admissible." No effort was made by counsel to meet this ruling, and to specify other portions of the instrument which would explain or modify the part admitted; but appellant simply insists that the whole complaint should have been admitted. The mere statement of the facts shows the unsoundness of the claim. So, too, it was not error for the court, after the case had been closed, to refuse to open it for the taking of further evidence. No showing is made that it had but newly come to the knowledge of plaintiff; and indeed, as the offered evidence was a part of defendant's answer in another action between the same parties, it is, at least, presumable that its existence and materiality were known to plaintiff all the time.

4. Of the findings which it is claimed are erroneous, each and all are fully supported by the evidence of defendant, which in many instances is corroborated by that of other witnesses. It is true that the evidence presents a conflict upon many of the questions; but the trial court's determination of the facts, under such circumstances, will not be disturbed. The order appealed from is affirmed.

Appellant has moved that the costs of obtaining the clerk's certification to the transcript, amounting to $126, be taxed against respondent, under rule 11 of this court, for the failure and refusal of respondent's counsel to certify to the correctness of the transcript within five days after its presentation to them for that purpose. The Code provides the mode by which the appellant shall bring his appeal to this court, and, as one of the steps in the process, that the clerk shall certify to the correctness of the contents of the transcript. In this case it appears that the law values the services of the clerk so rendered in the sum of $126. The claim of appellant is that, by its rule, this court could compel, and does compel, respondent's counsel to give his money or its equivalent in service to appellant in an adversary proceeding for the taking of an appeal which it is the duty of appellant to perfect, or, for his failure, to pay the cost of the clerk's certification to the appellant, regardless of the merits or outcome of the appeal. This claim is not sound, nor has this court the power to compel the performance of such services under penalty for refusal. The costs of appeal are by law, in the first instance, to be borne by the appellant. The respondent, in case the appeal is successful, may protect himself against the payment of the costs of certification, by having previously stipulated to the correctness of the transcript. But he is not obliged, and cannot by order or rule of court be compelled, to perform this labor. If the transcript be presented, and respondent, under the rule, refuses to certify, then, in the event of appellant's success, the latter may recover the costs. In brief, the rule contemplates that, to save possible expense to the respondent, the transcript shall be presented to him. If presented, and he fails to certify, he may be cast for costs in the event of appellant's success. If not presented, appellant shall not recover the costs of the certification which respondent might have saved to himself by stipulating to the transcript's correctness, had it been presented to him. The motion to allow the costs of certification is therefore denied.

We concur: TEMPLE, J.; McFARLAND, J.

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113 Cal. 272

## SPRECKELS v. NEVADA BANK OF SAN FRANCISCO. (S. F. 140.)

(Supreme Court of California. June 15, 1896.)

PLEDGE OF CORPORATE STOCK.

The pledgee of corporate stock, the contract of pledge being silent on the subject, has not the right, by virtue of the pledge, before maturity of the debt, to have the stock transferred on the books into his name.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Bill by Rudolph Spreckels against the Nevada Bank of San Francisco. From an order dissolving a temporary injunction, plaintiff appeals. Reversed.

E. P. Cole, for appellant. Delmas & Shortridge and F. S. Brittain, for respondent.

HENSHAW, J. This is an appeal from an order dissolving a preliminary injunction. The complaint charged the following facts: In 1894, C. A. Spreckels purchased of Claus Spreckels stocks and bonds of the Hawaiian Commercial & Sugar Company for the sum of $700,000, payable one-half on or before January 4, 1895, the other half on or before January 4, 1896. To secure these payments, C. A. Spreckels pledged collateral securities largely exceeding in value the amount of the debt. As additional security for this debt of C. A. Spreckels, plaintiff, Rudolph Spreckels, pledged 5,000 shares of the Paauhau Plantation Company of the value of $500,000. This stock was pledged under an agreement with Claus Spreckels that it should not be transferred out of the owner's name upon the books of the corporation until after maturity of the debt. In December, 1894, Claus Spreckels transferred and assigned the debt and its securities to the defendant bank, which took with notice of all conditions. The first moiety of the debt was paid when it became due, and defendant, under agreement, thereupon delivered to their respective owners one-half of the securities pledged as collateral. The half retained and still held by defendant is of more than twice the value of the unpaid debt. Defendant, before maturity of the principal debt, threatens to send, and, unless restrained, will send, the certificates of 2,500 shares of plaintiff's stock out of the jurisdiction of the court, and to a foreign country, the republic of Hawaii, and will surrender the same to and cause them to be transferred upon the books of the Paauhau Plantation Company out of plaintiff's name and into the name of defendant, or some of its agents. This will be done that said stock at the next election of officers of the Paauhau Company may be voted against the will and interest of plaintiff. These threatened acts, if consummated, will impair plaintiff's credit, will deprive plaintiff of control and the courts of this country of jurisdiction of the stock, will violate the contract of pledge by preventing plaintiff from redeeming it at will, will imperil plaintiff's interests in the corporation and impose extra burdens and large expenditures upon him by compelling him to go to a foreign jurisdiction to enforce his rights. At the hearing of the motion to dissolve the preliminary injunction there were disputes upon certain questions of fact. It was denied that in the contract of pledge there was an agreement that the stock should not be transferred until after maturity of the principal debt. It was further denied that the defendant bank took with notice of any such agreement. And it was denied that its purpose in seeking to effect the transfer, which purpose was admitted, was anything other than to avail itself of its legal rights for its protection against possible impairment of its securities, should proceedings be instituted against plaintiff, and his property be subjected to seizure or attachment at the hands of the Hawaiian government, or some private creditor, without notice of the pledge. By the order of the court dissolving the injunction these questions of fact may be taken as having been resolved against the claim of plaintiff. They need not here be further considered.

We turn to the legal problem of the case: Has a pledgee in this state, when the contract is silent on the subject, as matter of law, the right to have the pledgor's stock transferred upon the books of the corporation into his own name before maturity of the debt? If not, then it is not to be denied but that plaintiff's complaint shows cause for an injunction pendente lite, and the order dissolving it was erroneous. Code Civ. Proc. § 526; Civ. Code, § 3422; Porter v. Jennings, 89 Cal. 440, 26 Pac. 965; Ayer v. Seymour (Com. Pl.) 5 N. Y. Supp. 651; McHenry v. Jewett, 90 N. Y. 61; State v. Smith, 15 Or. 98, 14 Pac. 814, and 15 Pac. 137, 386. Section 324 of the Civil Code provides that shares of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid except between the parties thereto, "until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer." It has been determined by the decisions of this court interpreting these provisions that, even without entry upon the books of the corporation, such a transfer is valid as against all but innocent purchasers and transferees in good faith, for value, and without notice. Actual notice to such an intending purchaser by one having a prior claim upon the stock, even though his claim be not noted in the books of the corporation, is sufficient. Weston v. River Co., 6 Cal. 425; People v. Elmore, 35 Cal. 653; Winter v. Mining Co., 53 Cal. 428; Bank v. Wilson, 58 Cal. 600; Barstow v. Mining Co., 64 Cal. 388, 1 Pac. 349; Blakeman v. Iron Co., 72 Cal. 321, 13 Pac. 872. From these authorities, which declare the unquestioned rule in this state, appellant argues that a pledgee of stock would be fully protected by his power to give notice to an intending purchaser of his prior claim thereon. But this view of a pledgee's rights, we think, is altogether too strained and narrow. He should not be obliged to be on the constant watch to prevent dealings with the stock which has been hypothecated to him, at the peril of losing his security if he fails to give actual notice of his prior right to a subsequent intending purchaser or transferee. Section 324 of the Civil Code, it will be observed, is general in its terms, and applies not merely to sales of stock, but to all transfers thereof, and thus includes transfers by way of pledge as fully as transfers by which the absolute title is parted with. We entertain no doubt, therefore, that under this section a pledgee of stock has the right, and, indeed, as an ordinary business precaution it may well be his duty, to cause a proper entry of the transaction between himself and his pledgor to be entered upon the books of the corporation for his protection, as the section contemplates. The only question is whether the mode which plaintiff and appellant here pleads is about to be taken by defendant to effectuate this end is a proper one. In the case of a sale of stock the purchaser's right to have the stock transferred from the name of the seller into his own, and to surrender, if he desires, the old certificate, and have a new one issued to him in his own name, is unquestioned and unquestionable. But in the case of a pledgee, unless this particular form of procedure be necessary for his protection, it will not be adjudged to be within his rights, for the effect of it might be to imperil, upon the other hand, valuable rights and privileges of the pledgor. Thus, as here, it would give rise to questions involving the right to vote the stock at corporate elections, questions as to who should receive and retain dividends, questions of the removal of the stock to foreign jurisdictions, and the like. All that section 324 of the Civil Code exacts of a pledgee for the protection of his interests is that he should cause the transaction and the nature of it to be so entered upon the books of the corporation as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer. All this may be done to the full protection of the pledgee's rights without the surrender of the certificates, their cancellation, and the issuance to him of new ones, and, when done, the pledgee would be fully protected against a subsequent purchaser, who would be charged with the constructive notice which the entries upon the books of the corporation import; and, upon the other hand, there would be preserved to the pledgor all the rights incident to his ownership under the pledge. Moore v. Opera-House Co., 81 Iowa, 45, 46 N. W. 750; Haegele v. Manufacturing Co., 29 Mo. App. 487. It is not the law of this state, nor is it the law generally, that a transfer upon the books of the corporation is essential to the creation of a valid pledge. Civ. Code, § 324; Graves v. Mining Co., 81 Cal. 303, 325, 22 Pac. 665; National Bank v. Watsontown Bank, 105 U. S. 217; Cook, Stock & S. § 465. The order dissolving the preliminary injunction is reversed.

We concur: TEMPLE, J.; McFARLAND, J.

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113 Cal. 278

## PEOPLE v. TURNER. (Cr. 164.)

(Supreme Court of California. June 16, 1896.)

FORGERY — WHAT CONSTITUTES — CERTIFICATE OF RECORD—FRAUDULENT INTENT—INDICTMENT IN SEVERAL COUNTS—GENERAL VERDICT.

1. The false and fraudulent indorsement of a certificate of record on a deed, purporting to be made and signed by the recorder in his own handwriting, is forgery, under Pen. Code, § 470, providing that one who counterfeits or forges the seal or handwriting of another is guilty of forgery.

2. An indictment charging that defendant did willfully, knowingly, falsely, and fraudulently make and forge on a deed a certificate, in the handwriting of the recorder, purporting to recite the record of the deed and to be signed by the recorder, but which failed to allege that it was done with intent to defraud, was fatally defective.

3. On the trial of an indictment in two counts, the first charging the defendant with making a forged instrument, and the second with uttering the same, where it appeared that the first count was fatally defective, it was error to overrule a motion in arrest of a judgment entered upon a general verdict of guilty.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallner, Judge.

J. F. Turner was convicted of forgery, and appeals. Reversed.

Knight & Heggerty and George D. Collins, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant was convicted of the crime of forgery, and from the judgment, and from the order denying him a new trial, prosecutes these appeals. The information, it is admitted, contained two counts. By the first it is charged that the defendant, having in his possession a deed of a piece of realty made and executed by one Lizzie O'Donnell to J. P. Frenna, did "willfully, unlawfully, knowingly, feloniously, falsely, and fraudulently make and forge on the back of said deed a certificate in the handwriting of T. A. Bell, recorder of Fresno county, of the recordation of said deed in the county records of said county of Fresno, which said false, fraudulent, and forged certificate purported to recite that the aforesaid deed had been, to wit, on the 22d day of September, A. D. 1892, filed in the office of the county recorder of said county of Fresno for record, and had been recorded in the county records of said county, at a time, in a book, and at a certain page, specified in said false, fraudulent, and forged certificate and handwriting, and which said false, fraudulent, and forged certificate purported to be signed by said T. A. Bell, recorder of said county of Fresno." By the second count it is charged that the defendant, "well knowing said pretended certificate to be false, fraudulent, and forged, did then and there, to wit, on the 4th day of October, 1892, at the city and county of San Francisco, state of California, willfully, unlawfully, knowingly, falsely, fraudulently, feloniously, and with intent to defraud J. P. Frenna, of the city and county of San Francisco, utter, publish, and pass the same to said Frenna as genuine and true." The information is framed under section 470 of the Penal Code. It is contended that the act complained of is not embraced therein, nor known to our law as a forgery. We think, however, that section 470 is broad enough to cover the offense here charged. By the terms of that section, one who "counterfeits or forges the seal or handwriting of another" is guilty of forgery. Fraud and deceit are essential elements to the crime, and, unless the counterfeited handwriting be of such a nature as that some one might possibly be defrauded by it, the mere fact that it is a false writing is not sufficient to constitute an offense. But, on the other hand, if the counterfeit writing might possibly deceive another, and was prepared with intent to deceive and defraud another, then it becomes immaterial whether any person was actually injured or not. 1 Whart. Cr. Law, § 743; 2 Russ. Crimes (9th Ed.) *p. 774. It may be readily seen that one might be exposed to fraud and injury by a forged certificate such as this. He might rest under the assurance which the certificate carried with it,—that his deed was in fact of record,—and be subjected to injury, or perhaps to loss of the property at the hands of the forgers, who might thereafter sell or mortgage to an innocent third person, whose deed was placed on record.

Upon the trial of the cause, evidence was introduced under both counts, the jury was instructed upon the law governing both the making and the uttering of a forged instrument, and a general verdict of guilty as charged was returned. It is here contended, as it was in the trial court, both upon demurrer and upon a motion in arrest of judgment, that the first count is radically defective. The intent to defraud is not only an essential element of the crime of forgery, but it is an essential averment to every indictment for forgery. The first count is radically defective. It is therein merely declared that the defendant did fraudulently make and forge the certificate. It does not allege that the acts were done with intent to defraud anyone. In People v. Mitchell, 92 Cal. 590, 28 Pac. 597, a count containing the identical defect was held by this court in bank to be fatally imperfect. As evidence was introduced under both counts, as the jury was instructed upon both counts, and as their verdict was general, it is impossible to say whether that verdict was based upon one or the other, or upon both, of them. The judgment must therefore be reversed. People v. Mitchell, 92 Cal. 590, 28 Pac. 597; People v. Smith, 103 Cal. 563, 37 Pac. 516. In this case the attorney general has admitted, as the appellant has contended, that the information contains two counts. So treating it, the first count is defective for the reasons above given, while a new trial could not be had upon the second count by reason of the absence of necessary averments of facts. The judgment and order are therefore reversed, and the cause remanded, with directions to the trial court to sustain the motion in arrest of judgment.

We concur: McFARLAND, J; TEMPLE, J.

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(113 Cal. 268)

## SMITH v. SMITH. (S. F. 193.)[1]

(Supreme Court of California. June 11, 1896.)

HUSBAND AND WIFE — SEPARATION AND MAINTENANCE—DECREE FOR ALIMONY—DISCRETION OF COURT—REVIEW ON APPEAL.

1. Under Civ. Code, § 137, authorizing the court, in a suit by a wife against her husband for permanent maintenance, to require defendant to pay as alimony any money necessary for the prosecution of the suit and for maintenance, and to make and alter, in its discretion, such orders as it may deem necessary to enforce its final judgment, the granting or refusing of orders modifying the original decree in regard to the amount to be paid for plaintiff's support cannot be reviewed, in the absence of any evidence that the court abused its discretion.

2. In a suit by a wife against her husband for permanent maintenance, an order modifying the original decree in reference to the amount to be paid by defendant cannot be attacked for matters occurring before it was made, on a mere affidavit which shows no circumstance of mistake, inadvertence, surprise, or excusable neglect.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Josephine Smith against Charles H. Smith for permanent maintenance. From an order denying plaintiff's motion to have defendant pay certain sums alleged to be in arrears, and to increase the amount to be paid for maintenance, plaintiff appeals. Affirmed.

Gear & Gear, for appellant. Foshay Walker, for respondent.

BRITT, C. Plaintiff is the wife of defendant. She began this action July 5, 1893, to enforce from him permanent maintenance of herself and their minor child, a boy then near 14 years of age; alleging in her complaint that defendant willfully deserted her on May 18, 1892; that he receives a salary of $300 per month; and that he usually paid her $150 per month for the support of herself and said child until May 31, 1893, when he refused to make further payments. Defendant by his answer, admitted his salary to be $275 per month. He charged plaintiff with certain misconduct, but at the trial admitted, "for the purpose of this case only," the desertion alleged by her. The court made an order for plaintiff's alimony pending the suit, and by its decree, rendered after trial, January 3, 1894, required defendant to pay to her each month, until otherwise ordered, $100 "for her individual support and maintenance, and forty dollars for the support and maintenance of" said minor, who had elected to remain in his mother's custody. On March 7, 1894, both parties being before the court, an order was made reciting that plaintiff has become unable to control said minor, and is unwilling to have the further charge of him, and directing that he be placed at a certain school, there to remain under the control of the court, with permission to visit and be visited by both parents at reasonable intervals; reciting also as a fact that the sum of $80 per month will be all that is necessary or proper for the support of plaintiff individually when relieved of the care of said child, and reducing the provision for plaintiff's personal maintenance to $80 per month, and increasing that for the child to $720 per year, which latter sum defendant was required to pay for his support at said school. April 19, 1895, plaintiff moved the court for an order commanding defendant to pay sums amounting to $121.50, which she claimed to be in arrears upon the decree; also the further sum of $500 to discharge certain obligations of her contracting; and to restore her monthly stipend of $100, as it existed before the modifying order of March, 1894. This motion was supported by her affidavit, which stated, among other matters, that between May 31, 1893, and August 15, 1893, her husband paid nothing for her maintenance, and, in consequence, she incurred debts during that time which remain unpaid; that she has paid out $81.65 in order to keep in force a policy of insurance on defendant's life in her favor; that from May 31, 1893, to January 15, 1894, she was at the sole charge of maintaining the said minor; that said minor has visited her several times at her expense; and that in justice she ought to have the sum of $100 per month for her personal maintenance. Her motion was denied. Hence this appeal.

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[1] Rehearing denied.

It must be presumed that the court took into view the pecuniary condition and requirements of the parties, as well as their relative claims to its equitable consideration, when it made the decree of January 3, 1894, providing for the support of plaintiff and the minor child; and the like presumption must be made in favor of the modifying order of March, 1894. If the court abused its discretion on either of those occasions, the plaintiff might easily have brought the evidence disclosing such abuse to this court for review. That the court had jurisdiction to enter the order of March, 1894, changing the dispositions of the original decree, we have no doubt (Civ. Code, § 137[1]); the remedy being "enforced after analogies drawn from the divorce jurisdiction" (1 Bish. Mar., Div. & Sep. 1421); and the modified decree is not to be assailed now, for matters occurring before its rendition, on a mere affidavit which shows no circumstance of mistake, inadvertence, surprise, or excusable neglect. If defendant was in arrears of payments directed by the court, the proper course was to proceed against him for contempt in failing to obey the decree; no further order to pay was needed. Treating the affidavit as a petition for a new modification of the original decree, it was a matter addressed to the discretion of the court, and the record discloses nothing to convince us that in denying the motion the court exercised its discretion arbitrarily or indiscreetly. The order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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[1] Civ. Code, § 137, provides that during the pendency of an action by a wife against a husband who has deserted her, for permanent support, the court may, in its discretion, require the husband to pay, as alimony, any money necessary for the prosecution of the action and for maintenance; that the final judgment may be enforced by such orders as the court, in its discretion, may from time to time deem necessary, and that such orders may be varied, altered, or revoked.

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(120 Cal. 106)

## KENDALL v. PORTER, City Treasurer.

(Sac. 57.)[1]

(Supreme Court of California. June 9, 1896.)

CITY BONDS—INTEREST AFTER MATURITY.

Act April 24, 1858 (St. 1858, p. 267, § 37), authorizes a city to issue bonds, not to exceed a certain amount, "bearing interest from * * * and payable at the office of the treasurer * * * on the first day of January of each year, * * * coupons for the interest shall be attached to each bond." Section 38 provides that "the annual interest and principal of all bonds * * * shall be paid from the interest and sinking fund provided by section 35." Section 40 declares that "it shall be the duty of the treasurer to pay the interest on said bonds, when the same falls due, out of the interest funds, as provided in this act." Section 35 creates the interest and sinking fund (a certain per cent. of the revenues of the city's waterworks), and declares that the fund "shall be applied to the payment of the annual interest, and the final redemption of bonds." *Held*, that it authorized interest on the bonds after maturity, and made it the duty of the treasurer to pay the same. McFarland and Van Fleet, JJ., dissenting.

In bank. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Mandamus by W. S. Kendall against James M. Porter, treasurer of the city of Sacramento. Judgment for defendant. Plaintiff appeals. Reversed.

F. S. Sprague, for appellant. Robert T. Devlin and Holl & Dunn, for respondent.

HENSHAW, J. This is an application for a writ of mandate to compel the respondent, as treasurer of the city of Sacramento, to pay to plaintiff the principal of certain overdue bonds of the city of Sacramento, with interest thereon from the date of their maturity. A demurrer to the petition was sustained by the trial court, and judgment thereupon entered against plaintiff, from which judgment he prosecutes this appeal. The question thus presented is whether the bonds of the city of Sacramento, issued under the provisions of the act of April 24, 1858 (St. 1858, p. 267), bear interest after their maturity. Various questions touching the construction of the act of 1858, under which these bonds were issued, and the rights of the bondholders thereunder, have been decided by this and other courts. Meyer v. Brown, 65 Cal. 583, 26 Pac. 281; Davis v. Porter, 66 Cal. 658, 6 Pac. 746; Bates v. Porter, 74 Cal. 224, 15 Pac. 732; Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115; Davis v. City of Sacramento, 82 Cal. 562, 22 Pac. 1118; Kennedy v. City of Sacramento, 10 Sawy. 29, 19 Fed. 580. By these cases it is held that the act constitutes a contract between the city and the bondholders, and that the bondholders' rights, upon the one hand, and the duties of the city and its officers, upon the other, are measured by the terms of the statute. Thus in Davis v. Porter, 66 Cal. 658, 6 Pac. 746, the court decided that the treasurer of the city was not authorized to pay interest on coupons after they had matured and remained unpaid, holding that the overdue coupons did not bear interest, because the act nowhere in its terms provided for the payment of interest upon interest. Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115, affirmed the case of Davis v. Porter, and the court said: "The statute under and by virtue of which the bonds were issued was the basis of, and became part of, the contract; and the bondholders must be held to have taken the bonds with the understanding and agreement that they were only entitled to the principal and the annual interest, and that, if the fund provided for the payment thereof should be insufficient to meet the same, that no interest on the coupons was provided for, or could be recovered."

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[1] Rehearing granted.

The statute being thus the measure of the bondholders' rights, it becomes important to consider its provisions in relation to the interest upon the bonds; for the bondholders will be entitled to just such interest, and no other, as by a fair intendment the statute provides that they shall have. Section 37 of the act authorizes the city of Sacramento to issue bonds, not exceeding the sum of $1,600,000, "bearing interest at the rate of six per cent. per annum from the first day of January, 1859, and payable at the office of the treasurer. * * * The interest on said bonds shall be made payable at the office of the treasurer, on the first day of January of each year. * * * Coupons for the interest shall be attached to each bond so that they may be removed without injury to the bond. Said coupons consecutively numbered shall be signed by the treasurer." Section 38 provides: "The annual interest and principal of all bonds issued for claims against said city shall be paid from the interest and sinking fund provided by section thirty-five, and in the manner otherwise provided in this act." Section 40 provides: "It shall be the duty of the treasurer to pay the interest on said bonds, when the same falls due, out of the interest funds, as provided in this act." Section 35 of the act creates the interest and sinking fund, and declares that the fund "shall be applied to the payment of the annual interest, and the final redemption of bonds issued for city indebtedness." It is by this language specifically declared that the bonds shall bear interest, that the interest shall be payable annually from the date of their issuance, and that the interest shall be made a charge upon, and payable out of, a fund created by and designated in the act. There is no suggestion or intimation that the interest is to cease upon the maturity of the bond. It is a rule so general and well established that it is not even controverted by respondents in this case, that interest-bearing coupon bonds continue to bear interest after their maturity. People v. Getzendaner, 137 Ill. 234, 34 N. E. 297; Pruyn v. City of Milwaukee, 18 Wis. 367; Cromwell v. County of Sac, 96 U. S. 51; Beckwith v. Railroad, 29 Conn. 268; St. 1850, p. 92; Civ. Code, §§ 1917, 1918; Kohler v. Smith, 2 Cal. 597; Nash v. El Dorado Co., 24 Fed. 252. To take these bonds out of the operation of this rule, there must be pointed out some language in the statute evincive of an intent so to do; some declaration which will justify the court in saying that it was designed that the interest should cease upon the maturity of the bonds. That this intent can be deduced from the fact that the coupons attached to the bonds extended only to maturity is a proposition met and disposed of by People v. Getzendaner and Pruyn v. City of Milwaukee, supra. The attached coupons never extend beyond the maturity of the bond. The presumption is always that a contract will be performed, not violated. It is presumed, therefore, that the bonds will be met and paid at maturity. When we come to scan the language of the act above quoted, we find that the bonds are to bear annual interest from the date of their issuance, without any limitation upon the length of time that annual interest is to run. We find that the interest is payable at the office of the treasurer on the 1st day of January of each year. We find also that a fund is created which is to be devoted to the payment of the annual interest, and to the final redemption of the bonds, and, finally, that it is made the duty of the treasurer to pay the interest on the bonds, when it falls due, out of the interest funds provided in the act. These terms not only show no intention to terminate the interest upon the maturity of the bonds,—which intention must be expressed, if this contract is to be made an exception to the general rule,—but, to the contrary, they indicate with some clearness the intent that the bonds shall bear annual interest from the date of their issuance until the time they are actually paid. Nor can there be discerned in this any hardship upon the city. It is but the application of the general statutory rule allowing interest for the detention of moneys due.

In Beals v. Board of Sup'rs, 28 Cal. 449, which is relied upon by respondent, the question under consideration by the court involved, and was determined upon, an entirely different principle from that which governs this consideration; and this was pointed out by the learned author of that opinion in Nash v. El Dorado Co., 24 Fed. 252. In Beals v. Board of Sup'rs, an equitable demand growing out of the division of a county had been recognized by the legislature, which had imposed upon the new county an obligation to pay a specific sum. The obligation extended no further than the law expressly required, and the general principle here is as declared in the case of Wightman v. U. S., 23 Ct. Cl. 144, that from a legal obligation created solely by statute no obligation to pay interest will ordinarily arise. In the case at bar, however, the obligation to pay interest is itself a part of the contract. The declaration in Soher v. Supervisors, 39 Cal. 134, that interest was not provided for after the maturity of the bonds, is explicitly made to rest upon the authority of Beals v. Board of Sup'rs, supra; but as has been said, and as was pointed out by the learned author of the opinion in Beals v. Board of Sup'rs, the case is not authority for such a doctrine.

The question whether or not there was money in the treasury to pay the bonds at the time they became due, and that thus the holder of a matured bond, who had failed to present it at maturity, could not recover interest, does not here arise. If such be the facts, they might constitute a defense to the present action, but they cannot be considered upon demurrer. The treasurer is specially charged with the duty of paying the interest. If he can make a valid and sufficient showing why that interest should not be paid, he may make it in his return; but under the facts here pleaded, as it is made the explicit duty of the treasurer to pay the interest upon these bonds as it becomes due, mandamus may be employed to compel him to perform that duty. It follows, therefore, that the demurrer was improperly sustained. The judgment is reversed, and the cause remanded, with directions to the trial court to overrule the demurrer to the petition, with leave to the treasurer to make his answer or return thereto.

We concur: GAROUTTE, J.; TEMPLE, J.; HARRISON, J.

McFARLAND, J. I dissent, and am of the opinion that the judgment of the court below should be affirmed. The rights which the appellant has against the city are not those of a general creditor. He could not recover a judgment against the city, upon his bonds, for a single dollar; for the bonds were issued, and accepted by the bondholders, under a statute which provides that the city "shall not be sued in any action whatever." The complaint does not show the form of the bonds, but, assuming that they are, on their face, similar to ordinary bonds issued by corporations, they do not in themselves constitute complete and independent contracts. They are only parts of the contract which was made between the bondholders and the city by the passage of the act of April 24, 1858, and the issuance and acceptance of the bonds according to the provisions of that act,—a contract, as was said in Meyer v. Brown, 65 Cal. 589, 26 Pac. 281, "as solemn and binding * * * as it would have been if made between private persons." By that contract they waived all rights as general creditors under their old floating demands against the city, which were of uncertain value, and agreed to rely upon a special trust fund, to consist of 55 per cent. of the revenue derived by the city from certain enumerated sources, which substantially included all sources of revenue, and waived all right to sue the city. The contract was undoubtedly a good one for the bondholders, and this court has construed it very liberally in their favor. For instance, it was held in Bates v. Porter, 74 Cal. 224, 15 Pac. 732, by a majority of the court, that 55 per cent. of the "revenue derived" from "water rents" meant 55 per cent. of the gross receipts of the city's waterworks. But their legal remedies are confined to proceedings to compel the officers of the city to perform the duties enjoined upon them by the said act of 1858, and other supplementary acts, not important here. The question, then, is not whether, under general law, coupon bonds bear interest after the exhaustion of the coupons, for which judgment may be recovered, but whether, under the said statutes, the payment of interest on the bonds, other than that evidenced by the coupons, is "an act which the law specially enjoins" upon the city treasurer "as a duty resulting from" his office, and which he may be compelled to perform by mandamus. Section 40 provides that the treasurer shall pay "the interest" on said bonds "as provided in this act"; and section 37, in which authority for the issuance of the bonds is given, provides that "the interest" shall be payable annually at the office of the treasurer, but the latter section also provides that "coupons for the interest shall be attached to each bond"; and the whole tenor of the act seems to me to be clearly to the effect that it is not the duty of the treasurer, nor has he the power, to pay any interest other than that represented by the coupons. I think that the correct construction of the act is expressed in the opinion of Fox, J., in Bates v. Gerber, 82 Cal. 553, 22 Pac. 1115, as follows: "It did not provide for either principal or interest bearing interest after maturity, and provided no fund to meet such added liability." The treasurer is nowhere required, in the event of the bonds not being satisfied at maturity, to pay interest by way of damages. This is the view that must have been entertained in Davis v. Porter, 66 Cal. 658, 6 Pac. 746, where it was held that it was not the duty of the treasurer to pay interest on overdue coupons; and it is conceded that, under the general authorities, interest on matured and unpaid coupons stands in the same category with interest on the principal of a coupon bond after the exhaustion of the coupons. Moreover, in that case the view of the court must have been the same as that hereinabove stated, for in the opinion of the court it is expressly said, "The court cannot, therefore, issue any command to the defendant to pay, beyond the annual interest evidenced by the coupons involved in this proceeding," and cites Soher v. Supervisors, 39 Cal. 134, and Beals v. Board of Sup'rs, 28 Cal. 449; and those cases are, I think, clearly in accordance with the views above expressed. In the Beals Case, interest was claimed upon an overdue debt of the county of Amador, but the amount was to be paid out of a special fund, as provided by an act of the legislature; and the court say, "Nothing is said about the addition of other amounts resulting as damages for default in payment," and the claim for interest was denied. And so, in the case at bar, there is no provision for the payment, out of the special fund, of anything other than the coupons and the principal of the bonds. While the bondholders, if they could sue the city, might recover judgments for interest accruing after the maturity of the bonds, there is no provision in the act for the payment of such interest by the city treasurer out of the special trust fund. When the bondholders entered into the contract, they anticipated, no doubt, as they well might, that the enormous trust fund created by the act, into which more than one-half of all of the revenues of the city went, would be amply sufficient to pay the coupons as they should fall due, and the principal of the bonds when they should mature; and therefore no provision was made for the payment, out of the trust fund, of interest, as "damages in default of payment," in the event that the fund would not be sufficient to satisfy the principal at maturity. I think that in the case at bar the majority opinion treats this proceeding as an action against the city, by a general creditor, to recover a judgment for interest on overdue bonds; but, in that view, appellant could not recover either the principal or interest of his bonds, for both would be barred by the statute of limitations.

I concur: VAN FLEET, J.

113 Cal. 291

KENNEDY & SHAW LUMBER CO. et al. v. PRIET et al. (S. F. 23.)

(Supreme Court of California. June 18, 1896.)

MECHANIC'S LIEN — FORECLOSURE — JUDGMENT — APPEAL—HARMLESS ERROR.

1. In an action by several material men to foreclose their respective liens, the court rendered a money judgment for all the plaintiffs, but adjudged that the liens of A. and B., two of the material men, were invalid, and decreed that, as the aggregate amount of the liens of the other parties was less than the sum due the contractor, the surplus should be paid to A. and B. in proportion to the amounts of their judgments. *Held*, that the judgment was erroneous so far as it authorized the payment of said surplus to A. and B.

2. An error in favor of appellants affords them no ground of complaint.

3. In an action by several material men to enforce liens, one plaintiff cannot attack that portion of the judgment upholding the validity of his co-plaintiffs' liens.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Consolidated actions by the Kennedy & Shaw Lumber Company, the Charles M. Depew Planing-Mill Company, and others, against Pierre Priet and others, to foreclose mechanics' liens. From a judgment foreclosing the liens of all the plaintiffs except those above named, but giving the latter a money judgment against the contractor, and from an order denying their motions for a new trial, said plaintiffs appeal. Affirmed.

W. H. Jordan, for appellants. D. H. Whittemore, for respondents.

McFARLAND, J. This is a consolidation of several actions brought by different plaintiffs to foreclose their respective liens as material men against a building and premises owned by the defendant Pierre Priet and wife. Judgment was rendered enforcing the liens of all the plaintiffs except the Kennedy & Shaw Lumber Company and the Charles M. Depew Planing-Mill Company. The court found that said two last-named plaintiffs had no valid liens, and entered judgment in their favor against the contractor merely for the amount due to them from the latter, and refused to enforce their liens. There was also another provision in the judgment, to be noted hereafter. The said two last-named plaintiffs, the Kennedy & Shaw Lumber Company and the Charles M. Depew Planing-Mill Company, appeal from the whole of the judgment, and from an order denying their motions for a new trial.

The defendant Pierre Priet made a contract with one Fletcher, by which the latter was to erect a building upon certain land of Priet for the sum of $18,997, but said contract was never recorded. The court found, however, that Fletcher erected the building and did $1,100 worth of extra work, and that $20,097 was the amount of the reasonable value of the work done by Fletcher. It found also that Priet had paid Fletcher for the work $14,212, leaving a balance of $5,885. It also found that the said two appellants had furnished materials to Fletcher for which he was owing the Kennedy & Shaw Lumber Company $3,841.39, and the Depew Company $1,129.97, for which two sums judgment was entered against Fletcher in favor of the said two appellants respectively; but it was found that neither of said two appellants had any valid lien against the property. It found, however, that the aggregate amount of the liens of all the other plaintiffs was $1,721.73 less than the amount which Priet owed Fletcher; and it was adjudged by the court that, after the payment of the liens of said other plaintiffs, the said sum of $1,721.73 should be paid by Priet to said two appellants in proportion to the amounts of their judgments against Fletcher.

Appellants do not attack the findings that they have no valid liens. Their main attacks are upon the findings that the liens of the other plaintiffs were valid; and, contending that said findings as to said other liens were erroneous, they say that the whole of the money due from Priet to Fletcher should be applied to the satisfaction of their judgments against Fletcher. But, as the appellants have themselves no liens against the building and premises, they are not concerned with the correctness or incorrectness of the findings of the court as to the liens of the other plaintiffs. We see no warrant for that part of the judgment which decrees that the $1,721.73 should be paid by Priet to these appellants. This is not a creditors' bill nor a garnishment. The appellants brought their actions to recover judgment against Fletcher for the amount which he owed them for the materials furnished, and for liens against the property of Priet; and, having no liens, they were entitled only to a money judgment against Fletcher. That part of the judgment which decrees that the $1,721.73 owing by Priet to Fletcher after the payment of the other liens should be distributed between these appellants, while erroneous, is still an advantage to the appellants, of which they cannot complain.

In the brief of respondents it is asked that the appeals be dismissed for the reason that the notice of the motion for new trial was directed only to Priet and wife, and the notice of appeal was not served upon Fletcher. The appeal from the order was heretofore dismissed, and, under the views we have taken of the case, it is not necessary to determine that question as to the judgment. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(113 Cal. 205)

## CITY OF HEALDSBURG v. MULLIGAN et al. (S. F. 15.)[1]

(Supreme Court of California. June 6, 1896.)

CITY TREASURER — LIABILITY FOR MONEY TAKEN BY ROBBERY.

Const. art. 11, § 16, requires all money collected for the use of any city, etc., coming into the hands of any officer thereof, to be immediately deposited with the treasurer to the credit of the city, etc., for the benefit of the fund to which it belongs. Section 17 makes it a felony for any officer having control of such money to use or make any profit out of the same. Municipal Corporation Act, § 876, makes it the duty of the treasurer to receive and safely keep money coming into his hands, and pay it out on warrants signed, etc., and not otherwise. Pen. Code, § 424, makes it embezzlement for the officer to loan such money, to use it as his own, or to fail to keep it in his possession. *Held*, that the common-law liability of a city treasurer is not enlarged by such statutes, or by a bond providing that, if he shall faithfully "perform all the duties of such office of treasurer as required by any law," the obligation shall be void, and such treasurer is not liable for money forcibly taken from him by robbers. Beatty, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Sonoma county; R. T. Crawford, Judge.

Action by the city of Healdsburg against George V. Mulligan and others on the official bond of defendant Mulligan as treasurer of such city. Pending the action, defendant Mulligan died, and Frances Mulligan, executrix of his estate, was made defendant in his stead by supplemental complaint. From a judgment for plaintiff, defendants appeal. Reversed.

Rose & Pond, J. T. Campbell, and J. A. Barham, for appellants. W. W. Moreland, E. M. Norton, and Ruthledge & Pressley, for respondent.

HAYNES, C. This is an action brought upon the official bond of George V. Mulligan, as treasurer of the city of Healdsburg, and his sureties, to recover the sum of $3,541.49, with interest thereon, which moneys, it is alleged, were received by said treasurer on or about October 20, 1893, and which, in breach of his said trust, said Mulligan converted to his own use, and refused to account to the plaintiff therefor, or to pay out said sum on the warrant of the president of the board of trustees, countersigned by the clerk thereof. The answer consists of two defenses. The first puts in issue the alleged breach of trust, conversion, and refusal to pay out said moneys; and the second defense alleged, at great length and particularity, that the city of Healdsburg owned a city hall, in which was an office for the treasurer, and a vault in which he kept, and was required to keep, the funds of the city, and that on October 20, 1893, he had in said vault the said sum of $3,541.49, and that at about 4 a. m. of that day he was seized by robbers, carried to the vault, and compelled, by irresistible force and violence, and against his will, to open the vault, and that the said money was taken by the robbers by such irresistible force and violence. Upon motion of the plaintiff said second defense was stricken out, and the defendants excepted. Afterwards George V. Mulligan died, and Frances Mulligan was appointed and qualified as his executrix, and plaintiff afterwards filed a supplemental complaint, making the original complaint a part thereof by reference, and alleging the death of George V. Mulligan, the appointment of the executrix, and that plaintiff's claim had been presented to and rejected by her. Answers, in substance the same as those originally filed, were filed to the supplemental complaint, and plaintiff demurred to said second defense, and the demurrer was sustained. The cause was tried by the court without a jury. Findings and judgment went for the plaintiff, and defendants appeal from said judgment, and from an order denying their motion for a new trial. The findings were general, viz. that all the allegations of the complaint were true, and those of the answer untrue; and it was therefore found that "the said defendant George V. Mulligan, on or about said 20th day of October, 1893, in breach of his said trust, converted to his own use the said sum of $3,541.49, and refused to account to the plaintiff therefor, or for any part thereof, and refused to pay out any part thereof on the warrant signed," etc.

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[1] Rehearing denied.

The principal question presented by the record is whether the forcible taking of the moneys in question from the custody of the treasurer by robbers is a defense to an action upon his bond. "A public officer having property in his custody in his official capacity is a bailee, and the rules which grow out of that relation are held to govern the case; but the legislature can undoubtedly at its pleasure change the common-law rule of responsibility." U. S. v. Thomas, 15 Wall. 337, 344. The receipt of money by a public officer, such as Mulligan in this case, does not create the relation of debtor and creditor. The money received by him is not his, and he can only become a debtor when he becomes a defaulter; and whether he became a defaulter is the question raised by the second defense in the answer, to which a demurrer was sustained. That, at common law, a bailee for hire would not be responsible for moneys stolen from him, or taken from him by robbery, without his fault or neglect, is a proposition so well settled that authorities need not be cited. In the case before us, however, it may be that the responsibility of the treasurer has been enlarged, either by the statutes relating to such officers, or by the terms of his contract embodied in his official bond; and we must therefore look to the statute and the bond for the purpose of determining whether Mulligan's common-law liability has been enlarged. The condition of Mulligan's bond was in the following language: "Now, therefore, the condition of this obligation is such that if the said George V. Mulligan shall well and faithfully perform all official duties now required of him by law, and shall well and faithfully execute and perform all the duties of such office of treasurer required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void and of no effect; otherwise, to remain in full force and effect." The constitution (article 11, § 16) requires that "all moneys collected for the use of any county, city, town or other public municipal corporation coming into the hands of any officer thereof shall immediately be deposited with the treasurer or other legal depositary to the credit of such city, town or other corporation, respectively, for the benefit of the fund to which they respectively belong." Section 17 of the same article provides: "The making of profit out of county, city, town or other public moneys, or using the same for any purpose not authorized by law by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law." Section 876 of the municipal corporation act, so far as material, is as follows: "It shall be the duty of the treasurer to receive and safely keep all moneys which shall come into his hands as treasurer. * * * He shall pay out said money on warrants signed by the president and countersigned by the clerk, and not otherwise; * * * and for his compensation he shall be allowed one per cent. on all moneys received and paid out by him as such treasurer. * * *" By section 853 of the same act it is provided, among other things, that "all the provisions of any law of this state relating to the official bonds of officers shall apply to such bonds, except as herein otherwise provided."

If anything were required to show that Mulligan, as treasurer of the city, was a bailee of all the moneys received by him as such treasurer, and that the receipt of the money did not make him a debtor, the above provisions of the constitution and statutes would conclusively show it. It may be added, however, by section 424 of the Penal Code, the loaning of such money by the officer, or the appropriation thereof to his own use, or failing to keep the same in his possession, or changing or converting any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law, makes such officer an embezzler, and subjects him to imprisonment in state's prison. If, therefore, the receipt of the money made him a debtor, the money when received became his; and, if his, he could not embezzle it. All these provisions are based upon the theory that money in the hands of the treasurer is the money of the municipality, and that the treasurer is but the custodian or bailee of the money for the municipality. It is conceded that the requirements of the municipal corporation act make it the duty of the treasurer "to safely keep all moneys which shall come to his hands as treasurer," and that "he shall pay out said money on warrants signed by the president and countersigned by the clerk, and not otherwise," and that these requirements are included in the conditions of his bond. These statutory provisions, however, do not add to the common-law liability of the treasurer. "When the treasurer-elect accepts his office he thereby takes upon himself all the duties thereof, general as well as special. His general duties, arising from the very nature of his office, are to receive the money of the county lawfully deposited with him, keep it safely, and pay it out according to law. From these general duties, accepted, springs the legal obligation that he will bring to their performance good faith and reasonable skill and diligence, to enforce which the statute already referred to requires him to take upon himself the moral obligation of an oath that he will faithfully perform the duties which he has assumed, and give a bond with sureties with a condition of like import." Cumberland Co. v. Pennell, 69 Me. 357, 365. And, in State v. Harper, 6 Ohio St. 607, 610, it was said: "By accepting the office the treasurer assumes the duty of receiving and safely keeping the public money, and of paying it out according to law." If this be true, it will be seen that the condition of the bond given by Mulligan does not enlarge his common-law liability.

Counsel for respondent, however, has cited a very large number of cases to the point that robbery is no defense to an action upon this bond. The first case cited under this head is that of U. S. v. Prescott, 3 How. 578. Following this he cited five other cases from the supreme court of the United States, which, it is claimed, support his contention. U. S. v. Prescott, supra, was a suit upon the bond of a receiver of public moneys conditioned that "he should well, truly, and faithfully keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered by the proper department or officer of the government to be transferred or paid out, and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and would faithfully and promptly make, the same as directed." The defense was the felonious taking and carrying away of the moneys without any fault or negligence on the part of the receiver. It was held that this defense was not within the condition of the bond, that the defendant knew the extent of his obligation when he entered into it, and had realized the force of his obligation by the enjoyment of the office. The court said: "Shall he be discharged from liability contrary to his own express undertaking? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, expressed or implied; and nothing but the payment of it, when required, can discharge the bond." In U. S. v. Thomas, 15 Wall. 337, the case of U. S. v. Prescott, supra, was virtually overruled. After quoting from the Prescott Case as above, the court said: "This broad language would seem to indicate the opinion that the bond made the receiver and his sureties liable at all events, as now contended for by the government; but that case was one in which the defense set up was that the money was stolen, and a much more limited responsibility than that indicated by the above language would have sufficed to render that defense nugatory. And, as the money in the hands of the receiver is not his, as he is only custodian of it, it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law. Suppose an earthquake should swallow up the building and safe containing the money, is there no condition, implied in the law, by which to exonerate the receiver from responsibility?" The court there also referred to the cases of Muzzy v. Shattuck, 1 Denio, 233; Com. v. Comly, 3 Pa. St. 372; State v. Harper, 6 Ohio St. 607; and the then recent Cases of Dashiel, Keehler, and Boyden in that court,—all of which are cited by respondent. In another part of the opinion in U. S. v. Thomas it was said: "Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute a rule of responsibility in the discharge of those duties, or a legal excuse for the nonperformance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes in subordination to their terms are to be construed agreeably to the rules of the common law." The court in the same case noticed a distinction between an official bond and an ordinary money bond, saying that "the condition of an official bond is collateral to the obligation or penalty. It is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes." In that case Justices Swain, Miller, and Strong dissented. Justice Miller, for himself, referring to the case of U. S. v. Prescott, said: "In the subsequent case of U. S. v. Morgan, 11 How. 154, the same question was decided on precisely the same grounds. The case of U. S. v. Dashiel, 4 Wall. 182, was decided with merely a reference to the doctrine of the two cases just cited. The case of U. S. v. Keehler, 9 Wall. 83, asserts the same doctrine, and applies it to an action on a postmaster's bond. He had paid the money to the agent of the Confederate States on an order made by the insurrectionary government directing him to do so. When the case of U. S. v. Dashiel came before the court I was not satisfied with the doctrine of the former cases, and I do not believe, now, that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes on him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that, prior to this decision, there was any principle of public policy, recognized by the courts or imposed by the law, which made the depositary of the public money liable for it, when it had been lost or destroyed without any fault or negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping. Such were my opinions when, as a member of the court, I took part in the decision of U. S. v. Dashiel. But either no other judge shared those opinions, or, if any one did, he felt bound by the two previous decisions. I therefore acquiesced." So, in Cumberland Co. v. Pennell, 69 Me. 370, in a very learned opinion, in which the authorities are largely cited and reviewed, it is declared that U. S. v. Prescott for the first time promulgated the extreme views therein expressed. Of the cases cited by respondent the following are based upon statutes which made the officer a debtor as to all the funds received in his official capacity: Muzzy v. Shattuck, 1 Denio, 233; Inhabitants of Hancock v. Hazzard, 12 Cush. 112; Perley v. County of Muskegon, 32 Mich. 132. And these cases are cited in nearly all of the other cases cited by respondent.

It must be evident that, if the defendants in these cases were debtors as to all the funds received by them in their official capacity, they could not be bailees of their own property, nor embezzle it, nor could a larceny or robbery of their own property relieve them from their debts. Other cases, and all of them that discuss the grounds upon which the liability of the officer is placed, base their conclusions upon the contract, contained in the bond, to keep safely and pay over the funds on proper warrants therefor. In speaking of the official bond as a contract, Mr. Justice Bradley in U. S. v. Thomas, supra, drew a distinction between an ordinary contract or agreement and an official bond. The learned justice said: "So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such instruments. The learned judges, in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we consider to be a very important and vital distinction between an absolute agreement to do a thing, and a condition to do the same thing, inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case." In the state of New York, Supervisors v. Dorr, 25 Wend. 440, fully sustains the views we have taken of the liability of a public officer upon his bond. The opinion in that case was written by Chief Justice Nelson and concurred in by Justices Bronson and Cowen, in the supreme court. The case was carried to the court of errors (7 Hill, 583), where the judgment was affirmed by an equally divided court. In People v. Faulkner, 107 N. Y. 477, 14 N. E. 415, the action was upon a surrogate's bond. The general reasoning of the case clearly sustains our conclusion in this case, although a distinction was there drawn between moneys in the hands of a surrogate and moneys received by a treasurer or other public officer of that character. So that, so far as the question here is concerned, there has been no direct adjudication by the court of appeals of that state, and the question is left open. The supreme court of South Carolina, in an able opinion, sustains the view we have taken. There the treasurer deposited money in a bank of good repute, and the money was lost by its failure. The court referred to U. S. v. Prescott, and the other leading cases which lay down the strict rule of liability, and, following U. S. v. Thomas, held that the defendant was not liable. York Co. v. Watson, 15 S. C. 1. In Walker v. Association, 18 Adol. & E. (N. S.) 277, the action was upon the bond of the treasurer of a benefit building society, organized under a statute. The conditions of the bond were that he would faithfully discharge the duties of treasurer, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods, and chattels, which he, in his office of treasurer, shall receive on the society's account, and being bound by the rules of the society to pay over in a given time the same moneys which he shall receive; and it was held that the treasurer did not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence, and without fault of his own; such obligation being that only of a bailee. Lord Campbell, C. J., said: "This plea alleges a loss of the money by irresistible violence; and the general doctrine is not denied that, if the subject-matter bailed be lost by vis major, which we translate 'irresistible violence,' the bailee is discharged." In Cumberland Co. v. Pennell, supra, the court cited an unreported opinion of Mr. Justice Story, of the United States circuit court at the May term, 1822. In relation to that case it was said: "The doctrine that the official bond of a public depositary rendered him the insurer of the public funds in his possession is nowhere recognized by Judge Story. On the contrary, he was of the opinion that robbery is a good defense. Col. John L. Tuttle, a United States paymaster, was murdered and robbed of the public funds held in his official capacity, and an action was brought therefor against his administrator. In the trial of the action at the May term, 1822, of the United States circuit court in Boston, the defense of robbery was set up, and the jury, under the instructions of Judge Story, presiding, returned a verdict for the defense,—showing that the court must have ruled that robbery was a good defense. It seems the question was not carried any further, and hence the case was not reported."

We cannot better conclude this opinion than by another quotation from the case of Cumberland Co. v. Pennell, above cited: "Were the law otherwise in this state, and known to be such, faithfulness and honesty, even if they continued to be considered commendable personal qualities, would be held, if not mere abstractions, matters of secondary importance, at best, in candidates. Such qualifications, accompanied by the highest capability, would, in the absence of sufficient property in the principal to secure his sureties, fail to obtain them. For many a responsible person would gladly sign a bond as surety, guarantying the faithfulness, honesty, and capacity of his neighbor which were so potent in effecting his election to the responsible public station of county treasurer, who would long hesitate to insure the public against possible loss happening in spite of such qualities; for to insure against such a loss is not only vouching for the integrity of the officer, but practically for that of the rest of mankind,—that they will not rob him." We therefore conclude that the obligation resting upon Mulligan, as treasurer of the city of Healdsburg, was simply that which the common law imposes upon him as a bailee for hire; that the provisions of the statute to keep safely and pay over the money received by him in his official capacity were duties which would have rested upon him as such bailee in the absence of these provisions of the statute, and did not enlarge his responsibility or that of his sureties; and that, if he were violently robbed of the moneys of the city in his possession, it is a defense to the action. The burden of proving such defense, of course, rests upon him and his sureties. The question here, however, arises upon a demurrer to the second defense, which alleges the robbery, and therefore, as now presented, the fact of robbery is conceded.

As to the effect of the conclusion above stated, little need be said. It is urged, in many of the cases which hold the officer to an absolute responsibility for all moneys coming to his hands, that if robbery or larceny were held to be a defense, it would endanger the security of public funds, and encourage simulated robberies and pretended larcenies. But we cannot assume that courts of justice are unable to protect the public in such cases; and, even if they could not do so in all cases, justice does not require that the public shall be protected by enforcing against its servant, the officer, and his sureties, a liability the law has not imposed upon them, and which they have not assumed. No other question need be noticed. The judgment and order appealed from should be reversed, with directions to the court below to overrule the demurrer to the second defense set up in defendant's answer.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to overrule the demurrer to defendant's second defense.

I dissent: BEATTY, C. J.

(113 Cal. 312)

## BEATTY v. MILLS. (S. F. 62.)[1]

(Supreme Court of California. June 23, 1896.)

MECHANICS' LIENS—TIME OF FILING.

Where a building contract provides that the work shall be done "to the satisfaction of the superintendent of public streets of said city and county," the 60 days within which the contractor may file a lien begin to run from the completion of the work, and not from the time a certificate is made by such superintendent that the work was done to his satisfaction.

Department 2. Appeal from superior court, city and county of San Francisco; James E. Murphy, Judge.

Action by George W. Beatty against C. J. Mills to establish and enforce a mechanic's lien. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Chadburne & Herrin, for appellant. Reddy, Campbell & Metson, for respondent.

McFARLAND, J. This is an action to enforce a lien under the provisions of the Code relating to liens of mechanics and others. Judgment went for defendant, and plaintiff appeals.

The premises against which the lien is sought to be enforced are situated in the city and county of San Francisco, and are the property of the estate of Warren F. Mills, deceased; and the respondent, Cecil J. Mills, is executrix—jointly with one Holland Smith, who is executor—of said estate. The lien is based on an alleged written contract for certain street work in front of said premises made by Mrs. Mills alone, and without the concurrence of her co-executor, with Hogan & Burns, contractors, and an assignment of the lien by said contractors to the appellant. The court found (1) that the contract was void because one of said contractors had falsely represented to the respondent, when she was quite sick in bed, that her co-executor, Smith, to whom she intrusted the management of the estate, had sent, by said contractor, a direction that she should sign said contract; (2) that the assignment to appellant was made before the filing of the lien, and therefore of no legal value, as held in Mills v. Land Co., 97 Cal. 254, 32 Pac. 169; and (3) that the lien was not filed within 60 days after the completion of the work. The last of the three findings above stated was clearly right, and therefore we need not discuss the other two. It is beyond doubt that, as a fact, the lien was not filed until more than 60 days after the completion of the work. Appellant contends that this defect in his lien is obviated by a certain certificate of a deputy superintendent of streets. The contract provided, among other things, that the work should be done "to the satisfaction of the superintendent of public streets of said city and county"; and appellant offered in evidence a certificate of the superintendent, by a deputy, that the work "has been done to my satisfaction." Respondent objected, on several grounds, to the admission of this certificate in evidence, and the objection was sustained. Appellant contends that this ruling was erroneous, and that, as the lien was filed within 60 days after the date of said certificate, therefore it was filed in time. But this contention cannot be maintained. Assuming that, as evidence of the work having been done to the satisfaction of the superintendent as provided in the contract, the certificate or written declaration of the superintendent was admissible, and not mere hearsay, and assuming, further, that for the purposes of the contract a certificate of a deputy was a certificate of the superintendent, still such certificate could not change, or in any way affect, the statutory period within which a lien must be filed, and that period commences at the date of the completion of the work. By the contract the superintendent was arbiter, at most, of only the quality of the work; and his certificate only purports to state that the work which had been done was done well, and to his satisfaction. If it had contained a statement of the date of the completion of the work, such statement would have been of no value. The judgment and order denying a motion for a new trial are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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(113 Cal. 307)

## CENTER v. DAVIS et al. (S. F. 42.)[1]

(Supreme Court of California. June 23, 1896.)

PARTITION—DEED BY TENANTS IN COMMON—VALIDITY.

A deed by tenants in common which recites that it is made to the grantee "for the sole purpose of dividing the pieces or parcels of land hereinafter described, that deeds may come direct from the party of the second part to the parties of the first part, according to their respective interests," is binding on none of the grantors unless executed by all.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by George L. Center against Samuel

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[1] Rehearing denied.

[1] Rehearing denied.

Davis and others to quiet title to land. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. H. Moore, W. B. Sharp, and James T. Boyd, for appellant. Freeman & Bates and Jos. W. Nougues, for respondents.

McFARLAND, J. This is an action brought by plaintiff against a large number of defendants for the purpose of quieting plaintiff's title, as against said defendants, to a certain piece of land, covered by water, in the city and county of San Francisco. From the answers, and statements and admissions which appear in the statement on motion for a new trial, it appears that the defendants do not deny the quantity of plaintiff's undivided interest as a tenant in common with the defendants of a large tract of land, of which the tract described in the complaint is a part. But plaintiff contends, and his complaint goes upon the theory, that he is the owner in severalty of the premises described in the complaint, and this defendants deny. The court granted a nonsuit, and entered judgment in favor of defendants; and from the judgment, and from an order denying a new trial, the plaintiff appeals.

It appears that in 1854 the grantors of the parties plaintiff and defendant were the owners of a certain tract of land, consisting of certain beach and water lots, in the city and county of San Francisco; and it is contended by plaintiff that there has been a partition of said tract of land by which plaintiff has become the owner in severalty of that part of said tract which is described in the complaint. The first step in the process by which said plaintiff claims that said partition was effected is a trust deed made June 7, 1854. In that deed some 15 different persons are named as parties of the first part, or grantors, and one Joseph E. Gary is named as party of the second part. It is shown by the parol testimony introduced by plaintiff that the purpose of said deed was to effect a partition, through the process of all the co-tenants conveying to said Gary with the understanding that said Gary was to reconvey to each of the co-tenants, in severalty, the share to which he was entitled. The deed itself contains this clause: "The object of this conveyance to the party of the second part is for the sole purpose of dividing the pieces or parcels of land hereinafter described, that deeds may come direct from the party of the second part to the parties of the first part, according to their respective interests." The defendants make several objections to the validity of this deed. They say, in the first place, that it was not signed and executed by all of the persons named therein as parties of the first part and co-tenants. It is a fact that several of said parties did not sign said deed. It is claimed, however, by plaintiff, that some of those not signing had no interest in the property; but this question is not necessary to be discussed here, because it is admitted that Samuel Todd was one of the tenants in common of the land of which that mentioned in the complaint is a part, and that he refused to sign the deed, and did not sign it. It is contended also by defendants that this deed to Gary included other lands, to which, as it appeared afterwards, none of the parties to said deed had any title; and it is contended that this vitiated the whole deed, upon the authority of Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418. It is also contended that the deed was void because it did not describe the quantity of interest of the various parties, and presented no basis upon which a partition could be effected. We deem it necessary to notice only the first objection above stated to the validity of said deed. Todd not having signed the deed, and having refused to sign it, it was, as a deed contemplating partition, void. Gates v. Salmon, 46 Cal. 361; Hill v. Den, 54 Cal. 7; Sutter v. San Francisco, 36 Cal. 112. "A contract which is entered into by several parties for the purpose of effecting a partition of land which they hold in common must be binding upon all the parties, or it binds none." Gates v. Salmon, supra. The plaintiff contends that this difficulty was obviated by the fact that both Gary and Todd afterwards deeded their interest to the grantor of plaintiff; but, waiving all other considerations, the deed to Gary, for the reason above given, was inoperative, and did not confer upon Gary the right to convey the interests of the parties who had signed the trust deed. There is no pretense here that there was any partition of the tract, by actual occupation of different parts of it by the tenants in common, respectively, in accordance with any parol agreement. The whole tract was covered by water, and there was no separate possession of particular parts of it taken by the individual tenants in common. Neither was there any partition by mutual conveyance between all the tenants in common. For the reasons above stated, the court below was warranted in holding that the plaintiff had made out no case for the relief asked in his complaint, as a tenant in severalty of the tract of land therein described, and the nonsuit was therefore properly granted. These views make it unnecessary to particularly notice other positions taken by the respective counsel. The judgment and order denying a new trial are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(113 Cal. 310)

## LOUI SOY WING v. CHUNG YICK et al.

(S. F. 120.)

(Supreme Court of California. June 23, 1896.)

APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where, in malicious prosecution, the evidence as to want of probable cause, and malice, is conflicting, the verdict will not be disturbed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Loui Soy Wing against Chung Yick and others for malicious prosecution. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Lyman I. Mowry and Thos. T. Reardon, for appellants. Smith & O'Keefe and F. E. Stranahan, for respondent.

McFARLAND, J. This is an action brought by plaintiff to recover damages for an alleged malicious prosecution of plaintiff by defendants upon a criminal charge made by defendants against plaintiff in the police court of the city and county of San Francisco. The jury returned a verdict for plaintiff in the sum of $500, for which amount judgment was rendered. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

The record presents no error of law committed by the court below. There are no exceptions to the rulings of the court respecting the admissibility of evidence, or the instructions given to the jury. There is no doubt that the law is as claimed by counsel for appellant,—that in a suit for malicious prosecution the plaintiff must show both a want of probable cause, and malice,—but the instructions of the court were in accordance with this principle. Neither is there any question of law presented as to the proposition that the advice of respectable counsel, given upon a full and fair statement of the facts upon which the prosecution was instituted, and a bona fide acting upon such advice, constitute a defense to the action for malicious prosecution. The appeal in this case therefore rests entirely upon the proposition that the evidence fails to show a want of probable cause, and malice. We have examined the testimony in the case very fully, and while it does not make an exceedingly strong case in favor of the plaintiff, as to want of probable cause and malice, still there is not such a defect in the evidence as to those two points as would warrant us in setting aside the verdict. Nor is the evidence such as would fairly preclude the jury from finding that there was not a full and fair statement of the facts made to counsel of defendants at the time the prosecution was instituted, or from finding that the defendants did not act in good faith upon his advice. We are not called upon to determine whether or not the verdict of the jury was in accordance with the correct balance of closely-conflicting evidence, but whether the character of the evidence was such as to leave the question within the province of the jury. The judgment and order denying a new trial are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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(113 Cal. 302)

## VOORMAN v. LI PO TAI et al. (No. 15,927.)[1]

(Supreme Court of California. June 23, 1896.)

WRITS—RETURN—LIMITATIONS—DISMISSAL OF ACTION—APPEARANCE—WAIVER BY ADMINISTRATOR.

1. In foreclosure, summons was issued and served in 1877, but not returned till 1893. Defendant entered into no stipulation in regard to the case, but plaintiff granted him certain privileges, reserving the right to enter default and judgment in case defendant failed to comply with the conditions. Defendant made payments from time to time, and died in 1893. His administrator urged that the action was barred by limitations under Code Civ. Proc. § 581, subd. 7 (as amended St. 1889, p. 398), which requires that an action in which summons shall not have been issued within one year and served, and return thereon made within three years after the commencement of said action, shall be dismissed, "and no further proceedings shall be had therein." *Held*, that the statute is mandatory, and that plaintiff's right of action was lost by the failure to return the summons.

2. Code Civ. Proc. § 1014, defining an appearance, is exclusive, and defendant can appear only by an answer, a demurrer, or by written notice of his appearance, or by an attorney giving notice of appearance for him, as therein provided.

3. Where a claim against an estate has been barred by limitations, the administrator cannot bind the estate by waiving the defense.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action of foreclosure by Henry Voorman against Li Po Tai, and by substitution against A. C. Freese, administrator of the estate of Li Po Tai, deceased. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. G. Sullivan and Alexander D. Keyes, for appellant. R. H. Countryman and W. M. Willett, for respondent.

TEMPLE, J. This appeal is from a judgment of foreclosure. The action was commenced July 23, 1877, in the district court. Summons was issued and served on the same day, but was not returned or filed until September 26, 1893 The only question involved in the appeal is whether the right to prosecute the action has been lost under the provisions of section 581, Code Civ. Proc. Li Po Tai never formally appeared in the action, but July 31, 1877, Messrs. Howe & Rosenbaum procured a stipulation from plaintiff's attorney granting an extension of time, which was filed August 6, 1877. Upon this was indorsed, "Howe & Rosenbaum, Attorneys of

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[1] Rehearing denied.

Defendant Li Po Tai." By whom this indorsement was made was not shown, but, as it is the custom of lawyers to have all papers filed similarly indorsed, it is presumed that it was done by the consent and direction of the persons named. The same custom demonstrates that it was not intended as a signature in any sense. It was shown that the same firm negotiated with plaintiff's attorneys for a stay of proceedings, and procured a stipulation signed only by the attorneys for the plaintiff, whereby plaintiff acknowledged the receipt of all interest due and costs which had accrued, including the fees of plaintiff's attorneys and $1,000 of the principal sum due, in consideration of which an extension of 30 days was granted; and it was stipulated that another extension of 30 days would be given if defendant then paid $1,000 and interest; and, if defendant thereafter paid the interest monthly, monthly extensions would be granted for one year, but if the defendant "shall fail to make any of the payments aforesaid at the time above specified, the plaintiff may take his default in the action, and enter judgment therein for the amount unpaid," etc. Thereupon defendant made payments from time to time,—the last being $500, on the 5th day of December, 1892. And it was doubtless in consideration of these payments that plaintiff delayed his action. On the 3d day of April, 1893, Li Po Tai died. An administrator having been appointed, plaintiff presented his claim against the estate, and procured a substitution of the administrator in the action. He then filed a supplemental complaint setting up the death of defendant and the presentation and rejection of his claim. To the supplemental complaint defendant interposed a general demurrer, which was overruled. He then answered, and in his answer denied that summons had ever been issued or was served on Li Po Tai, and denied that the summons had been returned, or that Li Po Tai had made default. Plaintiff recovered judgment. On the 19th day of March, 1889, section 581 of the Code of Civil Procedure was amended by adding subdivision 7. St. 1889, p. 398. It reads as follows: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served, and return thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years." This provision is very sweeping, and is expressly made applicable to pending suits. It is mandatory; otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion when there had been culpable failure to prosecute. To hold this statute directory would, therefore, be to repeal it. Then the language could hardly indicate more plainly the intent that it shall be mandatory. Besides being absolute in form, it contains a prohibitory clause,—"and no further proceedings shall be had therein." Such a negative cannot be, and never has been, considered as directory merely.

I see no point in the suggestion, as applied to this case, that such a statute is unconstitutional, so far as made applicable to pending suits. The most that could be claimed would be that in such case a party would be allowed the entire period of three years after the law took effect. Here three years was allowed to pass after the statute took effect before the summons was filed. As authority for this construction we have the following cases in regard to the representative effect of statutes of limitation: Nelson v. Nelson, 6 Cal. 430; Lehmaier v. King, 10 Cal. 373; Scarborough v. Dugan, Id. 305. But it is contended by respondent that by taking and filing the stipulation extending the time to answer, and by accepting and acting upon the agreement to grant successive extensions in consideration of certain payments made, defendant appeared in the action. Section 1014, Code Civ. Proc., defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of an appearance for him; and he can appear in no other way. This statute was intended to settle all disputes upon the subject. There can be no chance for argument about unequivocal acts. State v. McCullough, 3 Nev. 202, seems to be the other way, but the reasoning is far from satisfactory. There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be dispute. There was no such appearance in this case. The defendant entered into no stipulation in regard to the case. Plaintiff granted him certain privileges, reserving the right to enter default and judgment in case defendant failed to comply with the conditions. These facts would constitute a good showing against a motion to dismiss for lack of prosecution if it were not for the mandatory statute. In the case of Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125, the question was whether the amendment to section 581 of the Code of Civil Procedure, above referred to, prohibited the court from an exercise of its discretion in dismissing a case for want of prosecution before the expiration of three years. It was held that the new statute did not interfere with the discretion of the court in that respect.

It is next contended that when the administrator appeared and answered the supplemental complaint he waived the objection. It is unnecessary to decide the point made that the court lost all jurisdiction in the case, and that no further proceedings could be had, even by consent of both parties. Here the defendant was an administrator. The claim of plaintiff was barred by the statute of limitations. The administrator is prohibited from allowing or paying any claim which is barred. To waive the objection here would be to allow such a claim to be collected. In other words, the administrator would be voluntarily paying a claim which is barred. No such consent could be given so as to bind the estate. This rule is applicable to all trustees. Emerson v. Thompson, 16 Mass. 428; Bank v. Wright, 8 Allen, 121; Manufacturing Co. v. Barnes, 48 N. H. 25; Rhoads v. Rhoads, 43 Ill. 239; Lenox v. Notrebe, Hempst. 251, Fed. Cas. No. 8,246c. The judgment is reversed, and the cause remanded, with directions to dismiss the suit.

We concur: McFARLAND, J.; HENSHAW, J.

113 Cal. 124

## ANDRES v. FRY et al.

(Supreme Court of California. June 4, 1896.)

CORPORATIONS — CONTRACTS—EVIDENCE—AUTHORITY OF EXECUTIVE COMMITTEE.

1. A contract signed by the president and secretary of a corporation, to which the corporate seal is attached, is prima facie evidence that the contract is a corporation contract.

2. The executive committee of the board of directors of a corporation authorized by the board to make arrangements with a person for "securing the transfer" of patent rights belonging to him to the corporation have authority to execute a contract for the transfer.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by George S. Andres against John D. Fry and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

W. H. L. Barnes, for appellants. Tilden & Tilden, for respondent.

VANCLIEF, C. The defendants were sued upon their personal liability as stockholders of the Eureka Manufacturing Company, a corporation organized under the laws of this state. The cause was tried by the court without a jury, and the court found "that the agreement was duly executed and delivered by the corporation to the plaintiff, and that the officers of said corporation who executed said agreement were duly authorized so to do"; and further found in favor of plaintiff on all other issues, and rendered judgment accordingly. The defendants have appealed from the judgment, and from an order denying their motion for a new trial.

At the time of ordering judgment the court filed the following written opinion, which is incorporated in the statement on motion for a new trial: "The Court: The only question presented in this case is whether the contract sued upon was the contract of the corporation. It was signed by the president and secretary, and bore the corporate seal. The production of the contract, therefore, with proof of its signature and of the corporation seal, made out a prima facie case in favor of the plaintiff. The defense is founded upon the claim that the execution of the contract in question was not authorized by the corporation, and was, therefore, without authority. After a careful examination of the evidence, I am of opinion that this defense cannot be sustained. The minutes of the board of directors (page 9) show that upon motion of Garnett the attention of the board of directors was called to the necessity of acting upon the proposition of the plaintiff, and the board then passed a resolution which, in my opinion, authorized the execution of the contract. This resolution, in terms, referred the matter to the executive committee, and empowered them to make the necessary arrangements with Andres for securing the transfer of his right to this company. It would seem, therefore, that in the execution of the contract in question it was entirely satisfactory to the executive committee. They were but carrying out the resolution of the board, which practically authorized and empowered them to close the transaction with Andres, and the sale and transfer of his rights to this company. The power thus delegated to the executive committee was exercised by them. The paper in question was properly signed by the president and secretary, and the corporate seal affixed. I am therefore of opinion that the act was binding upon the corporation, and that plaintiff is entitled to recover. It is therefore ordered that plaintiff recover judgment as prayed for. Hunt, Judge. November 14, 1893." (In denying the motion for a new trial the court filed an additional opinion, which contains a summary of the evidence bearing upon the issue as to the authority of the executive committee, and tending to show that the contract was repudiated by defendants for reasons other than that the committee was not authorized to execute it, and for which plaintiff was not responsible. This opinion is attached to the statement on motion for new trial, and satisfactorily vindicates the finding of the authority of the committee to execute the contract.)

The conclusion of the trial court that the plaintiff made a prima facie case by production of the contract signed by the president and secretary and bearing the corporate seal is warranted by the following authorities: Ang. & A. Corp. § 224; Burrill v. Bank, 2 Metc. (Mass.) 166; Lovett v. Association, 6 Paige, 60; Ditch Co. v. Zellerbach, 37 Cal. 600; Underhill v. Improvement Co., 93 Cal. 314, 28 Pac. 1049. There is no question that the president and secretary signed the contract, nor that the secretary affixed the corporate seal; but appellants contend that they were not authorized so to do by the board of trustees. The minutes of the board show that the terms of the proposed contract were made known to the board by a member thereof (Mr. Garnett) at a meeting held on August 12, 1889, but no definite action was then taken upon it. But at a regular meeting of the board on August 14, 1889, Mr. Garnett again "called the attention of the board to the necessity of acting" upon the proposition of Andres, when "at the suggestion of the president, it was moved and carried that the matter be referred to the executive committee, and that they be empowered to make the necessary arrangements with Messrs. Miller and Andres for securing the transfer of their rights to this company." The proposition of Andres, which had been submitted to the corporation, and which was thus referred to the executive committee, was to sell to the corporation certain patent rights; and the executive committee to which it was referred consisted of the president and two other members of the board of directors, being a majority of the board, and including the secretary. The only ground upon which it is claimed that the execution of the contract was not complete is that the executive committee did not formally report its action to the board, and that the board never formally acted on the matter after having referred it to that committee. It appears that the executive committee was created by the by-laws, but, as the by-laws were not put in evidence, it does not appear what power they conferred upon that committee. However this may be, I think the resolution referring "the matter" to the committee, and empowering it "to make the necessary arrangements with * * * Andres for securing the transfer of his rights to this company," may fairly be construed, under the circumstances, to have authorized the committee to execute the contract. How else could the (then) future transfer of Andres' patent rights have been secured? No doubt Andres was bound by the contract, and that it could have been enforced against him. Nothing was said to him about reporting the contract to the board for further action, or indicating that it was not completely executed. While it is true that corporate powers must be exercised by the board of directors when duly assembled, it is also true that while so assembled such board may authorize a committee or other agent to make a written contract in its name. In Burrill v. Bank, 2 Metc. (Mass.) 167, Chief Justice Shaw said: "We think, therefore, that a board of directors may delegate an authority to a committee of their own number to alienate or mortgage real estate; that an authority to convey necessarily implies an authority to execute suitable and proper instruments for that purpose; and, in case of a corporation, to affix the corporate seal to an instrument requiring it." To the same effect are Gashwiler v. Willis, 33 Cal. 20; Abbott v. Water Co., 87 Cal. 323, 25 Pac. 693. These authorities narrow the controversy to the question: Could the executive committee have secured a then future transfer of the patent rights of Andres to the corporation without an executed contract binding him to do so? I think the answer to this question must be negative; and, consequently, that the committee was authorized to execute such contract. It follows, I think, that the judgment and order should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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(113 Cal. 294)

BYRNE et al. v. BYRNE et al. (No. 18,422.)

(Supreme Court of California. June 18, 1896.)

TRUSTS — IDENTITY OF TRUST PROPERTY — SUFFICIENCY OF EVIDENCE — ADMISSIBILITY — SECONDARY EVIDENCE—CONTENTS OF LETTER.

1. In an action against an administrator to enforce an alleged trust it was alleged that the trust was created by the mother of plaintiffs, and accepted by the intestate; that the trustee received the trust fund, and invested it in a drug store. It appeared that intestate had carried on the business for several years, and upon his death the administrator had continued it, though at a loss; that during the last two years goods had been purchased amounting to the original purchase price; that there were claims against the business to the amount of $1,000, and that the appraised value of the business when closed was only $1,900. *Held*, that the evidence was insufficient to identify the drug stock and good will as the trust fund. McFarland, J., dissenting.

2. Where parol evidence is admitted for a specific purpose only, the trial judge should at the time state and limit the purpose for which it was received and considered.

3. Parol evidence as to the contents of a letter is inadmissible in the absence of proof of its loss.

In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Walter W. Byrne and others against B. McGrath, Mary F. Byrne, and others. There was a judgment for plaintiffs, and defendant B. McGrath appeals. Reversed.

A. J. Ridge, for appellant. A. D. Mason and F. J. Dennis, for respondents.

HENSHAW, J. Appeal from the judgment and from the order denying a new trial. Plaintiffs, who are the children of Michael Byrne, Jr., deceased, commenced this action against the administratrix of his estate and the creditors thereof, seeking a decree that certain property which had come into the possession of the administratrix as the property of the estate was in fact property held by their father as trustee in trust for them. The facts averred, sought to be proved, and found by the court, are, generally, that the wife of Michael Byrne, Jr. (the mother of these plaintiffs), died testate, naming Michael Byrne, Jr., her husband, executor of her estate, and leaving all her property to him as trustee for the use and benefit of her children, these plaintiffs, and another child, made defendant in this action. The father, as trustee, accepted the trust, and of the trust property there came into his hands the sum of $2,500. This money he used in the purchase of the stock, fixtures, and good will of a retail drug business in the city of Grass Valley, where the parties resided. He conducted this drug business during his lifetime, and upon his death Mary F. Byrne, defendant herein, and administratrix of his estate under order of court, continued in the conduct and management of the business. It was carried on at a loss, and was finally closed out. The estate of said Michael Byrne, Jr., is admittedly insolvent, and the defendants in interest are creditors of his estate with allowed claims. Plaintiffs, having failed to present their claim against the estate within the time contemplated by law, are here seeking to follow, and claim to have followed, and the court finds that they did follow, the specific property of the trust through its mutations in form, with such certainty as justifies it in saying that the $2,500 received by the father in trust is now represented by the drugs, good will, and fixtures of the retail store.

The evidence upon the part of the plaintiffs to establish the necessary facts—that there was property in the estate of their deceased mother which was the subject of the trust, that this property came into the hands of their father as trustee, that this identical property was by him used in the purchase of the drug business—consists almost wholly of admissions alleged by one or another of the children to have been made to them by the father. This evidence, while not in law insufficient, is to the last degree unsatisfactory, in view of the fact that the father is dead, and cannot be heard upon the question, and in view of the further fact that, as this trust property must have come to the father through proceedings in distribution in the estate of his deceased wife, which estate was probated in the county in which this litigation was prosecuted, there was available to plaintiffs the primary evidence of the records and proceedings in that estate.

But, passing this point with the declaration that there is still sufficient to support the findings in this regard, an alleged error of the trial court in the admission of evidence first invites attention. One of the daughters of Michael Byrne, Jr., being upon the witness stand, testified that her father told her in January, 1883, that he had received $2,500 from her mother's estate. The drug store was bought in December, 1883. Plaintiffs' attorney then offered in evidence the petition for the probate of the will of the deceased wife of said Michael Byrne, Jr., which petition, signed by said Michael Byrne, Jr., declared that the character and probable value of the property of the estate was three 80-acre tracts of land in the state of Indiana, appraised for taxation in said state at $2,640. Objection was made to the introduction of the petition. The court declared that it was "admitted for the purpose of tending to show the existence of the trust." The following discussion then ensued: "Mr. Mason: We offer it for all purposes—all legitimate purposes. The Court: It is proper for the purpose of showing or tending to show the existence of the trust, and when it is in evidence it can be considered for all purposes. Mr. Ridge: I want the court to state what purpose it limits it to. The Court: I state now that it seems to me that it is admissible for the purpose of showing an intention, or tending to show that he accepted the trust. It may be, of course, for other purposes. Mr. Ridge: Now, to that we object on the ground that it is incompetent and irrelevant. There is no denial that M. Byrne, Jr., did accept that trust, whatever it was. Now, to allow it is to give evidence of a fact that is not denied. The Court: It will be admitted for all purposes that it is competent to establish. Mr. Ridge: Note our exception. Counsel for plaintiff then read the said petition in relation to the acres of land situated in Monroe county, Indiana, appraised at $2,640, the reading of balance being waived." It is the fact, as counsel for appellant then objected, that there was no issue joined by the pleadings upon the question of the acceptance by Michael Byrne, Jr., of the trust. The offered evidence, therefore, was immaterial upon that point. It is the undoubted rule that, when evidence is offered generally, and admitted, it is evidence for all proper purposes; but it is also the rule that evidence may be admissible for a specific purpose, and, when so admissible, the trial judge should state the purposes for which it is to be received and considered by him, and particularly should he do this when, as in the case at bar, his attention is directed to the matter, and he is repeatedly asked to declare those purposes. Thus, for example, a letter may be offered merely to prove the handwriting of a party or of a witness. To admit that letter generally, or for all proper purposes, would admit as well the contents of the letter; and unless the court, by its ruling, specifically limits the purpose of the admission, objecting counsel can never know the inner workings of the mind of the court, nor be able to tell for what purpose it was considered. They would thus be deprived of the opportunity of urging upon the attention of this court a valid objection to the introduction of evidence which they had done their utmost to have cast in perfect form. Or, again, a letter might be admissible in evidence to prove the state or condition of mind of the person writing it, as frequently happens in cases of contested wills under charges of undue influence or fraud. In such an instance the contents of the letter would be admissible as tending to show the state of mind of the writer, but it would not be admissible as establishing or tending to establish any facts or recitals or charges which the letter might contain. Yet, if generally admitted, how could objecting counsel know but that the court considered the letter for these purposes?

We come, however, to a much more serious exception taken to the ruling of the court in connection with this very evidence. Counsel for plaintiffs, having read that portion of the petition in relation to the lands in Indiana, asked the following question of the witness: "Q. Is that the property, Mrs. Cartwright, for which this check was sent on, and which he advised with you in relation to the sale of?" The witness, over objection and exception, answers: "A. I do know it was the identical property." Upon cross-examination it is disclosed that she knows it was the identical property, because her father told her so. The following proceedings were then had: "Q. Mrs. Cartwright, did you see the letter your father wrote to Louden & Meyer, instructing them to sell this property for $2,500? A. I did. Q. Did you see the reply Louden & Meyer wrote to your father? A. I did. The Court: State the contents of the letter. (Objection is made to this upon the ground that the letters themselves are the best evidence.) The Court: I will allow the evidence, at least that portion of it showing she saw the letter written by her father. (Exception taken.) Q. Will you state, Mrs. Cartwright, what the letter was, and what it contained, if anything, that came back from Louden & Meyer to your father, in response to his letter directing them to sell the property for $2,500? (Same objection as above. Objection overruled. Exception taken.) A. Well, a letter closing the business and inclosing the proceeds of the property; a check; a folded check." Then, against the same objection and ruling and exception, the following questions were asked and answered: "Q. The transaction was wound up? A. Yes, sir, by this letter. (No proof of loss of any of these letters was made or of any search for them, nor was any attempt made to account for their non-production.)" The admission of this evidence was palpable error. The witness is asked, both by court and counsel, to testify to the contents of letters without any foundation by proof of loss for the introduction of such secondary evidence. Code Civ. Proc. §§ 1855, 1937. Moreover, her answers themselves do not fairly state the contents, but under leading questions from her counsel she is permitted to give her own judgment and conclusion as to the meaning of the contents of the letters.

There is finally to be considered the question whether or not plaintiffs followed the trust fund in its mutations, and have sufficiently identified it to avoid the rule laid down in Lathrop v. Bampton, 31 Cal. 17, which places the beneficiary who is unable so to follow the trust funds in the position of a general creditor of the estate. The drug business was bought by Michael Byrne, Jr., in 1883. He conducted it until his death, in 1887. After his death it was conducted on behalf of his estate by the administratrix thereof for a period of something over two years. During that time the estate bought goods and supplies for the store to the amount of $2,469.63. There were outstanding and unsettled accounts due to creditors of the estate who had furnished supplies for the store. For a period, then, of over eight years, a business which had been originally purchased—the stock, fixtures, and good will—for $2,500 had been in active operation. During the last two years of the life of the business there had been purchased goods equaling in value the total amount paid for the property. During all of this time the store was conducted by or on behalf of Michael Byrne, Jr. His credit was used for the purchase of supplies. The approved claims of creditors for goods furnished to the business exceeded the sum of $1,000. Of the stock in the store at the commencement of this action over $1,000 in value represented by these claims were bought; therefore, not by the moneys of the trust, but upon the credit of Byrne. Yet the total value of the business at the time of the action was but $1,900. It is not and cannot be successfully contended that plaintiffs, during all this time, and through all of these mutations, and under these circumstances, can trace the original $2,500 or its proceeds. If they cannot, then they are relegated to the position of general creditors of their father's estate. Had their action been commenced against their father during his lifetime, a court of equity would have imposed upon him the duty of segregating the trust property from any property of his own which he might have commingled with it, but upon his death other rights intervened,—the rights of the creditors here made defendants; and thus comes into application the rule, and thus appears the reason for it, that the plaintiffs, in order that the creditors may not suffer unjust loss, must be able to separate their own property from the general assets of the estate, or, failing to do this, must take their place along with the general creditors, and, like them, look to those assets for reimbursement. While the determination as to whether or not the trust funds have been followed and identified so as to permit of segregation from the general assets is one of fact, yet the uncontradicted evidence in this case clearly fails to establish the required identity. The judgment and order are reversed, and the cause remanded.

We concur: TEMPLE, J.; HARRISON, J.

BEATTY, C. J. (concurring). I concur in the judgment, and in so much of the opinion of Justice HENSHAW as deals with the exceptions to rulings of the superior court upon objections to evidence. I concur also in his conclusion that the fund in controversy is not sufficiently identified as the property of the plaintiffs. In respect to this matter, however, I base my conclusion upon grounds different in some respects from those stated in the principal opinion. If the findings of the superior court were in other respects supported by the evidence, the mere fact that at the death of the trustee a part of the stock in the drug store remained unpaid for would not, in my opinion, destroy the identification of the trust property. Assuming that the store and good will were purchased with money of the trustor; that the business was thereafter carried on by the trustee for the benefit of the plaintiffs at a profit; that the stock was kept replenished out of the receipts of the business; that profits were received and appropriated by the trustee to an amount exceeding all expenses of the trust,—in such case it seems clear to my mind that the store and business at the death of the trustee were sufficiently earmarked as the property of the beneficiaries, despite the fact that considerable bills for stock on hand remained unpaid. This circumstance alone could not have furnished a ground for subjecting the fund to the claims of general creditors of the trustee, and, as to those creditors whose claims were on account of stock furnished to the store, they could be protected in this proceeding (to which they are parties) by preferred payment out of the fund, for they are creditors, not of the trustee, the agent, but of the beneficiaries, the principals. But the trouble I find with the case is that there is no evidence to support several material findings attacked by the specifications. There is no evidence sufficient to sustain the finding that the business was conducted at a profit, that the stock was replenished out of the receipts of the business, or that it paid the expenses of the trust, and for this reason I conclude that the stock on hand at the death of the trustee was not earmarked as the property of the plaintiffs.

McFARLAND, J. I dissent. I see no sufficient reason for reversing the judgment. The whole record shows, in my opinion, that the errors for which the judgment is reversed are immaterial, and that the drug store was sufficiently identified as trust property.

(112 Cal. 627)

## Ex parte TURNER. (Cr. 172.)

(Supreme Court of California. May 15, 1896.)

BAIL—PENDING APPEAL—DISCRETION.

Admission to bail after conviction, pending appeal, is matter of discretion, primarily vested in the trial judge, whose action therein will not be disturbed except in the instance of manifest abuse.

In chambers. Application on the part of J. F. Turner for admission to bail pending appeal. Denied.

Geo. A. Knight, for petitioner.

VAN FLEET, J. The petition shows that the prisoner, Turner, has been convicted of forgery in the superior court of the city and county of San Francisco, and sentenced to confinement in the state prison (for what term does not appear); that he has taken an appeal to this court from the judgment; and that a certificate of probable cause has been granted by the judge before whom he was tried, and he is now confined in the county jail of said city and county, pending the determination of such appeal. The petition also shows that, since his conviction, application has been made by him to the trial judge for admission to bail, upon the ground that he is in ill health, and his life is endangered by his confinement; and that such application was denied. The present application is now made to me upon the same ground, and has been submitted upon substantially the same evidence and showing as that made before the trial judge. This evidence tends to show that the prisoner was not at the date of his being taken into custody a man of robust health, and that during his confinement his health has further declined, and he has lost flesh and strength, to some extent, and that there is, in the judgment of his physicians, danger arising from his present condition that his health may be permanently and dangerously affected by further confinement at the present time.

Admission to bail after conviction is purely a matter of discretion, and not of right (Pen. Code, § 1272), and it has been several times held by the supreme court of this state that such discretion should not be exercised in favor of the liberation of a defendant pending appeal, except in instances where circumstances of an extraordinary character have intervened since conviction, which make such action obviously proper (Ex parte Smallman, 54 Cal. 36; Ex parte Marks, 49 Cal. 681; Ex parte Brown, 68 Cal. 183, 8 Pac. 829; Ex parte Smith, 89 Cal. 79, 26 Pac. 638). The discretion given in cases of this kind is vested primarily in the court that tried the cause, or the judge thereof (People v. Perdue, 48 Cal. 552; People v. January, 70 Cal. 34, 11 Pac. 326); and the determination of the latter should not be disturbed or ignored except in an instance of manifest abuse. Such an instance is not here disclosed. There is nothing in the case showing the intervention of any such extraordinary circumstance as would justify holding that the application was improperly denied by the judge of the trial court. The evidence does not show that there is such imminence of dangerous results to the life or health of the defendant as to obviously require his removal from the county jail at this time. Should more serious consequences of his confinement hereafter manifest themselves, and such as to render it proper that bail should be allowed, there is nothing to preclude another application for the purpose. Such application should, however, always be made in the first instance, if practicable, to the judge before whom the defendant was tried. Ex parte January, supra. Application denied.

113 Cal. 97

## BARRERE v. SOMPS. (S. F. 127.)

(Supreme Court of California. July 3, 1896.)

In bank. Action by J. A. Barrere against P. G. Somps. Verdict for plaintiff, and defendant appeals. From a judgment in department reversing such verdict (45 Pac. 177), plaintiff appeals. Modified.

PER CURIAM. A rehearing is denied. The opinion heretofore filed is modified by striking therefrom the whole of the last paragraph commencing, "The qualification laid down," down to and including the words "about which no opinion is expressed."

113 Cal. 409

## BANK OF CALIFORNIA v. J. L. MOTT IRON WORKS et al. (S. F. 274.)

(Supreme Court of California. July 22, 1896.)

TRIAL — FINDINGS — SUFFICIENCY — GARNISHMENT —APPEAL—PARTY AGGRIEVED.

1. On the issue as to right to the money in dispute between a garnishing creditor of the payee of a note and an assignee thereof, a finding that, in a suit by such creditor against the payee, a writ of attachment was placed in the hands of the sheriff for service, "and thereafter the said sheriff levied and served the said writ of attachment, by notifying" the plaintiff, to whom the note had been sent for collection, "that all the goods, moneys, and chattels of the defendant," the payee of the note, were levied upon in pursuance of the writ, does not sufficiently show that the writ of attachment was served on the defendant.

2. A party in possession of a negotiable note, indorsed in blank by the person to whose order it was made payable, is prima facie the owner thereof, and may question the validity of garnishment proceedings by a creditor of the payee.

3. Where a note is sent by an indorsee to a bank for collection, statements by another bank, to which the note was sent by the first bank, are inadmissible against the indorsee to defeat his title.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Interpleader by the Bank of California against the J. L. Mott Iron Works and others. From a judgment for the defendant iron works, defendant S. A. Monsarrat appeals. Reversed.

R. H. Countryman, for appellant. Thornton & Merzbach, for respondent. Allen & McAllister, for plaintiff.

McFARLAND, J. The plaintiff, the Bank of California, brought this action against the J. L. Mott Iron Works, the West Coast Plumbing Supply Company, and S. A. Monsarrat, defendants. The plaintiff and the two defendants first above named are corporations. The plaintiff alleged that it had on deposit, and held as a banking corporation, $627, which was claimed by each of said defendants hostilely to each other. Plaintiff alleged that it had no interest in said money, and asked to be allowed to pay the same into court, and that said defendants be compelled to interplead and litigate their several claims to said money among themselves. The defendant the West Coast Plumbing Supply Company made default; and the said defendants, the Mott Iron Works and said Monsarrat, filed pleadings in which each claimed title to said money. They consented that plaintiff deposit said money in court, and be relieved from any further liability in the matter. The plaintiff came into possession of said money in this way: A certain firm, called J. L. Barker & Co., had executed its note to the said defendant the West Coast Plumbing Supply Company for $550, payable to the order of said company, and said note had been sent to the plaintiff, the said bank, for collection by one Louis E. Arnold, inclosed in a letter dated at Vancouver, B. C., with directions that said bank should collect the same, and remit the proceeds to said Arnold, at Yokohama exchange. The bank collected the money due on said note, and said money is the subject of this action.

The Mott Iron Works contends that it commenced an action against the said plumbing company, in which it had an attachment issued; and that, by virtue of said writ of attachment, it garnished said money in contest in the hands of the said bank plaintiff; and that it was the money of said company. It also claims that it recovered judgment against said plumbing company in said action. The said defendant Monsarrat contends that said note belonged to said Arnold, and that the said Arnold assigned to said defendant the moneys collected upon said note by said bank. The case does not seem to have been very closely tried, and the record presents the conflicting claims of the parties in a rather unsatisfactory manner. There are findings of the court which are not sustained by the evidence, though most of the findings not thus sustained are immaterial. For instance, the court finds that "all the defendants" claim said money, and demand payment for the same, whereas the defendant the plumbing company does not claim said money, but, on the other hand, made default; but this finding is immaterial. It is also found that "the defendant West Coast Plumbing Supply Company indorsed and delivered said promissory note to the plaintiff, the Bank of California, for collection"; and there is no evidence to support this finding, but this finding is not material, except, perhaps, in one view of the case, which will be noticed hereafter. There are some other findings not sustained by the evidence which are also immaterial. There are also exceptions to rulings of the court about matters which are immaterial. The court rendered judgment in favor of the Mott Iron Works, and Monsarrat appeals from the judgment, and from an order denying his motion for a new trial.

Appellant objected to the introduction of the judgment in favor of the Mott Iron Works against the said plumbing company, upon the ground that the year allowed for appeal in that case had not expired. It will not be necessary to determine the validity of that exception, because the judgment must be reversed for another reason, and that point will probably not arise upon another trial. The claim of the plaintiff to the money in contest rests upon its allegation that it procured the Bank of California to be garnished in said action which it had brought against the said plumbing company, and the court found that in said action "a writ of attachment in due form of law was issued, and placed in the hands of the sheriff of said city and county of San Francisco for service; and thereafter the said sheriff levied and served the said writ of attachment by notifying the plaintiff, the Bank of California, that all goods, moneys, and chattels of the defendant the West Coast Plumbing and Supply Company were levied upon and attached by him, in pursuance of the terms of said writ." But we are unable to find anywhere in the record any evidence that said writ of attachment ever issued, or was ever served upon the said bank. That being so, we see no basis for a judgment in favor of the said Mott Iron Works, respondent.

Respondent contends that, whether or not the court committed any errors in its favor, or erroneously entered a judgment for it, still the appellant has no cause to complain, because he has shown no right or title whatever to the proceeds of said note. But this position is not tenable. The appellant's assignor, Arnold, was in possession of the note. He sent it to the Bank of California for collection, and it was collected by said bank, and the proceeds placed to the credit of said Arnold. The court found that said note had been indorsed by the said plumbing company, although it erroneously found, without any evidence, that it had been so indorsed by said plumbing company to the Bank of California; and, under these circumstances, it cannot be said that no right at all to the note was shown to be in said Arnold. A party being in possession of a negotiable note, either payable to bearer or indorsed in blank by the person to whose order it is made payable, is at least prima facie the owner of the note, although, of course, such prima facie ownership may be swept away by proper rebutting evidence. If on another trial the respondent shows that it is entitled to said money by virtue of its attachment and judgment against the plumbing company, it will be in a position to attack the claim of the appellant or his assignor to said money; but, not having shown any title itself to the money, it is not now in a position to maintain a judgment in its favor.

It seems that the note sent by Arnold to the Bank of California was forwarded by the latter to the Union Savings Bank of Oakland for collection, and a letter written by the said savings bank to the Bank of California with regard to said note was introduced in evidence by the respondent, over the objection of the appellant. This objection should have been sustained, for we see no ground upon which that letter was in any way evidence in this case as against the appellant.

It seems that there was another note for $87, made by one Brownlie, which was also inclosed in the letter from Arnold to the Bank of California. It does not appear to whom this note was made, and it is not mentioned in the complaint or in the findings; yet its amount seems to have been included in the judgment in favor of respondent. Appellant makes a point in his brief about the Brownlie note; but we cannot discover that the record in any way presents any question whatever about this note, and therefore it cannot be here considered.

The court properly overruled appellant's objections to the affidavit and undertaking on attachment.

There was sufficient evidence that the respondent was a corporation, and the objections to that evidence were properly overruled.

We do not see any other points in the case necessary to be now considered. Questions relating to the validity or admissibility of all judgment rolls and pleadings in other cases offered or received in evidence, and all facts relating thereto, if such evidence shall be offered upon another trial, and all questions relating to other matters not expressly passed upon in this opinion, are to be regarded, if arising on another trial, as open questions. Judgment and order appealed from reversed, and cause remanded for a new trial.

We concur: HENSHAW, J.; TEMPLE, J.

(5 Cal. Unrep. 398)

## QUIGGLE v. PROUTY. (S. F. 105.)

(Supreme Court of California. July 16, 1896.)

REAL-ESTATE BROKER — COMMISSIONS — CONTRACT.

A real-estate broker who makes a contract with a property owner can recover commissions only in accordance with such contract.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Charles Quiggle against Simon Prouty. Judgment for defendant, and plaintiff appeals. Affirmed.

Johnson & Johnson, for appellant. Albert M. Johnson, for respondent.

TEMPLE, J. The only question involved in this appeal is whether plaintiff is entitled to recover commissions for the sale of a lot at Sacramento. Defendant placed with plaintiff, as broker, a certain lot for sale, to remain in his hands for one year, with the condition that "if a sale of said property shall be negotiated during that time by the said Chas. Quiggle, directly or indirectly, for the amount stipulated, or any less amount which I may accept, * * * I promise to pay the said Chas. Quiggle a commission of five per cent. on the amount of said sale." A broker's contract, like any other, is governed by its terms. There is no evidence showing, or tending to show, that plaintiff negotiated a sale of the property placed in his hands. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(113 Cal. 639)

## WILCOX v. LUCO. (S. F. 179.)[1]

(Supreme Court of California. July 16, 1896.)

COURTS—JURISDICTION—CONSUL OF FOREIGN NATION.

Under Const. U. S. art. 3, § 2, providing that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers, and consuls, a state court has no jurisdiction in a civil case over the person of a consul of a foreign government resident in the state.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Alfred A. Wilcox against Juan M. Luco. Judgment for defendant, and plaintiff appeals. Affirmed.

Orestes J. Orena (William Rix, of counsel), for appellant. I. N. Thorne, for respondent.

McFARLAND, J. The only question presented in this case is whether the superior court had jurisdiction in a civil case over the person of the defendant, who is the consul general of Chili for the United States, resident at San Francisco, Cal. The court below held that it had no jurisdiction, and the plaintiff appeals from the judgment. The question was determined adversely to the contention of appellant by this court in the case of Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512. Appellant contends that said case should not be considered as conclusive authority upon the question, because at the time it was decided the ninth section of the judiciary act of 1789 expressly provided that the jurisdiction of the United States over consuls was exclusive, and that since then, on February 18, 1875, the congress of the United States, by an act entitled "An act to correct errors, etc., in the Revised Statutes," repealed the said section of the said act of 1789, and that the court in said case of Miller v. Van Loben Sels assumed that said section 9 was still in existence, and that its attention was not called to the said repeal of said section. The attention of the court in that case was called to such repeal by a petition for rehearing, but it is contended by appellant that the court must be deemed to have not considered a point presented for the first time in such petition. Whether that decision should or should not be considered as final authority upon the question, we are satisfied that the rule there declared was correct, even in view of the fact that said section of the act of 1789 has been repealed. By section 2 of article 3 of the constitution of the United States it is provided that the judicial power of the United States shall extend "to all cases affecting ambassadors, other public ministers and consuls." By this provision consuls are put on the same footing with ambassadors. Under our system the government of the United States is the only sovereign having relations with foreign countries under the law of nations, and all dealings with the representatives of foreign nations must be by the courts or other agencies of the government which is alone sovereign in that regard. It is the right and privilege of the foreign government to be thus treated. In Davis v. Packard, 7 Pet. 276, it was contended that Davis, who was consul general of the king of Saxony, had waived his privilege by not setting it up at the proper time in the court below. The supreme court of the United States, however, did not sustain this contention, and said: "If this was to be viewed merely as a personal privilege, there might be grounds for such conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our constitution and law seem to put consuls on the same footing in this respect. If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government with which rested the regulation of all foreign intercourse should have cognizance of suits against the representatives of such foreign governments." We think, therefore, that under the said provision of the constitution of the United States there was no jurisdiction of the case at bar in the superior court of this state. The judgment is affirmed.

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[1] Rehearing granted.

We concur: HENSHAW, J.; TEMPLE, J.

113 Cal. 324

## GAVIN v. SWAIN et al. (S. F. 64.)

(Supreme Court of California. July 16, 1896.)

Action to Quiet Title — Pleading and Proof — Ownership.

Ownership or seisin of real property is a fact that may be pleaded, proved, and found as a material, ultimate fact in any case involving title to the property.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Charles J. Gavin, administrator of Ellen Gavin, deceased, against Frank Swain, executor of Mary J. Holmes, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Dunne & McPike, for appellant. J. M. Whitworth and H. G. Platt, for appellees.

VANCLIEF, C. This action was commenced against Mary J. Gavin, Patrick Gavin, and C. S. Laumeister to quiet plaintiff's alleged title to a piece of land in the city of San Francisco. Pending this action, Mary J. Gavin married, and thereby took the name Mary J. Holmes, and died before judgment, and her executor, Frank Swain, was substituted for her as defendant. The defendant Mary J. Gavin alone answered, denying plaintiff's alleged title and right of possession; and alleging that, at and before the commencement of the action, she was, and still is, the owner of the piece of land described in the complaint, and is entitled to the possession thereof. Upon the issues thus raised, the court below found in favor of the defendant, executor of Mary J. Holmes, and rendered judgment accordingly. The plaintiff brings this appeal from the judgment, upon the judgment roll, and without any bill of exceptions.

The only point made by counsel for appellant is that there is no sufficient finding of facts to sustain the judgment. The court found that plaintiff's intestate, Ellen Gavin, never did, and that her estate does not now, "own or possess or have any right, title, or interest or estate in or to the real property mentioned and described in the complaint, or any part thereof, and never was, and is not now, entitled to the possession of the same, or any part thereof"; and further found that defendant's testatrix, Mary J. Gavin, "was at the commencement of this action, and since the 18th day of March, 1893, up to and at the time of her death (December 7, 1893), the owner and seised in fee and entitled to the possession of said property, and the whole thereof." It is contended that these are not findings of facts, and especially that the findings that plaintiff's intestate never owned or possessed any interest or estate in the land in question, and that defendant's testatrix was, at the commencement of this action and at the time of her death, "the owner and seised in fee" of said land, are mere conclusions, "reached by the application of rules of law to an ascertained fact or collection of facts." There is no merit in this point; and the decisions in this state overruling it are so numerous that it seems unaccountable that it should be relied upon or contended for by counsel at this time. That ownership, or (in technical language) seisin, of real property, is a fact that may be pleaded, proved, and found as a material ultimate fact in all cases involving title to real property, is unquestionable in this state. Payne v. Treadwell, 16 Cal. 244; Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Daly v. Sorocco, 80 Cal. 367, 22 Pac. 211; Gill v. Driver, 90 Cal. 72, 27 Pac. 64. Indeed, the plaintiff has so, and not otherwise, pleaded it. It is averred in her complaint, simply, that plaintiff is "the owner and entitled to the possession of" the land in question, without any reference to the source of title, or to the manner or means of its acquisition. It follows, I think, that the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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113 Cal. 326

## PATRIDGE v. BUTLER. (S. F. 57.)

(Supreme Court of California. July 16, 1896.)

CORPORATIONS—STOCKHOLDER'S LIABILITY—ORIGINAL CONTRACT—ACCOUNT STATED.

In an action to enforce a stockholder's individual liability for a debt due from the corporation, the complaint averred that plaintiff's testator, under contract with the corporation, performed certain labor for it, for which the company agreed to pay the sum of $6,977.16; "that on or about the 10th day of May, 1892, all of said work was completed, and on or about the 1st day of June, 1892, an account of said work was stated," and there was found due to plaintiff's testator the sum of $6,800, which sum defendant agreed to pay; that on June 29, 1892, defendant, as president of the corporation, and for it, paid on account of said sum of $6,800 the sum of $1,500, and that no further payment had been made. *Held* sufficient, as the cause of action pleaded was on the original contract, and not on an account stated.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Anne E. Patridge, executrix of the last will of H. C. Patridge, deceased, against C. C. Butler, to enforce a stockholder's liability against defendant for his proportionate share of a corporation's indebtedness to plaintiff's testator. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rodgers & Paterson and James L. Robison, for appellant. D. H. Whittemore, for respondent.

HENSHAW, J. Defendant's demurrer to plaintiff's complaint having been overruled, and his motion to strike out certain portions of the same having been denied, he refused to answer, and takes this appeal from the judgment thereafter entered against him.

Plaintiff, executrix, prosecuted the action to enforce a stockholder's liability against Butler for his proportion of the debt due her testator from the S. S. Construction Company, a corporation. After proper averments showing the number of shares of stock owned by Butler and the total number of subscribed shares of the capital stock, she pleaded that her testator, under contract with the corporation, performed certain labor for it, for which the company agreed to pay the sum of $6,977.16. She then alleged: "That on or about the 10th day of May, 1892, all of said work was completed, and on or about the 1st day of June, 1892, an account for said work was stated between the said S. S. Construction Company and said H. C. Patridge, and upon said statement there was found due to said H. C. Patridge the sum of $6,800, which sum defendants agreed to pay. That on or about the 29th day of June, 1892, defendant, C. C. Butler, as president of said S. S. Construction Company, and for said company, paid on account of said sum of $6,800 the sum of $1,500, and that no part of said sum of $6,800, except said sum of $1,500, has been paid."

The principal argument upon the demurrer, as well as upon the motion to strike out, is that the cause of action here pleaded is not upon the original debt, for which alone there is a statutory liability against the stockholder, but is on a new cause of action under the contract of stated account (Littlefield v. Nichols, 42 Cal. 372; Coffee v. Williams, 103 Cal. 550, 37 Pac. 504), upon which latter the stockholder may not be held. It is true that the stockholder's liability under the statute is primary, and for his proportion of the original indebtedness or liability. Redington v. Cornwell, 90 Cal. 63, 27 Pac. 40; Hunt v. Ward, 99 Cal. 612, 34 Pac. 335; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047. But, without considering the question whether an account stated, since it constitutes a new contract, giving rise to a new cause of action, may not in itself be treated as a new or original liability for which stockholders would be liable, we are of opinion that the demurrer in the case was properly overruled, and the motion to strike out properly denied.

The action is based upon the original contract and indebtedness, which are specifically pleaded. In an action upon an account stated, these averments would have no proper place. An account stated is a mere acknowledgment of the amount of an existing liability between the parties. From it the law implies a promise to pay the admitted amount. Thereby arises a new and independent cause of action, so far that a recovery may be had without setting forth or proving the original contract or accounts, or the separate items of liability from which the balance results. Coffee v. Williams, supra; Throop v. Sherwood, 9 Ill. 92; Chace v. Trafford, 116 Mass. 529; Foster v. Allanson, 2 Term R. 479; Bouslog v. Garrett, 39 Ind. 338; Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; 2 Greenl. Ev. § 127. In this case the plaintiff, after averring facts establishing the creation and existence of the original indebtedness, proceeded, as was proper, to show a reduction of the amount by way of account stated. Of this reduction the stockholder was entitled to the benefit, as he would have been had there been an actual payment by the company upon the original debt. These averments, then, were not designed to found a cause of action upon the stated account, but were set forth as a transaction between the creditor and the corporation by which the corporation's debt was diminished, and accordingly the stockholder's liability therefor. Thus these allegations amounted to a mere admission by plaintiff that the debt had been reduced from the original amount. Whether reduced by payment or by convention was one and the same thing to the stockholders, who profited by it. Upon both the creditor and the corporation the agreed amount, in the absence of fraud or mistake, was binding. It became plaintiff's duty, in pleading, to show how the debt had been reduced from its original amount. How she could do this in any other or better way than was adopted we do not perceive. The stockholder was still at liberty to repudiate the reduction if he saw fit, and he also had full liberty to assail the primary transaction, and show, if he could, that no indebtedness existed. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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113 Cal. 321

## WETMORE v. C. A. WETMORE CO.

(S. F. No. 2.)

(Supreme Court of California. July 16, 1896.)

CONTRACT—CONSTRUCTION — CONSIDERATION FOR SERVICES.

Under a contract, signed by W. and accepted by the W. Company, reciting that, in consideration of the purchase by K. of certain shares of the W. Company, and the payment by K. of $10,000, W. agrees to render certain services to the company for five years, W. is entitled to no other consideration for his services than that stated in the contract.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Clarence J. Wetmore, assignee of Charles A. Wetmore, against the C. A. Wetmore Company, a corporation. Judgment for defendant. Plaintiff appeals. Affirmed.

Geo. W. Towle, Jr., and T. C. Van Ness, for appellant. A. A. Moore, J. C. Martin, T. C. Coogan, and J. H. Meredith, for respondent.

VANCLIEF, C. C. A. Wetmore having been adjudged an insolvent debtor, the plaintiff, Clarence J. Wetmore, was elected assignee, and to him all the insolvent's property was assigned in accordance with the provisions of the insolvent act of 1880. Plaintiff alleges, in his complaint, that at the time of the assignment the defendant was indebted to said insolvent in the sum of $2,500 for personal services of the latter from July 16, until December 21, 1891, in superintending defendant's winery and manufacturing wines; that such indebtedness passed to plaintiff by said assignment, and has not been paid,—and prays that he may have judgment against the defendant for said sum. The answer of the defendant denies that defendant employed Charles A. Wetmore to perform any services whatever, and denies that he performed any services for the defendant, except such as he performed under and in accordance with the following written contract: "San Francisco, July 16, 1891. In consideration of the purchase of thirteen hundred shares of the capital stock of the C. A. Wetmore Company by C. K. Kirby, and the payment of ten thousand dollars by said Kirby, I hereby agree to give my personal supervision to the business of the company, attend to the selection of the materials, the making, blending, bottling, and selling of all wines connected with the wine business for and during the full period of five years from the date hereof, for the sole benefit of said company, and that I will not engage in or use any of my skill or knowledge in the wine business, in any form whatever, for the benefit of myself or any party or parties other than the above named company, or their successors, during the full period of the time above mentioned. [Signed] Charles A. Wetmore. Witness: Maurice Clark." Indorsed across the face of original as follows: "Accepted by the C. A. Wetmore Company by C. K. Kirby, business manager. This is a true copy. Maurice Clark." Admits that Charles A. Wetmore performed such services as required of him by said contract until December 21, 1891, and alleges that on said 21st day of December, 1891, said contract was canceled and annulled, and that each party thereto was then released from all obligations thereby incurred. The findings by the court upon all the material issues of fact were in favor of the defendant, and the judgment was in accordance with the findings of fact. The plaintiff has appealed from the judgment, and also from the order denying his motion for a new trial.

No point is made by appellant on the appeal from the judgment, nor is any error in law specified or complained of, even by implication, except that the court erred in its construction of the contract of July 16, 1891. As to insufficiency of the evidence, the only points made, or specified in the statement, are the following: "(a) There is no evidence to show that said Charles A. Wetmore ever, either with said Kirby as an individual, or with him as business manager of said C. A. Wetmore Co., agreed to render services to C. A. Wetmore Co. without being paid therefor the reasonable value of the same. (b) There is no evidence to show that any agreement was ever made or entered into between said Charles A. Wetmore and the C. A. Wetmore Co., relating to the services of said Wetmore to said company, save the contract of July 16, 1891. (c) That under the contract of July 16, 1891, Charles A. Wetmore is entitled to compensation for services rendered in pursuance thereof." From these specifications, as well as from the brief of counsel for appellant, it is manifest that the only matter in controversy here is the question whether or not the court below misconstrued the contract of July 16, 1891, to the prejudice of appellant. By the plain and unambiguous terms of that contract the appellant agreed to perform the services the reasonable value of which he seeks to recover, "in consideration of the purchase of thirteen hundred shares of the capital stock of the C. A. Wetmore Company by C. K. Kirby, and the payment of $10,000 by said Kirby." It is not questioned that Kirby purchased the stock, nor that he paid the $10,000; and it is admitted that plaintiff performed the services under that contract, and that there was no other contract between the parties relating to the services of the plaintiff. I think the court correctly concluded that plaintiff was entitled to no other consideration for his services than that stated in the contract, and for which he expressly agreed to perform them. Besides, the evidence clearly shows that both parties to the contract so construed and acted upon it until December 14, 1891, seven days prior to the cancellation thereof, and that on December 21, 1891, the contract was canceled and a settlement made with plaintiff by another contract, which, among other things, contains the following: "That certain other agreement between said parties, dated July 16, 1891, relating to the services of the party of the first part [C. A. Wetmore] in said corporation, is canceled, set aside, and annulled, and each of said parties and said corporation is discharged of and from each and every obligation on him or it binding by the terms thereof." I think the judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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113 Cal. 345

## JEFFERS et al. v. EASTON, ELDRIDGE & CO. et al. (S. F. 174.)

(Supreme Court of California. July 17, 1896.)

LEASEHOLD—ASSIGNMENT—IMPLIED WARRANTY—FAILURE OF ASSIGNOR'S TITLE—PAYMENT OF CONSIDERATION.

1. Where there is an assignment in toto of a lease for a number of years, there is an implied undertaking to make out the lessor's title to the demised premises and that of the assignor to the lease itself, and the failure of the title of the assignor to the leasehold attempted to be assigned constitutes a valid defense to an action to recover the purchase money from the assignee.

2. The assignee in possession of a leasehold is not estopped from denying the title of his assignor, and may yield it to a demand of the true owner which he could not legally resist.

Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by M. S. Jeffers and another against Easton, Eldridge & Co. and others to recover moneys for an assignment of a leasehold interest. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Estee & Miller, for appellants. C. F. Hanlon, for respondents.

McFARLAND, J. This is an action brought by the plaintiffs, Jeffers & Wright, to recover certain moneys alleged to be due upon an assignment by them of a certain leasehold interest to the defendants Easton, Eldridge & Co., a corporation. Certain individual defendants are also sued. Judgment went for defendants, and plaintiffs appeal from the judgment, and from an order denying a new trial.

In 1886 one George Hyde executed to the plaintiffs, Jeffers & Wright, a written lease of certain real property in the city of San Francisco, for a term of eight years and six months, at a monthly rental of $175. Plaintiffs went into possession of the leased premises, and in 1889 they procured from Hyde an extension of the term of the lease until January 1, 1896. On February 1, 1890, the plaintiffs and the said corporation executed a written instrument by which the plaintiffs sold, assigned, and transferred said leasehold interest to said corporation, and said corporation promised to pay to Hyde the said rent of $175 per month, and also to pay plaintiffs, in consideration of said assignment, the sum of $275 per month until the said 1st day of January, 1896. Plaintiffs delivered possession of the said premises to said defendant corporation, and the latter paid the $175 to Hyde and the said $275 to plaintiffs up to and including the month of August, 1890, but since then have refused to pay plaintiffs any money whatever. This action is brought to recover said two sums of money for each of the seven months, commencing with September, 1890, and ending with March, 1891. The lessor, George Hyde, died in August, 1890, and soon afterwards his widow, Ellen J. Hyde, and certain of her children, informed the said corporation that at the time of the execution of said lease, and of said extension thereof, they were the owners in fee of said leased premises, and ever since had been such owners, and that at said times the said George Hyde had no right, title, or interest to or in said premises, and had no right or authority to make said lease or said extension thereof, and they demanded that the corporation give up possession to them, and threatened to put the said corporation out of possession, and employed an attorney to do so. This was the first intimation which said defendant had that said leasehold was not perfectly valid, as it had been represented to be by plaintiffs. The defendant immediately consulted its attorneys, who, after investigation, advised it that the title to the leasehold interest was worthless, and that an action by Mrs. Hyde and her children for possession, or for use and occupation of the premises, could not be successfully defended. There was then considerable negotiation between the defendant and the plaintiffs about the defect in the title, which appears to have resulted in nothing definite. Defendant then told Mrs. Hyde to take possession, and claims that she did it, but defendant did not remove its effects from the premises, and Mrs. Hyde did not take actual possession; but, without going out of actual possession, the defendant took a lease of the premises from Mrs. Hyde and said children, and has since remained in possession as their tenants.

The court found that on or about June 30, 1886, the said George Hyde was seised in fee and possessed of the said leased premises, and on that day executed a certain written instrument marked "Exhibit A," which was recorded August 9, 1866. By this instrument the said leased premises, together with a large amount of other property, were granted and conveyed to Ellen J. Hyde for her life, with remainder to certain children of the parties, therein expressly named. There is also a provision in the conveyance that the said Ellen shall use the rents and profits of the whole property conveyed for the support and maintenance of herself, and also for the maintenance and education of said children, and the latter are therefore named in the findings and evidence as "beneficiaries." The court also found "that Ellen J. Hyde and the beneficiaries in the instrument set forth as Exhibit A in the amended answer were the only persons who, at any time since 1866, held any legal or equitable title to the premises in said instrument described, or any part thereof, and that George Hyde at no time since 1866 was the owner of the whole or any part thereof, or was entitled to make and execute said lease and the extension thereof." The court also found that at the time of the said assignment the plaintiffs represented to said corporation that said George Hyde was the owner of said premises, and that plaintiffs were entitled under said lease to the possession of said premise until January 1, 1896, and that by reason of said representations said defendant was induced to take said assignment in ignorance of the true state of the title. As to the findings above stated, it is sufficient to say that they are supported by the evidence. The court held that the consideration for the promise of the said defendant to pay said sums of money monthly for said assignment had failed, and the question to be determined is whether or not, under the circumstances above stated, the failure of the title of plaintiffs to the leasehold attempted to be assigned constitutes a valid defense to this action. The question must be answered in the affirmative.

Counsel for appellants argued the case mostly upon the theory that the relation of landlord and tenant existed between plaintiffs and the corporation respondent. But there was no such relation. The assignment was of the whole term. There was no underletting,—no interest left in the assignors,—and the relation was simply that of seller and purchaser. Smiley v. Van Winkle, 6 Cal. 605; Wood, Landl. & Ten. p. 145, § 65. Neither do the rules which govern conveyances of real property apply to assignments of estates for years. A term for years is only personal property,—a chattel real. "An estate for life, even if it be per autre vie, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate." 2 Bl. Comm. p. 143. See, also, pages 385-387. "All leases for years are held by law to be of less value, perhaps it would be more proper to say of less dignity, than estates for life; estates for life being freeholds, and for years but chattels, and regarded as part of the personal estate, and cast upon the executor." 1 Wood, Landl. & Ten. p. 143; see, also, page 149, § 73. Under the common law leasehold estates of the wife went to the husband as personal property. Id. p. 223. In the Revised Statutes of New York there was a provision that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special provisions or not" (1 Rev. St. p. 738, § 140); and the court of appeals of that state held that the language did not include a term for years, because it is not real estate, and that in a grant of such term there is an implied covenant of quiet enjoyment, not only against the grantor, but against others claiming by lawful title. Mayor, etc., v. Mabie, 13 N. Y. 151. The court there say: "Terms for years fall within the definition of personal property. They go to the executors like other chattels, and although they are denominated chattels real, to distinguish them from mere movables, they are not, when speaking with legal accuracy, considered real estate." The common law upon the subject has not been changed by our statutes. The provision of section 1113 of the Civil Code that only certain enumerated covenants shall be implied in transfers of property is expressly limited to a conveyance by which "an estate of inheritance or fee simple is to be passed"; and by section 765 the common-law distinction between freehold estates and estates for years is followed, and it is declared that "estates for years are chattels real." The same distinction is to be found in section 14, and in sections 657-663 of the same Code. There is a marked difference between things real, and an interest or estate in things real. "The nature of the thing itself, therefore, does not determine the character of any particular estate that may exist in it, whether personal or real, but the extent and duration of the estate." 2 Cooley, Bl. p. 15, note 1.

An assignment of a term for years is therefore governed generally by the rules applicable to the sale of personal property, and on such sale, while as to the quality of the thing sold caveat emptor is the general rule, the seller impliedly warrants the title. Civ. Code, § 1765; 2 Bl. Comm. p. 451; Benj. Sales, p. 631; 1 Pars. Cont. (8th Ed.) p. 573 et seq. And the rule does not depend upon the knowledge, or want of knowledge, of the vendor as to the real state of the title, or upon deceit or fraud practiced by him. Parsons correctly states the rule as follows: "In this country it is now well settled by adjudications in many of the states that the seller of a chattel, if in the possession, warrants by implication that it is his own, and is answerable to the purchaser of it if taken from him by one who has a better title than the seller, whether the seller knew the defect of his title or not, and whether he did or did not make a distinct affirmation of his title." Pars. Cont. p. 574. In the case at bar appellants were in possession, but our Code does not except a seller out of possession, and provides, generally, that "one who sells, or agrees to sell, personal property as his own thereby warrants that he has a good and unincumbered title thereto." Civ. Code, § 1765. In Souter v. Drake, 5 Barn. & Adol. 992, the rule was expressly applied to the sale of a lease, and it was held that in a contract for such sale there is "an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity." To the same effect is Farrer v. Nightingal, 2 Esp. 639.

The court below therefore correctly held that the consideration for respondent's promise to pay the monthly installments sued on as purchase money for the term of years had failed, and that therefore appellant had no cause of action. The total breach of a warranty of title—either express, as in case of a sale of real estate, or implied, as in case of a sale of chattels—makes a good cause of action for the purchaser to recover the purchase money if he had paid it, and a good defense against an action by the seller to recover such purchase money. Benj. Sales, pp. 908, 909, and cases cited. In Frisbie v. Hoffnagle, 11 Johns. 50, which was an action to recover the purchase money for land conveyed to the purchaser with an express warranty of title, a nonsuit was sustained, the court saying: "The consideration for the note has therefore failed, for the defendant has no title, it having been extinguished by the sale under the judgment." That case is also pertinent to another point made in the case at bar, viz. that the respondent did not suffer an actual eviction; for the court there say: "Here is a total, not a partial, failure of consideration; for, although the defendant has not yet been evicted by the purchaser under the sheriff, he is liable to be so, and will be responsible for the mesne profits."

One who has received possession of property, either on a sale or any other kind of contract, from a person who has no title to it, may yield it to the true owner on his demand, without waiting for the latter to take it forcibly or by legal proceeding; although, if he do so, he takes upon himself the burden of proving that he to whom he thus yields possession had the paramount title. This principle was quite fully discussed by Mr. Justice Thorton when delivering the opinion of the court in Palmtag v. Doutrick, 59 Cal. 154. That case arose upon a bailment, where the bailor had no right to the property bailed, and the bailee delivered it to the true owner; but, as to the principle there invoked, there is no difference between the relation of bailor and bailee and that of a seller and purchaser. The doctrine of jus tertii applies equally to both. There was also some fraud in that case; but the court quotes approvingly from an English case, in which it is said: "The position of the bailee is precisely the same whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the jus tertii is that indicated in Shelbury v. Scotsford, Yel. 23, viz. *that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to eviction by title paramount.*" The above language which we have italicized shows the principle upon which, in cases like the one here at bar, a party in the possession of property is not estopped from denying the title thereto of the person from whom he received it, and may yield it to a demand of the true owner which he could not legally resist. Justice Thornton refers to Hayden v. Davis, 9 Cal. 573, where the doctrine was applied to the case of a common carrier delivering property to the true owner instead of the consignor, and quotes from King v. Richards, 6 Whart. 418, where the court say: "If the bailee in such a case receives the goods from the bailor innocently, under the impression made by the bailor that he is the owner thereof, or has the right to dispose of them in the manner he is doing, and therefore promises to return the goods to the bailor, it is very obvious that such a promise ought not to be regarded as binding, because obtained through a false impression made willfully by the bailor; and truth, which lies at the foundation of justice, as well as all moral excellence, would seem to require in every such case that the goods should be delivered to the true owner, especially if he demand the same, instead of the wrongful bailor." In that, as in some other cases, there was fraudulent misrepresentation; but, as we have seen, the rule is the same whether the person undertaking to dispose of the property "was honestly mistaken as to the rights of third persons or fraudulently acting in derogation of them." Justice Thornton illustrates the principle by reference to the general relation of landlord and tenant,—a relation certainly as favorable to appellants' contention in the case at bar as that of seller and purchaser,—as follows: "As to eviction of tenant by title paramount, referred to in some of the cases above cited, * * * the rule is thus stated by Wilde, J.: 'If the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor without rendering himself liable to the other party, he may yield the possession, and take a new lease under him, or he may abandon the possession; and, in either case, he will thereafter not be liable to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster.' 6 Rob. Pr. 364."

In view of the principles above stated, the court below was right in holding that the consideration for the promise to pay the purchase money sought to be recovered in this action had failed, and that judgment should go for respondents. The judgment is not only legally correct, but is also in accordance with general principles of justice. The opposite view would compel respondent to pay, not only the $3,150 demanded in this action, but $275 for each and every month down to January, 1896, for nothing. Appellants have lost nothing. They would have been forced to yield possession to the holders of the paramount title if they had never made the assignment to respondent. We have been considering only the $275 per month to be paid by respondent as purchase money for the assignment. Of course, appellants could not, under any view, recover the $175 per month named in the lease, for there is no pretense that they have paid it. Neither can they ever be legally called upon to pay it, for the lessor is dead, and his legal representatives and successors in interest have repudiated the lease.

Although the briefs of counsel are quite voluminous, there are no other matters necessary to be discussed. It is proper to say, however, that we have considered appellants' points,—that the title of Mrs. Hyde has been extinguished by failure to perform conditions mentioned in the deed to her, and that George Hyde had authority to make the lease for eight years and six months and to extend it for another year,—and that, in our opinion, neither of said points is tenable. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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(113 Cal. 341)

## J. L. MOTT IRON WORKS v. WEST COAST PLUMBING SUPPLY CO.

(S. F. No. 172.)[1]

(Supreme Court of California. July 17, 1896.)

APPEAL—REVIEW—EVIDENCE—VACATING JUDGMENT.

1. The denial of a motion to set aside a default judgment against a corporation, based on the assertion that defendant had not been served with summons, and depending on the question whether the person to whom summons was delivered was its president, will not be disturbed; the only evidence that he was not president being his affidavit that he had previously resigned, and there being evidence of statements of his to the contrary, and evidence that no one else was elected president, and that, after the time when he claimed to have resigned, he was acting for the corporation as usual, and indorsing notes, made to the corporation, as its president.

2. The question whether a corporation had a defense to a claim on which a default judgment was rendered against it will not be considered on appeal from an order denying a motion to set aside the judgment, the motion being based on the ground that the person on whom summons was served was not an officer of the corporation, and there being evidence to sustain a finding that he was president.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by the J. L. Mott Iron Works against the West Coast Plumbing Supply Company. From an order denying a motion to set aside a judgment for plaintiff, defendant appeals. Affirmed.

Alexander G. Eells, for appellant. Thornton & Merzbach, for respondent.

McFARLAND, J. Each of the parties is a corporation. The action is for the recovery of the possession of certain personal property, or its value; and judgment by default was rendered for plaintiff. Afterwards defendant made a motion for an order vacating and setting aside the judgment, and the default upon which it was entered, upon the ground that the court had never acquired jurisdiction of said defendant. The court denied the motion, and from the order denying it the defendant appeals.

The motion appealed from was not made upon the ground that the judgment was taken against appellant through its excusable neglect, etc., from which it might be relieved under section 473, Code Civ. Proc.; but it was based upon the alleged fact that there had never been any service of summons upon appellant, and that, therefore, there was no jurisdiction in the court to render the judgment. The action was commenced on October 30, 1893; and proof was regularly made that service of the summons was duly made on the appellant at San Francisco, Cal., on December 20, 1893, by delivering a copy thereof, together with a copy of the complaint, to Fletcher F. Ryer, who was then and there president of said defendant corporation. But appellant claims that at said time Ryer was not its president or officer of any kind. The question whether or not said Ryer was president of appellant was one of fact for the court below. The court found that he was such president; and, unless the evidence on the issue was so one-sided against such finding as to show an abuse of discretion, we cannot disturb its conclusion. The case of appellant on this point rests entirely upon two affidavits, made by said Ryer, which were used on the hearing of the motion. In one of these affidavits he stated that on December 20, 1893 (the date of the service), and on October 30, 1893 (the date of the commencement of the action), and on April 17, 1893, he was not president or other officer or director of the appellant, "and had not been for many months prior to said April 17, 1893." In his other affidavit he stated that he "was up to August, 1892, the president of said defendant, at which time he resigned, and since which time he has not been connected with the defendant as president or other officer, or otherwise." But, in contradiction of his affidavits, the plaintiff introduced certain testimony which he gave in December, 1894, in another case, in which he made an explanation of his asserted resignation as president in August, 1892, as follows: "Mr. Freidenrich: Q. How did you resign? Tell us just what you did. A. My impression is that I sent in a written resignation. Q. Sent it in where? A. I directed it to the board of trustees of the West Coast Plumbing Supply Company, and I probably put it on the desk there. I don't know. Q. Were you present at any meeting of the board at which this resignation was presented? A. No, sir. Q. Did you do anything more than write out a resignation, and leave it on the desk? A. Not that I recollect; no, sir. Q. That is all you did? A. So far as I can remember. Q. To whom did you deliver the resignation? A. I don't remember. Q. Did you deliver it to any one? A. I don't remember. I said I don't remember positively whether I had written a written resignation or not; but that is my impression. Q. Then you don't state positively that you ever wrote a resignation? A. No, I am not positive about it. Q. Will you state positively that you ever handed any person a written resignation? A. No, sir." It also appeared that the appellant moved its place of business in 1883 from 657 Market to First street, and that he moved with it. It further appeared from the affidavits of witnesses for the respondent that until late in 1893, when they had their last business with the appellant, Ryer was acting for appellant as usual and, as they understood it, as president. It further appeared that as late as September 12 and 18, 1893, promissory notes made to the appellant were indorsed by Ryer as president. These facts are entirely inconsistent with his statement that he resigned as president in August, 1892, even supposing that the facts testified to by him constituted a resignation. There is no pretense that any other president was ever elected. It is said that Ryer's declarations could not bind or estop appellant. That is quite true; but they were admissible evidence to contradict the statements in the affidavits of Ryer, who was the only witness introduced by appellant on this point. It is a significant circumstance that the appellant did not introduce any record of the proceedings of the corporation to show any proceedings taken upon the alleged resignation of Ryer; and it is still more significant that no other officer, stockholder, or member of the corporation appellant appeared to deny in any form that Ryer was president at the time of the service. Under these circumstances, we cannot say that the evidence as to proper service was not, to say the least, substantially conflicting. And in such a state of the evidence the conclusion of the court below cannot, upon well-established rules, be disturbed.

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[1] Rehearing denied.

We need not examine the point, based on the affidavit of C. S. Arnold, that the cause of action set forth in the complaint had been settled and paid by a certain promissory note. Whether the facts stated in Arnold's affidavit would have constituted a defense to the action if appellant had appeared and set them up, is not a question now before us. The position taken by appellant on this appeal is that the court had no jurisdiction to render any judgment whatever in the case. The case of Norton v. Railroad Co., 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452, is not in point. In that case the court below found that Wade, upon whom the service was made, was not the general managing agent of the corporation defendant; and we there said that "the evidence before the lower court was conflicting, and we would not be warranted in disturbing the finding of the lower court as to that fact." The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

113 Cal. 337

## BENNETT et al. v. DAVIS et al. (S. F. 298.)

(Supreme Court of California. July 17, 1896.)

MECHANIC'S LIEN—MATERIAL MEN—SETTING UP AND COMPLETING FIREPLACE.

One who agrees to furnish certain mantels, tiles, and grates, and the appurtenances thereof, and to deliver and set them in position, is a material man, and not an original contractor.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Mary Bennett and John H. Schutte against Charles A. Davis and others to foreclose a mechanic's lien. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Chas. S. Perry and Gale & Perry, for appellants. Vogelsang & Brown, for respondents.

TEMPLE, J. This is an action for the foreclosure of a mechanic's lien. In the complaint it is averred that plaintiffs contracted and agreed with defendants "to furnish, in the addition to, and in the alteration of, the certain building heretofore erected on said premises by said Davis, certain materials, to wit, certain mantels, tiles, and grates, and the appurtenances thereof, and also the labor required in the addition of the same to, and the erection of the same in, said building, as a part thereof," etc. The mantels and other materials were furnished and were erected in the house of defendant Davis, and the only question presented here is whether plaintiffs, in the purview of the mechanic's lien law, are material men or original contractors. As the court found in favor of the lien, the inquiry resolves itself into this: Is there evidence upon which the conclusion can be sustained? One was a wooden mantel, and the other what the witness called a "tiling mantel." Schutte testified that a tiling mantel is composed of numerous parts, from 150 to 10,000. "The tiling is placed in the building by attaching it to the brickwork and to the chimney. It is not nailed. It is a material part of the chimney,—an integral part of the chimney itself. It is attached to the brickwork surrounding the mantelpiece. We cement it to the brickwork. It is put there permanently, and not for temporary use. They are part of the mantel proper, as much as a door is to a house." He further said that the contract was to furnish the materials and the labor necessary to put them up. They kept the mantels in their store for sale, put together as they would appear when finally put up. The brickwork was done by the contractor, but they set up the mantels, built the fireplaces, and inclosed them. They agreed upon the price of the mantels with the regular grate set up.

The question is somewhat similar to that which sometimes arises under the statute of frauds, the precise issue being whether a contract is one of sale or for the manufacture of goods. Numerous decisions have been rendered in such cases, and, so far as I know, no rule universally applicable has been formulated. The cases seem generally to turn upon the relative value of the work and goods, or how far the article was modified by the work. In Bates v. Coster, 1 Hun, 400, it was said that "when the article existed in its entirety, but something is to be done to fit it for use, it is a sale." In Flint v. Corbitt, 6 Daly, 429, it was said: "When an article is exposed for sale in an unfinished state, that the finish may be done to suit a customer, it is a sale, and not a manufacture." In Fitzsimmons v. Woodruff, 1 Thomp. & C. 3, a marble mantel was sold to be set up. It was held that putting it up was a part of the delivery. In Cooke v. Millard, 65 N. Y. 353, in relation to mechanics' liens the criterion is said to be whether the work is simply done on the materials to complete a delivery of them in a finished condition, the cost of the labor being included in the price of the things sold. It must be confessed that no satisfactory rule can be deduced from these cases. Each seems to assume the question at issue. The main consideration, after all, is whether the labor bestowed upon the article was merely trifling in comparison to the price. The same thing appears in the two cases decided by this court, one of which is relied upon by the appellants, and the other by the respondents. Hinckley v. Cracker Co., 91 Cal. 136, 27 Pac. 594, was a case where plaintiff contracted to furnish "and to deliver and put in place, upon foundations prepared by said Arthur Field in said structure, building, and factory, a steam plant, consisting of boilers, engine, heater, feed pipes," etc. Plaintiff was held to be a material man only, and it was said: "The work done by them on the premises of defendants, in placing them in position, was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute." In La Grill v. Mallard, 90 Cal. 373, 27 Pac. 294, it was held that a person who contracts to paper and decorate several rooms in a building and furnishes the material, is an original contractor. I see little difference in the cases save in the relative amounts of material and labor. In the last case the contract was to decorate as well as to hang paper, and, further, the defendant promised to pay for the labor in decorating the building. The material used in decorating a room may be very trifling in comparison to the labor. The main point discussed in La Grill v. Mallard was whether an implied contract to pay was such a contract as is specified in the mechanic's lien law. The labor required to place the engines and machinery in proper position in the case of Hinckley v. Cracker Co., was evidently much greater than the labor performed in La Grill v. Mallard, but, relatively to the material furnished, it was much less. In the one case the material was not only the principal thing, but, compared to it, the work was trifling. In the other the work was the important matter. One of the defendants testified that some tile mantels are composed of more than 10,000 pieces, and that it sometimes requires two days to put one up. He did not say that it required two days or two hours to put up the one in question. Even had it taken two days, the labor would still have been comparatively trifling. I think the case directly within the decision of Hinckley v. Cracker Co., and therefore the judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

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(113 Cal. 377)

## VON ARX v. SAN FRANCISCO GRUETLI VEREIN. (S. F. No. 148.)[1]

(Supreme Court of California. July 20, 1896.)

VOLUNTARY BENEFIT ASSOCIATION—EXPULSION OF MEMBERS—NOTICE AND OPPORTUNITY FOR DEFENSE.

Where no provision is made in the constitution or by-laws of a voluntary benefit association for a mode of procedure in expelling members for nonpayment of dues, or for notice and opportunity to be heard, mandamus will lie for the reinstatement of a member expelled without reasonable notice of the proceedings which resulted in his expulsion, and a fair opportunity of presenting his defense.

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[1] Rehearing denied.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawells, Judge.

Mandamus by Joseph Von Arx to compel the San Francisco Gruetli Verein to restore plaintiff to his rights as member of defendant's society. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Shadburne & Herrin, for appellant. Clitus Barbour, for respondent.

McFARLAND, J. This is an appeal by the Gruetli Verein from a judgment of the superior court in a mandamus proceeding, by which appellant was commanded to restore the respondent, Von Arx, to all the rights, etc., of a member of said appellant; and also from an order denying a new trial. The Gruetli Verein is a society organized for intellectual intercourse and mutual aid and benevolence. The respondent was for many years prior to December 5, 1893, a member in good standing of said appellant, but on said last-named day he was expelled, and he brought this proceeding to be reinstated. It is perhaps unfortunate that the general law takes notice of the rights of persons as members of voluntary associations organized for such purposes as those contemplated by the appellant herein. It would perhaps be better if a person joining such a society should be forced to look alone to the society itself for the protection of his rights as a member of it. But our Code recognizes such associations, and courts have felt compelled to listen, reluctantly, to complaints of their members in certain cases. This is particularly so where, as in the case at bar, ordinary property rights are involved. The appellant, in its character as a mutual aid society, has a fund of $15,000. It maintains sick members at the rate of $10 each per week, and it insures the life of each member to the extent of $300. The respondent has contributed $1,000 to the resources of the association. We do not deem it necessary to discuss at any length the cases in which courts will listen to complaints of members of such associations, or the principles by which courts in such cases will be governed. They can be found in the text-books upon the subject, and are quite fully stated in the opinion of Searls, C. J., in Otto v. Benevolent Union, 75 Cal. 308, 17 Pac. 217. Where the society has by-laws, not unreasonable in their character, which are applicable to the difficulty out of which the litigation arises, and the asserted rights of the parties have been determined by the society in accordance with such by-laws, a court will not ordinarily interfere. But, where there are no such by-laws, a court will inquire whether or not an expelled member has had a reasonable notice of the proceeding which resulted in his expulsion, and a fair opportunity of presenting his defense in accordance with general principles of law and justice.

It is not necessary to notice the full findings of the court, all of which, we think, are supported by the evidence, nor to give here a full statement of the facts in the case. It is only necessary to notice the findings and facts which show the theory upon which the case was decided by the court below.

A committee of 15 of the appellant, which is composed of Swiss people, issued a circular letter to kindred societies, suggesting a federation of all the Swiss societies of the Pacific coast. This letter was sent to a society called the "Helvetia Verein," of which respondent was also a member. The latter society, through a committee of 8, of which respondent was a member, sent a reply to the appellant, declining the proposition of said circular letter. This reply was referred by appellant to the same committee of 15 who had issued the circular letter. This committee considered that said reply contained objectionable matter, and so reported to a meeting of the appellant held on November 7, 1893. Of the committee of 8 of the Helvetia Verein who signed said reply, there were 4 others besides respondent who were also members of appellant; and in the report of the said committee of 15 to appellant, on said November 7th, it was recommended "that judicial proceedings be instituted against the five signers" of said reply of the Helvetia Verein, "upon the grounds of undermining the best interests of the society, and, if found guilty, to punish them according to our constitution." Respondent and the other 4 were present, and there was a "heated discussion of the circulars, in which plaintiff [respondent here] participated." After a good deal of wrangling, the president ordered respondent and the other 4 to leave the room, which they did; and, after they had left, a motion was made, and carried by a two-thirds majority, that respondent be fined in the sum of $20, and that he be given until the 1st day of December, 1893, to pay the same. On December 5th, said fine not having been paid, the financial secretary of appellant reported that the respondent owed the society more than $12, and he was expelled. He did not owe $12, nor more than $1, exclusive of said fine. Before his expulsion, "plaintiff [respondent here] delivered to defendant [appellant here], and defendant received from plaintiff, a protest against its threatened action, and a demand for a hearing upon any accusation that might be made against him. The defendant ignored said protest, and denied said demand." The constitution and by-laws provide that "a member owing more than $12 to the society, who, in spite of repeated warnings, neglects to pay, is to be expelled"; but the court found that "no provision is made in such constitution or by-laws for a mode of procedure in imposing fines or expelling members for misconduct or nonpayment of dues, or for specific charges to be served on them, or for notice of time or place of trial, or for time or opportunity to prepare for or make their defense to any accusations that may be made against them," etc. The court further found that "plaintiff was never informed or given to understand, and did not understand, at or before the time when he was excluded from the room as aforesaid, that any charges had been preferred against him, and plaintiff did not, at said meeting, defend himself against said charges, or against any charges." On December 9, 1893, respondent offered to pay to the financial secretary of appellant all dues from him to appellant, and demanded that his name be replaced on the list of members; and on December 19, 1893, at a regular meeting of appellant, respondent delivered to it his demand to be restored to membership, but appellant wholly neglected and refused to comply with said demand.

We cannot see that, upon the foregoing facts, the court erred in holding that respondent had been unlawfully expelled. The proceedings which resulted in his expulsion were not in accordance with any procedure established by the constitution or by-laws of appellant; and the court was justified in concluding that they were, in the language used in the Otto Case, "lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men in passing upon the rights of their fellow men." The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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(113 Cal. 314)

## HARNEY v. BENSON. (S. F. 87.)[1]

(Supreme Court of California. July 16, 1896.)

MUNICIPAL CORPORATIONS — CONSTRUCTION OF SEWER—ASSESSMENT OF COST.

1. The fact that the power of a board to order and construct a sewer was unwisely exercised, and the sewer was at the time of its completion impossible of use, does not affect the validity of the proceedings, nor relieve a property owner of liability to pay a tax therefor.

2. Where the action of a municipal body in ordering and contracting for the construction of a sewer is within its powers, a property owner who does not protest and follow the special remedies given by statute cannot be relieved by the courts of the tax levied therefor.

3. An assessment of the cost of a sewer made in accordance with the statute is not illegal because based on an estimate of benefits in which the frontage of lots on the street in which the sewer was built, and also on lateral streets, were both taken into account; and it will not be reviewed except for want of jurisdiction, where no appeal was taken.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Daniel Harney against John Benson. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward J. Pringle, for appellant. D. H. Whittemore, for respondent.

TEMPLE, J. This is a street-assessment case, and the appeal is from the judgment, and was taken within 60 days after its rendition. The charge is for the construction of a trunk or main sewer on Fourteenth avenue. In the resolution of intention it was declared that the work was of more than local or ordinary benefit, and the expense was made a charge upon a district which was defined by and in the resolution. On October 20, 1890, the board had adopted plans for the sewerage of that locality, and had made a map of a system of sewers, of which the sewer in question constituted a part. The scheme contemplated a drain to the Pacific Ocean through the Presidio, and it was found, and is admitted, that the board had no power to lay out streets or to construct sewers through the Presidio reservation. The resolution of intention was passed November 19, 1890, and the work ordered constitutes but a small part of the system which had been adopted. The portion let had no outlet, and the plan of which it is a part cannot be completed. By that method the city cannot furnish an outlet. It was open to the board, however, to adopt other plans, and at the time of the trial it was shown that the plans had been changed, and contracts actually let, which, when completed, would furnish an outlet for this sewer. In the specifications and contract it was provided that connections should not be made with the sewer until there was an outlet. The sewer was still unused at the time of the trial, some four years after the completion of the work. It is charged that the supervisors well knew that the work would be of no value to the property in the district, and that there was fraudulent collusion between the board and the contractor. The court found, however, against all charges of fraud, and against the claim that the work had not been done according to contract.

It is contended that since the structure has no outlet, and since, as counsel claim, it is legally impossible (or was so impossible at the time the work was done) to procure an outfall, it is not a drain, and cannot be made one, and therefore is not a sewer, and the board had not the power to contract for its construction. It may have been very unwise and even reckless on the part of the board to order work done under such circumstances, but, conceding it to be so, I cannot see how that would affect their power. It is their duty to provide the means of disposing of the sewage. If there can be no outlet provided into the ocean or some other permissible place, the board must dispose of it in some other mode, and may gather it for that purpose. It is their province to determine whether sewers are needed, and what districts will be benefited thereby. Upon these points their judgment is ordinarily final. And there may have been, in the judgment of the board, other reasons why this sewer should be thus constructed, although it would not be at once utilized. The cases cited from New Jersey (State v. City of Elizabeth, 37 N. J. Law, 335, and 40 N. J. Law, 276) do not seem to me to hold that this cannot be done. In that state the law was different. The city constructed the street, and paid for it, and then reimbursed itself by an assessment upon the property benefited. It was held that, under the law, this could not be done until the streets could be used. Besides, the property owners should have protested against the work on that ground, if their complaints are well founded. As we have seen, the work was within the general power of the board, though to construct this sewer may have been an improvident use of the power. Possibly, if, as matter of law, we could see that the structure could not be useful, the conclusion of the board would not prevent the courts from giving relief. But the aggrieved owner should exhaust the special remedies provided before he applies to the court. The board could have afforded him all the relief he required. If he had protested in time, the contractor might not have expended his money and labor in the improvement of the property. Since the law provided that he should object, and he did not, he should not now be heard, unless there was a total absence of the power in the board to do the work, or the procedure has been materially departed from. A property owner should not thus sit by and see his property improved, and expect to escape the expense.

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[1] Rehearing denied.

Defendant also objects to the assessment, and claims that his property is twice assessed, or that the assessment is on two inconsistent theories. The assessment is entered in the following form:

| No. | Direct Frontage. | Names of Owners. | Beneficiary Frontage. | By Whom Paid. | Amt. for Direct Frontage. | Amount for Beneficiary Frontage. | Total. |
|---|---|---|---|---|---|---|---|
| 685 | 240 | Block 193 Unknown. | 1680 | | $641.82 | $235.20 | $877.02 |

The method is described in finding 45: "That on the 17th day of August, 1891, the said superintendent of streets estimated upon the lot and lands within said district the benefits arising from said work and received by said lots or portions of land, and thereupon assessed the same upon said lots, to wit, in the sum of $49,293, in proportion and according to the estimated benefits received by each lot; that, in so doing, he did assess said sum of $49,293 in different amounts upon the lots fronting upon the streets in which said sewer was constructed, and upon the lots within said district fronting upon streets other than those in which said sewer was constructed, and, in assessing said lots, assessed the same at different rates per front foot, deeming the lots benefited to the amounts so assessed; that said proposed assessment showed the direct frontage of said lots of the defendant upon the line of said sewers, and the rate per front foot of all of the lots fronting on the line of said sewers, and a beneficiary rate of assessment for each foot fronting within said district, and the total sum so assessed on each lot, and the amount of the direct and beneficial frontage assessment, and that such assessment is not invalid or void; that such assessment was made upon the lots described in the complaint as therein alleged." The averments in the complaint referred to in the finding follow the statute, and show the performance of all the acts required in making an assessment for benefits. The statute required the superintendent to estimate the benefits to each parcel of land, and then to assess upon the lots the entire expense in proportion to benefits. The judgment of the superintendent is called into action only in making the estimate of benefits. If he first made a tabulated statement of his estimates, the assessment would be a mere mathematical calculation. But, if the burden has in fact been distributed as the statute requires, the particular process by which the calculation was made is not material. It was not necessary that the superintendent should show his method. The presumption is that he has done his duty, and, if the assessment does not show that he has not followed the law, it is sufficient.

Does the assessment, then, show that the burden was not distributed as the law requires? That this may have been done, and that the assessment does not show the contrary, I think conclusively appears. The superintendent concluded that the different parcels of land would all be benefited in proportion to frontage by a main sewer. The district was in an unsettled part of the city. It does not appear that any lots had been improved, or that any holdings were otherwise than entire blocks. It does not appear that any holding had much frontage and small area, or the reverse. The superintendent had diagrams showing each parcel, and made his estimate upon the land. If there had been irregular lots, he probably would have made a different estimate of benefits. Now, the facts being as suggested (as, if necessary, we must suppose), the estimate seems a very fair one. At all events, it is a rational one; and it is not for us to say whether it is the best. If the superintendent so thought, the method does show what, in his opinion, was the relative benefit to each lot from the construction of a main sewer. But some of the lots fronted upon the avenue upon which the sewer was constructed. The superintendent thought these received a special benefit, from the fact that they were thereby saved the expense of connecting sewers, whereas on the other streets branch or lateral sewers would be required. He therefore assessed against those lots what he thought it would cost to build sewers. For such sewers they would have been assessed per front foot. Upon this theory, each of these lots would be benefited according to their frontage, and it was so calculated. If the superintendent believed that this method did show the relative benefits to the different parcels, he would have used these precise calculations had he made a tabulated statement of relative benefits. Can we say that the assessment shows two assessments, or an illegal method, because it shows how he reached his conclusion? I think not. I think, also, that, if the method was wrong, the defendant should have appealed to the board. They could have afforded any relief to which he was entitled. He was not in the position of a defendant in an ordinary suit upon whom a summons had been served, but who makes default. In such case the judgment must be warranted by the notice contained in the summons. The defendant is not supposed to be in court, but to have consented to the relief demanded. In such a proceeding as this a property owner is not expected to appear by counsel, but he is supposed to be aware of the steps taken, and is authorized and required to make known his grievances. Unless he does so, he is precluded, unless the board is wholly without jurisdiction, or the procedure has been departed from in some vital matter. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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(113 Cal. 371)

PAINTER v. PAINTER et al. (S. F. 100.)[1]

(Supreme Court of California. July 20, 1896.)

APPEAL—REVIEW—EVIDENCE—WILLS—RIGHTS OF POSTHUMOUS CHILD—COMMUNITY PROPERTY —RIGHTS OF WIFE AND LEGATEE.

1. Code Civ. Proc. § 939, provides that an exception to a decision as not supported by the evidence cannot be reviewed on appeal unless the appeal is taken within 60 days after the rendition of the judgment. *Held*, that the "rendition of the judgment" takes place when findings are filed and judgment ordered, and not when the judgment is entered.

2. Under Civ. Code, § 1306, a son born after the execution of a will, and not having been provided for or mentioned therein, takes the same portion of his father's estate that he would have succeeded to if the testator had died intestate, and his right to do so will not be affected by a reference in the will to the testator's sons then living and who are specially mentioned.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by J. Milton Painter against Theodore P. Painter and others, to determine plaintiff's interest in partnership property devised to him, and for further relief. From the judgment entered plaintiff appeals. Affirmed.

E. J. Pringle, for appellant. Fox, Kellogg & Gray, for respondents.

McFARLAND, J. The deceased, Jerome B. Painter, was a brother of the plaintiff and also of the defendant Theodore P. Painter. At the time of his death, in February, 1883, the deceased and the defendant Theodore P. Painter were co-partners in a firm called Painter & Co., engaged in the business of manufacturing and selling printing presses, type, and other printers' materials. On March 11, 1864, the deceased made his will; and at that time plaintiff was also a co-partner in said firm, but he afterwards withdrew from the co-partnership. The firm owned a large stock of machinery, type, materials, and fixtures necessary to carry on its business, and also some real property, which was worth at the time of the death of the deceased about $6,600. The first clause of the will is as follows: "(1) I give and bequeath to my brothers, J. Milton Painter and Theodore P. Painter, all my share, right, title, and interest of and in and to the co-partnership of Painter & Co., the stock thereof, its business, good will, and all interests, of whatever nature, connected with them as partners (except real estate), debts due us, and moneys out at interest, for their own use and benefit, upon the express condition that they assume all debts standing against the concern, and pay off that certain mortgage on property, S. W. cor. of Washington and Sansome streets." The only interests or rights of plaintiff which are involved in this action are those which belong to him as legatee under said first clause of said will. These embrace only his claim to his share of the personal assets of the co-partnership. He has no proprietary interest in the real property of the firm, for he is not a partner, and by the will said real property is not devised. It appears that, down to the time of the withdrawal of plaintiff from the firm, the interest of the deceased in the co-partnership was one-half, and the interest of each of the other two one-fourth; and it does not appear whether or not his interest was increased after said withdrawal.

The averments of the complaint necessary to be noticed are, in brief, these: It is averred that the deceased in his lifetime borrowed, from time to time, large sums of money from said firm, and paid and agreed to pay interest thereon, and that, at the time of his death, on account of such borrowed money and some other items of account, he was indebted to said firm in the sum of $33,534.62. It is further averred that the share of the deceased in the personal assets of said firm are not sufficient to repay his said indebtedness; that the executors and executrix, or some of them, claim that the deceased was not indebted to said firm in any sum of money whatever; that the defendant Theodore P. Painter, as surviving partner, is engaged in liquidating the affairs of said co-partnership, and claims that it is necessary for him to sell all of the stock on hand, machinery, type, materials, fixtures, general assets, and good will of the business, in order to repay the said amount due from the deceased to said firm, and to settle the accounts of the deceased with the firm, and threatens so to do; and that, if he be permitted to do so, the legacy to plaintiff will be wholly defeated. It is further averred that plaintiff, as such legatee, is entitled to demand that the real property of said firm should be first sold and the proceeds applied to the payment of the said alleged indebtedness of the deceased to said firm, and that, after such application, the said surviving partner should recover from said executors and executrix sufficient moneys to repay any unsatisfied balance of said indebtedness.

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[1] Rehearing denied.

The defendant Theodore P. Painter, executor and surviving partner, filed a short answer in which he substantially made default; but the other defendants, including the widow and children of the deceased, answered, and denied all the material averments of the complaint. They specially deny that deceased, at the time of his death, owed said firm any borrowed money, or that he was indebted to said firm for any cause in any sum of money whatever; and they deny that the share of deceased in the personal property and assets of such firm, including large amounts due it upon bills receivable, is not sufficient to pay all partnership obligations. The court found all the issues of fact in favor of defendants; and found particularly that the deceased was not indebted to said firm for borrowed money, or for any other cause, in any sum of money whatever. Judgment was rendered for defendants, and plaintiff appeals from the judgment.

The transcript includes a bill of exceptions which contains evidence introduced at the trial, and appellant contends that some of the findings are not sustained by the evidence; but he cannot be heard on these points because the appeal was not taken within 60 days after the rendition of the judgment. Code Civ. Proc. § 939. The cause was tried in 1887, and the findings of fact and conclusions of law were made and filed on December 3, 1887, and judgment ordered for defendants, although the judgment was not entered until October 18, 1894. The notice of appeal was not given until after the entry of the judgment, to wit, on November 19, 1894, which was nearly seven years after the filing of the findings. The "rendition of the judgment," within the meaning of section 939, as has been frequently held by this court, took place when findings were filed and judgment ordered for defendants. Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657, and cases there cited; Crim v. Kessing, 89 Cal. 487, 488, 26 Pac. 1074. Therefore, as the appeal was not taken within 60 days after the rendition of the judgment, we cannot consider the evidence. Under these circumstances, the evidence could have been reviewed here only after a motion for a new trial. This makes it unnecessary to consider respondents' contention that there is no bill of exceptions here, because the proposed bill itself was not prepared and served within the time prescribed by section 650 of the Code of Civil Procedure.

Looking at the judgment roll alone, we see no good reason for reversing the judgment. The plaintiff is the sole appellant, and the findings and judgment are important here only so far as they affect him and his interests. In his complaint he asks, among other things, "that a construction be made by this court of the terms of the said will making the said bequest to the plaintiff and the said Theodore P. Painter." We assume for the purposes of this decision, without closely examining or determining the question, that appellant can, in this action, have the will construed, so far as a construction thereof may determine the quantity of his interest as legatee in said partnership property. Now, upon this point the respondents aver that all the property in which the deceased had any ownership at the date of the will and at the time of his death was community property, and that he could not and did not bequeath or devise any more than his half interest in said community property, and that therefore the bequest of the said property to appellant and said Theodore did not carry the interest of the surviving wife, Caroline H. Painter, therein. It is also averred that the respondent, Eugene Painter, who is a son of the deceased and said Caroline, was born subsequently to the execution of the will (and a certain codicil thereto), and is therefore entitled, as heir, to such share of his father's estate, including the said property bequeathed to appellant, as he would have been entitled if no will had been made. If the appellant can have the will construed in this action for the purpose above stated, then these two last-mentioned averments of respondents are pertinent to that matter; and the court found in favor of both of said averments, and decreed accordingly. As to the second of these averments the court was certainly right, for Eugene, having been born after the execution of the will, and not having been provided for or mentioned therein, succeeds to the same portion of his father's estate "that he would have succeeded to if the testator had died intestate." Civ. Code, § 1306. The words in the codicil, "my sons," refer to his sons then living and who are specially named and enumerated; and they certainly do not include an after-born child, whether a son or a daughter. Neither do we see how, upon the record before us, the conclusion of the court that the will disposed of only one-half of the community property can be successfully attacked. Here there is no evidence and there are no extrinsic facts to be considered. Of course, as a legal proposition, a husband cannot, as against the wife, dispose of more than one-half of the community property; and the cases where wills undertaking to do more have been upheld have been cases which turned upon the point that the widow was put to her election either to take under the will or to stand upon her rights as surviving wife and repudiate it. No such question arises in the case at bar. We see no other question in the case which it is necessary to discuss. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

113 Cal. 329

### CALIFORNIA POWDER WORKS v. ATLANTIC & P. R. CO. (No. 15,834.)

(Supreme Court of California. July 17, 1896.)

AGENT — RELEASE OF CARRIER'S LIABILITY — EXPLOSIVES—VALIDITY OF CONTRACT.

1. A drayman employed to haul powder from one depot to another, and ship it for plaintiff to its destination, had authority to sign a shipping order conforming to Civ. Code, § 2176, releasing defendant carrier from liability for loss occasioned by fire from any cause whatsoever.

2. As it is optional with a carrier to accept or refuse powder for transportation, if it chooses to accept it, it can do so with such limitation of its common-law liability as it sees fit.

3. A contract releasing a carrier of powder from liability for fire from any cause whatsoever is not void, as unconscionable or unreasonable.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the California Powder Works against the Atlantic & Pacific Railroad Company to recover the value of a car load of powder destroyed while in transit on defendant's road. There was a judgment for defendant, and plaintiff appeals. Affirmed.

E. S. Pillsbury and F. D. Madison, for appellant. C. N. Sterry and Wm. F. Herrin, for respondent.

HENSHAW, J. Plaintiff brought its action to recover from defendant the value of a car load of blasting powder, destroyed while in transit upon defendant's railroad. The findings are not attacked. It is claimed, however, that they do not support the judgment. It is also contended that the court erred in admitting in evidence a certain shipping order.

The facts disclosed by the findings are the following: Plaintiff was a manufacturer of powder. Its factory was situated at Santa Cruz, Cal. It had for many years been in the habit of shipping its products over the line of the Southern Pacific Company, and of the Atlantic & Pacific Railroad Company, defendant herein. When the shipment was designed for a point upon the line of the defendant company, the powder was received by the agent of the Southern Pacific Company at San José, acting for the defendant company, and by this agent a shipping order was taken, and a bill of lading returned therefor. Santa Cruz, the place of manufacture of the powder, is connected with San José by a narrow-gauge railroad, owned or controlled by the Southern Pacific Company. At San José the depots of the narrow-gauge railroad and of the broad-gauge railroad (over which the powder was shipped for exportation without the state) were some distance apart. By reason of the haul upon the streets of San José from one depot to another, thus necessitated, the Southern Pacific Company declined to accept a through shipment of the powder from Santa Cruz; and, under special contract with plaintiff, the powder was shipped to San José, there transferred by an agent under the control of the plaintiff from the narrow-gauge depot to the broad-gauge station, and by this agent placed upon suitable cars provided, and shipped to its ultimate destination. "At the time of the shipment of the powder in controversy, and for several years prior thereto, the plaintiff had always employed one John McNally, who was a common drayman at San José, to haul all the powder which the plaintiff had transported to San José over the narrow-gauge railroad, and which was destined for points on the Southern Pacific or the Atlantic & Pacific, from the narrow-gauge railroad to the Southern Pacific, and to there ship it for the plaintiff to its destination; the course of business being that the secretary of the plaintiff company at San Francisco, who had charge of the shipping business of the plaintiff, would, in the case of each of said shipments, write to McNally that the shipment was made from Santa Cruz, and for him to transfer it to the broad-gauge depot, and there ship it to its point of destination, instructing him to what point and the name of the consignee, and sending him with his instructions a directed envelope within which to inclose the bill of lading, and mail it to the company at San Francisco, or to hand the envelope to the railroad agent, and have him mail it to the company." "McNally, on receiving such instructions, would receive the powder from the narrow-gauge railroad, and haul it upon his drays to the broad-gauge depot, and there load it himself into such car or cars as the Southern Pacific agent would designate, and, upon its being loaded, would fill out a shipping order upon printed blank first furnished by the agent of the Southern Pacific for such purpose. These blank forms were all exactly alike for all kinds of goods. * * * Upon delivery of such shipping order to the agent of the Southern Pacific, filled out and signed, such agent would have the property checked, and, if correct, would ship bill of lading, which would either be delivered to McNally, and by him sent to the company at San Francisco, or McNally would deliver to the agent an envelope directed to plaintiff company, and the agent would inclose bill of lading in the same, and forward it to plaintiff. Each of these methods was pursued indiscriminately. The shipping order was retained by the agent of the railroad company, and kept in his office, and neither it nor a copy of it would be delivered to the agent or McNally, but would always be signed in the name of the plaintiff by McNally." For several years previous to the shipment in question, plaintiff had shipped over the Southern Pacific in this manner a great deal of powder, on an average from one to two or more car loads per month. The defendant never in any way objected to taking the powder, on the ground that it was a dangerous article, and that it was not bound to carry it; nor did the defendant at any time, in any way, declare to plaintiff or to the said drayman that it would take the powder only as a private carrier. It required McNally in each instance to sign the shipping order. The plaintiff, in the case of each of said shipments, would advise McNally of the same, and direct him where to ship the powder; and the secretary would, in due course of time, receive the bill of lading. None of the officers of plaintiff's company ever authorized McNally to sign any shipping orders, or ever had any actual knowledge of the fact that he was signing such orders, nor had it actual knowledge that the defendant ever claimed that there was any different contract between them than that contained and expressed in the bill of lading. The conditions in the bill of lading are identical with those of the shipping order. Defendant's agent at San José had no authority to receive the goods, except upon the signing of such a shipping order, and such agent would not have received or accepted the goods unless such a shipping order was delivered to him, properly signed. There was during all of the time but one rate on powder, and no one could have procured the shipment of any powder over either of said railroads without such shipping order signed, and such bill of lading issued; the agents of both companies being furnished with but one form of shipping order and one form of bill of lading for all goods and merchandise, and having no authority to receive goods for shipment on any other terms.

The preceding quotations are from the findings, which are not attacked. The powder in question was shipped in the manner indicated. It exploded while in transit, in the territory of Arizona, entirely destroyed the car in which it was placed, partially destroyed two other cars and their contents, and killed two men upon the train. The immediate cause of the explosion is unknown, but it is found that the defendant was not guilty of any negligence or misbehavior in the matter.

The views which we take, and which will hereafter be expressed, render unnecessary the consideration of many questions ably and elaborately presented by respective counsel. They will be passed by, not as being unimportant, but as being unnecessary to this determination. Thus, we will not consider whether the bill of lading issued by the defendant to plaintiff, and by the plaintiff retained without protest, constitutes a unilateral contract, binding upon plaintiff. Nor will we consider the question whether section 2176 of the Civil Code, defining the mode in which common carriers' liability may be limited, is or is not applicable to contracts with defendant, or is or is not applicable to any contract not wholly to be performed within the state as being an unwarranted and illegal interference with and restriction upon the exclusive right of congress to regulate interstate commerce; for we are of the opinion that the shipping order signed in the name of the plaintiff by McNally as its agent was a contract within the scope of his authority to make, and therefore binding upon the plaintiff. This order conformed to the requirements of section 2176 of our Code; and, as it released the defendant corporation from liability for loss occasioned by "fire from any cause whatsoever," its admission in evidence was proper, and its proof relieved the defendant of liability.

The finding of the court, as above quoted, is to the effect that McNally was the authorized agent of plaintiff, not merely to haul the powder as a common drayman, but "to ship it for the plaintiff to its destination." The circumstance that he was in fact a common drayman, and that defendant's agent knew him to be such, does not militate against the force of this declaration. There was nothing inconsistent in the agency to haul as a drayman with the agency to ship as representative of the consignor. Any competent person, regardless of his profession or business vocation, might have been employed by plaintiff to ship for it. There is here no question of ostensible agency, or of a failure of defendant to make due inquiry as to the scope of the powers of the agent. The finding expressly declares that McNally was employed to ship. Having this power, he was entitled to make a special contract of shipment, as was done in this case. An agent who is employed by the owner or consignor of goods to procure them to be transported by a common carrier has a general and implied authority to make an agreement with the carrier as to the terms upon which the goods are to be transported. Christenson v. Express Co., 15 Minn. 270 (Gil. 208); New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Nelson v. Railroad Co., 48 N. Y. 498; Zimmer v. Railroad Co. (N. Y. App.) 33 N. E. 642; Van Schaack v. Transportation Co., 3 Biss. 394, Fed. Cas. No. 16,876; Aldridge v. Railway Co., 15 C. B. (N. S.) 582; Jennings v. Railway Co., 127 N. Y. 438, 28 N. E. 394; Railroad Co. v. Jonte, 13 Ill. App. 424; Squire v. Railroad Co., 98 Mass. 239; Hutch. Carr. § 265; Wheeler, Carr. c. 13, § 2.

Nor are the exemptions contained in the contract of the shipping order void for lack of consideration. The defendant was not obliged to receive and transport the powder at all. A common carrier is not bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk; nor dangerous articles as nitroglycerin, dynamite, gunpowder, aquafortis, oil of vitriol, matches, etc. 3 Wood, Ry. Law, § 426; Hutch. Carr. § 113; 2 Rorer, R. R. § 1231; Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. 686; Railroad Co. v. Lockwood, 17 Wall. 357; Railroad Co. v. Perkins, 25 Mich. 329. It was thus optional with the defendant to accept the powder for transportation or not; but, if it chose to accept it, it could accept it upon such terms and with such limitation of its common-law liability as it saw fit. Piedmont Manuf'g Co. v. Columbia & G. R. Co., 19 S. C. 353. And, from the nature of the goods, the consideration expressed was sufficient to support the entire contract. York Co. v. Central Railroad, 3 Wall. 107.

The term of exemption releasing the carrier from liability for fire from any cause whatsoever will not be held void, as unconscionable or unreasonable. It is well settled that a common carrier may not relieve itself from any liability imposed upon it by law under the dictates of public policy; but, upon the other hand, upon any question of private right, or the right of private property, it may, for a consideration, lessen the degree of responsibility which attaches to it as an insurer, by any contract not in itself unreasonable. Any one may waive the advantage of a law intended solely for his own benefit, but a law established for a public reason cannot be contravened by private agreement. Civ. Code, § 3513. If necessary, the condition above referred to would be construed as an exemption from liability by fire occasioned by any cause, other than that of defendant's negligence. Hooper v. Wells, Fargo & Co., 27 Cal. 12; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Wells v. Navigation Co., 8 N. Y. 375.

The conclusion having been thus reached that the contract of the shipping order made by plaintiff's agent McNally was authorized, that it was based upon a consideration, and that its terms were reasonable, the other considerations urged, as above stated, are rendered unnecessary of determination. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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113 Cal. 366

## DALY v. HINZ. (S. F. 149.)

(Supreme Court of California. July 18, 1896.)

NEGLIGENCE—FAST DRIVING—INJURY TO CHILD ON STREET—NEGLIGENCE OF PARENTS—CONTRIBUTORY NEGLIGENCE.

1. In an action for injuries to a child run over by defendant's buggy, where the evidence was clear as to defendant's negligence, the burden of proving contributory negligence on the part of the parents in allowing it to go out on the street rests on defendant, if contributory negligence does not appear from plaintiff's evidence.

2. Evidence that defendant, while intoxicated, was driving at a reckless speed along a street, where plaintiff, a child of seven years, was playing, and that the child was run over, is sufficient to support a verdict for plaintiff, where the only evidence of negligence on the part of the child's parents was in allowing him to go out on the street.

**Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.**

**Action by James Daly, an infant, by guardian, against Adolph F. Hinz, for damages for personal injuries. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.**

Eugene F. Bert, for appellant. M. C. Hassett, for respondent.

VANCLIEF, C. This is an action to recover damages for personal injuries. At the time of the injuries plaintiff, then about seven years of age, was upon a public street in the city of San Francisco, and was playing tag with his sister and another girl, each of the age of about eleven years. They were in front of the house where plaintiff and his parents resided. Defendant was driving a horse attached to a buggy, which passed over the plaintiff, breaking his left thigh bone and otherwise injuring him. Plaintiff had been going to school for about a year, at some distance from his home, crossing two railroad tracks in going and returning. He generally went alone in the morning. Sometimes little girls would be with him coming home. On these occasions he always safely took care of himself. The cause was tried with a jury. At the close of plaintiff's evidence in chief the defendant moved for a nonsuit on the ground of contributory negligence of the child's parents in allowing him to go upon the street without any person exercising proper care or control over him. The court denied the motion. The jury returned a verdict for plaintiff, awarding him $1,000. The defendant moved for a new trial, which was denied, and he appeals from the judgment and from the order refusing a new trial.

There is no question that the evidence tended to prove negligence on the part of the defendant. Therefore, the burden of proving contributory negligence of the parents of the child devolved upon the defendant, unless it had been made to appear by the evidence for plaintiff. But there was no evidence of negligence of the parents, except the facts above stated. In the case of Schierhold v. Railroad Co., 40 Cal. 447, the court, speaking of the negligence of parents in a case like this, said: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts. And the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. * * *

The question whether there was negligence on the part of the parents of the child in allowing him to be in the streets unattended ought to have been submitted to the jury. This depended, not only upon his age, but his intelligence and physical ability, and we cannot say, as matter of law, there was negligence in this particular case." In Huerzeler v. Railroad Co., 139 N. Y. 494, 34 N. E. 1101, the court held: "It was not negligence, as matter of law, for the mother of a child a little over five years of age to permit her to be in the street." That was a question of fact for the jury to determine. See, also, Kline v. Railroad Co., 37 Cal. 400; Meeks v. Railroad Co., 52 Cal. 602; McQuilken v. Railroad Co., 64 Cal. 464, 2 Pac. 46; Higgins v. Deeney, 78 Cal. 578, 21 Pac. 428. I think the court did not err in denying the nonsuit.

The only other point presented by appellant is that the evidence was insufficient to justify the verdict. Upon all the issues as to which the evidence is claimed to be insufficient, it was substantially conflicting. It clearly tended to prove negligence of the defendant. It tended to prove that he was intoxicated, and, under the circumstances, was driving at a reckless speed, and that with proper care he might have avoided the accident. There was no other evidence of contributory negligence on the part of the plaintiff or his parents than that above stated, and there is no pretense that the case was not fairly submitted to the jury. I think the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

113 Cal. 360

## GEORGE H. FULLER DESK CO. v. McDADE, Sheriff, et al. (S. F. No. 84.) [1]

(Supreme Court of California. July 18, 1896.)

CONVERSION—ACTION AGAINST OFFICER—PLEADING —DEMAND—JOINING SURETIES.

1. To state a case against a sheriff for the conversion of property seized by him on an attachment against another, facts should be alleged showing that, after being advised of plaintiff's ownership, he refused to surrender the property.

2. A complaint which states material facts by way of recital, instead of direct allegation, will be *held* sufficient, where objection is not raised by special demurrer.

3. A formal demand, as prescribed by Code Civ. Proc. § 689, providing for a special proceeding by the officer to determine the ownership of property levied on under execution and claimed by another, is not essential to the maintenance of an action against a sheriff for the conversion of property seized under an attachment.

4. An action for the conversion of property seized on process may be maintained against a sheriff and the sureties on his bond.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by the George H. Fuller Desk Company against John J. McDade, sheriff, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Matt. J. Sullivan, for appellants. H. R. Wiley, for respondent.

BRITT, C. Action against McDade and the sureties on his official bond given to qualify him for the office of sheriff of the city and county of San Francisco, to which he was elected in November, 1892. The condition of the bond was that he would perform the duties of his office according to law. Plaintiff alleged in its complaint that it was on May 25, 1893, and is now, the owner of certain goods described, of the value of $1,132, at that date in the possession of the Carnall-Hopkins Company, a corporation; that on said May 25th McDade, in his capacity of sheriff aforesaid, and acting in virtue of a writ of attachment against the property of said Carnall-Hopkins Company, levied upon and took from its possession the said goods of plaintiff, and detains the same against plaintiff's will, "and notwithstanding that immediately thereafter plaintiff notified said defendant McDade that plaintiff was the owner thereof, and demanded possession thereof; * * * that by reason of the wrongful conversion" of said goods plaintiff was damaged in the sum of $1,200, for which it prayed judgment. Defendants appeal from the judgment entered on a verdict in plaintiff's favor for the sum of $1,132.

Appellants insist that the complaint, at best, makes a case for the recovery of the property seized, and that the judgment for its value—not as an alternative if delivery cannot be had—is erroneous, for they say no conversion of the property is alleged in the complaint. We agree with them that the taking from the possession of the Carnall-Hopkins Company, the defendant in the writ of attachment, was not of itself a conversion of the property taken. "When an officer proceeds to execute an attachment, he is authorized to seize any personalty found in the defendant's possession, if he have no reason to suppose it to be the property of another." Drake, Attachm. § 199. We conceive this to be the correct rule, and in accord with most of the cases in this court touching the subject (Ledley v. Hays, 1 Cal. 160; Daumiel v. Gorham, 6 Cal. 43; Killey v. Scannell, 12 Cal. 73; Paige v. O'Neal, Id. 483, 495; Babe v. Coyne, 53 Cal. 261; Brichman v. Ross, 67 Cal. 601, 8 Pac. 316; Black v. Clasby, 97 Cal. 482, 32 Pac. 564; Murfree, Sher. §§ 964, 965), though a different doctrine seems to be taught in Boulware v. Craddock, 30 Cal. 190, and Wellman v. English, 38 Cal. 583. In order, therefore, to make out that the sheriff committed an actionable wrong, when, as in this instance, it is not charged in terms that he converted the property to his own use, facts should be stated to show that upon notice of the true owner's claim he refused to surrender the property. We think it must be held that such facts appear in the complaint here (Arzaga v. Villalba, 85 Cal. 191, 196, 24 Pac. 656, and cases cited); true, rather by way of recital, when they should have been alleged directly; but the demurrers interposed by defendants do not include this fault among the grounds they specify, and, under the rule requiring objections based on such defects to be taken by special demurrer, we are not at liberty to treat the complaint as bad on that account. San Francisco v. Pennie, 93 Cal. 465, 29 Pac. 66; Santa Barbara v. Eldred, 108 Cal. 294, 41 Pac. 410.

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[1] Rehearing denied.

Appellants claim further that the complaint is bad in that it does not allege a demand for the property in the manner and form prescribed by section 689, Code Civ. Proc., as amended in 1891, and in that a cause of action against McDade for a tort is misjoined with a cause of action against his sureties, based on their contract. These points have been ruled adversely to their contention in recent decisions of this court. Brenot v. Robinson, 108 Cal. 143, 41 Pac. 37; Bell v. Peck, 104 Cal. 35, 37 Pac. 766. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

113 Cal. 357

## WILSON et al. v. HIND et al. (S. F. 259.)

(Supreme Court of California. July 18, 1896.)

MECHANICS' LIENS—MATERIAL MEN—PLEADING—VARIANCE.

1. A person contracting to furnish material for a building, such as doors, sashes, blinds, etc., which, instead of manufacturing to order, he purchased ready made, is a material man only.

2. In an action to enforce a lien for material furnished contractor, the complaint alleged the contract to have been for the payment of the reasonable value of the material furnished, by order given on the owner of the building, whereas the evidence showed that the contractor purchased on his own credit, for a fixed price. *Held*, that there was a variance.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Wilson & Bro. against Robert R. Hind and another to enforce a material man's lien. There was a judgment refusing to foreclose the lien, and plaintiffs appeal. Affirmed.

Lincoln Sonntag, for appellants. John C. Hughes, for respondents.

TEMPLE, J. This appeal is from the judgment, and was taken within 60 days after its rendition. The action was to foreclose a material man's lien. The court held that plaintiffs had no lien on two grounds: First, because they did not furnish material to the owner or his agent, or to a contractor or subcontractor; second, because there was a fatal variance between the contract proven and that stated in the claim of lien.

Henry Behrens was the contractor. He contracted with W. R. Johnston to furnish all the mill work for the house, and to deliver it at the building. Mr. Johnston was called as a witness for plaintiffs, and testified that the mill work included certain manufactured material, such as front door frame, door, top light, recess panels, portico (columns or bracket or cap, balustrade, put together), window frames, sashes, etc. Witness further said: "I generally bought all my doors and sash and blinds and all stock material, you know, from Wilson & Brother." The court: "Stock material means material that is kept in stock?" Answer: "Yes, sir; manufactured. Yes, sir; all stock, doors, sashes, blinds, and transoms, and such like. We did not manufacture these in our mill; nothing only hard work." These extracts sufficiently show the nature of the contract both between Behrens and Johnston, and between Johnston and plaintiffs. It is very evident that Johnston was a material man only. Hinckley v. Biscuit & Cracker Co., 91 Cal. 140, 27 Pac. 594.

There was also a material variance between the contract set forth in the claim of lien and that proven. In the notice of lien it was stated that the contract was that the corporation was to be paid what the goods were reasonably worth, and that the subcontractor was to deliver to said Wilson & Bro. immediately upon the acceptance of the building, an order for the amount due to said plaintiff by said subcontractor, signed by the original contractor, Henry Behrens, and indorsed by the said Robert R. Hind, etc. The evidence was that Johnston bought the goods at a fixed price, and on his own credit; and there was no agreement in regard to an order upon Hinds, or that plaintiffs were to be paid from the contract price at all.

If these conclusions are correct, other points suggested need not be noticed. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

113 Cal. 382

## AUBURN OPERA-HOUSE AND PAVILION ASS'N v. HILL. (Sac. 110.)

(Supreme Court of California. July 22, 1896.)

CORPORATIONS — SUBSCRIPTIONS TO STOCK — CONTRACT—VALIDITY—IMMATERIAL ISSUES.

1. Matters which have no proper place in the pleadings, and, whether correctly found upon or not, can make no difference to the judgment, are wholly immaterial.

2. In an action by an opera-house company to recover a subscription to its capital stock, it appeared that a "prospectus" recited in detail the objects of the intended corporation, the amount of stock, etc.; that the subscriptions were to be called in on installments; and that defendant signed the prospectus for a certain number of shares. *Held*, that the prospectus constituted a contract under which defendant was liable for the amount of his subscription. 32 Pac. 587, affirmed.

Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by the Auburn Opera-House & Pavilion Association against George M. Hill on a contract of subscription to stock in such association. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John M. Fulweiler, for appellant. Jo. Hamilton and Geo. W. Hamilton, for respondent.

VAN FLEET, J. This is a second appeal. On the former appeal a judgment in favor of the defendant was reversed. Association v. Hill, 32 Pac. 587. Judgment was in favor of plaintiff at the second trial, and defendant now appeals therefrom, and from an order denying his motion for a new trial.

1. There is nothing substantial in the claim that certain of the findings are not sustained by the evidence. Of the material facts in the case,—that defendant signed the prospectus which is the basis of the plaintiff's action; that demand was made upon him for the amount of his subscription; and that he has not paid it, or any part of it,—the first and last are not denied, while the evidence is uncontradicted in support of the second. The other matters about which there is some controversy in the briefs—whether defendant participated in all the meetings of the board of directors of plaintiff down to the time of his resignation therefrom; whether he consented to the purchase of the Lardner lot; and as to the manner in which the proposed amount of the capital stock of plaintiff was raised from $20,000 to $30,000; and others not necessary to enumerate—are things wholly immaterial to the merits of this action, had no proper place in the pleadings, and, whether correctly found upon or not, can make no difference to the judgment.

2. The defendant's contention that the prospectus did not constitute a contract, and that he cannot be held liable thereon as such, that his only liability is as a stockholder of the corporation, to be proceeded against by the method of levying and collecting assessments provided by the Civil Code, is concluded by the judgment of this court on the former appeal, where it is said: "Under defendant's contract of subscription for the stock of plaintiff as contained in the prospectus signed by defendant, and upon the facts alleged in the complaint as to plaintiff's calls or demands for the amount agreed to be paid for such subscribed stock, the plaintiff is entitled to maintain this action." The pleadings remaining unchanged, the construction given them in the former opinion of this court becomes the law of the case.

The other points demand no special notice. We have examined them, and are satisfied they involve no material error. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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113 Cal. 392

## MACKAY et al. v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 214.)

(Supreme Court of California. July 22, 1896.)

TAXATION—BONDS—NONRESIDENT CORPORATION—CONSTITUTIONAL LAW—ASSESSMENT—UNAUTHORIZED INCREASE—DELINQUENCY—PENALTIES.

1. Bonds of a railroad corporation organized in Arizona, payable in New York, and secured by a mortgage in Arizona, may be taxed in California as the property of a permanent resident of California, under Const. 1879, art. 13, § 1, which defines property for the purposes of taxation, and expressly declares it to include, among other things, moneys, credits, and bonds.

2. The constitutional and Code provisions authorizing the taxation of bonds held by a permanent resident within the state, though issued by a nonresident corporation, and secured by a mortgage on property outside the state, are not in contravention of the fourteenth amendment of the federal constitution, which guaranties to all persons the equal protection of the laws.

3. Where the constitution has provided that certain specific things shall be taxed as property, the legislature cannot exempt them.

4. Where railroad bonds, secured by a mortgage on the corporation's property, have been assessed at their face value, the state board of equalization cannot raise the assessment, in violation of Const. art. 13, § 9, which provides that "no board of equalization shall raise any mortgage, deed of trust, or other obligation by which a debt is secured, * * * above its face value."

5. A local assessment of railroad bonds was increased without authority by the state board of equalization, and the taxes became delinquent before Act 1893 (St. 1893, p. 32; Pol. Code, § 3819), authorizing a payment of taxes under protest, took effect. Under the then-existing law, payment under protest could not be made until a sale was threatened. The taxes were not paid till after delinquency, and, on payment subsequently under protest, the statutory penalties were added. *Held*, that, to entitle the taxpayers to recover the penalties, there should have been a tender, before delinquency, of the taxes due according to the local assessment, where the excess was susceptible of exact calculation.

6. That a holder of bonds refused and failed to pay the taxes thereon under the erroneous conclusion that the bonds were not taxable is not a defense to the statutory penalties for delinquency.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by John W. Mackay and R. V. Dey, executors of the will of Theresa Fair, deceased, against the city and county of San Francisco, to recover taxes levied and assessed against certain railroad bonds and other personal property, and paid under protest. From a judgment in favor of plaintiffs, plaintiffs appeal. Affirmed.

Wm. F. Herrin, Byron Waters, Eugene R. Garber, and Isaac Frohman, for appellants. H. T. Creswell and Rhodes & Borden, for respondent.

HAYNES, C. This action is prosecuted by appellants, as the executors of the last will and testament of Theresa Fair, deceased, to recover from the city and county of San Francisco the sum of $31,687.90, the amount of state and city and county taxes for the fiscal year beginning July 1, 1892, levied and assessed upon certain railroad mortgage bonds and other personal property belonging to said estate, which said sum was paid by appellants to the tax collector of said city and county, under protest, on June 13, 1893. The action is prosecuted, under the provisions of section 3819 of the Political Code, a new section, approved February 27, 1893 (St. 1893, p. 32). The action was tried by the court upon an agreed statement of facts, which was adopted by the court as its finding of fact, pursuant to stipulation of counsel, from which the court found as a conclusion of law that plaintiffs were entitled to recover from the defendant the sum of $1,911.55, with interest from June 13, 1893, and costs, and judgment was entered accordingly. James N. Block, as tax collector, was made a party defendant, but the action as to him was dismissed. This appeal is by the plaintiffs from the judgment upon the judgment roll.

The city assessor assessed the personal property of said estate as of the first Monday in March, 1892, as follows: 1,915 6 per cent. bonds of the Southern Pacific Railroad Company of Arizona, of the denomination of $1,000 each, assessed or valued by said assessor at $1,915,000; $3,593 in money; furniture, $3,000; one vehicle, $300,—making a total of $1,921,893. The rate of taxation for city and county purposes was duly fixed by the board of supervisors at $1 on each $100 of the valuation of the taxable property of said city and county. The state board of equalization, for the purposes of state taxation, raised the entire assessment of said city and county, except as to money, 20 per cent., and fixed the rate of the state tax to be levied for that fiscal year at 43.4 cents on each $100. By the local assessment, said bonds were assessed at their face value; and, by the raise made by the state board of equalization, they were assessed for purposes of state taxation at $2,298,000, or $383,000 above their face value. No part of the taxes, either state or local, were paid until after they became delinquent, when the whole of the taxes, both state and local, were paid, with the penalty of 5 per cent. on the local tax, and 15 per cent. on the state tax, and $1 in addition to cover the cost of advertising. Upon said railroad bonds the city and county tax levied upon their face value amounted to $19,150, and upon the valuation as increased by the state board of equalization the state tax amounted to $9,973. As a consequence of the delinquency, 5 per cent. was added to the city and county tax, amounting to $957.50, and 15 per cent. was added to the state tax, making an addition thereto of $1,495.99. If the state tax had been levied upon said bonds at their face value, the amount thereof would have been $8,311.10, instead of $9,973.32,—a difference of $1,662.22. The penalty for delinquency upon said difference, 15 per cent., is $249.33; and this, added to said difference, makes $1,911.55, for which, with interest from the date of payment, and for costs, the court gave judgment in favor of the plaintiffs; the court holding that the increased valuation by the state board was unauthorized, but that the tax and penalty thereon, being capable of separation, and the bonds being taxable, the plaintiffs should have paid the remainder of the taxes, both state and local, and gave judgment only for the amount so found to be illegally assessed, with the penalty thereon, adding thereto interest and costs. The bonds in question were made by the Southern Pacific Railroad Company of Arizona, a corporation organized and existing under the laws of that territory, are payable in the city of New York, and are secured by a mortgage executed by said corporation to Henry M. Newhall and Charles Mayne, residents of San Francisco, upon the railroad and telegraph lines, rolling stock, stations, fixtures, and appurtenances of said corporation situated in the territory of Arizona.

Appellants make the following points, upon which they contend the judgment should be reversed: (1) "These bonds are not taxable, because they are not tangible property, and do not inhere in tangible property situated in this state; and it is incompetent for the constitution or statute of the state to make that property—and therefore taxable—which is not property in fact." (2) "The law of California, contained in the constitution as well as in the Code, relating to the taxation of such credits as those taxed in this case, is void, because in contravention of the fourteenth amendment of the federal constitution, which guaranties to all persons the equal protection of the laws." (3) "The legislature of California, at its last session, assumed to correct this evil, by declaring that railroad bonds are not property for the purposes of taxation."

Section 1, art. 13, of the constitution of 1879, is as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to bona fide residents of this state." Section 4 of said article provides that "a mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. * * *" Railroads and other quasi public corporations are excepted from the above provision. The constitution not only provides that all "property" shall be taxed, but defines the word "property," and expressly includes "bonds" in that definition; thus placing it beyond the power of the legislature or the courts to say that bonds are not property within the meaning and intent of the constitution.

The bonds in question were held here. Their situs was the city and county of San Francisco. City and County of San Francisco v. Lux, 64 Cal. 481, 2 Pac. 254. They could not be taxed in Arizona, where the property mortgaged to secure them is situated. State Tax on Foreign-Held Bonds, 15 Wall. 300. In the case last cited, it was said: "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts 'property' of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts have no locality separate from the parties to whom they are due." In Illinois it is held that their statute requiring credits to be taxed is not obnoxious to any constitutional objection, even if the property for which the credit was given is also taxable. Goldgart v. People, 106 Ill. 25. The case of Kirtland v. Hotchkiss, 100 U. S. 491, is in point, and we refer to it somewhat fully, because it also answers appellants' second contention, based upon the fourteenth amendment to the constitution of the United States. In that case, Kirtland, a citizen of Connecticut, brought an action to restrain the enforcement of certain tax warrants levied upon his real estate in the town where he resided, which taxes were assessed upon certain bonds executed in Chicago, and made payable in that city, and secured by deeds of trust upon real estate there situated. The statute under which the tax was levied declared that personal property in that state or elsewhere should be deemed, for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), chattels, or effects, or any interest thereon. The supreme court of errors of that state held that the assessments were in conformity to the state law, and that the law itself did not infringe any constitutional right of the plaintiff. Kirtland thereupon sued out a writ of error to the supreme court of the United States, and his counsel contended that said tax was not only repugnant to the sovereignty of the state of Illinois, but violated the constitution of the United States in several specified particulars. The supreme court of the United States, restricting its remarks to the facts of the case, and quoting from McCulloch v. Maryland, 4 Wheat. 428, said: "It is obvious that it [the right of taxation] is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." And quoting from State Tax on Foreign-Held Bonds, 15 Wall. 300, said: "Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." Applying these principles to the special facts before it, the court further said: "The creditor, it is conceded, is a permanent resident, within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same state, to contribute for the support of the government whose protection he enjoys. That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. * * * Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in the state of Illinois." The only case cited by appellants in support of their first proposition is that of People v. Hibernia Sav. & Loan Soc., 51 Cal. 244. That case arose under the constitution of 1849, which did not define the word "property" (article 11, § 13); and the court was dealing with a definition given it by the legislature. But the principal distinction is based upon the facts involved in the case. In that case the bank was assessed upon a large amount of money, all of which was loaned upon mortgages upon real estate; and it was conceded that the taxes upon the real estate, which was the basis of the credit, had been paid. The theory of the court was that a credit had no value apart from property in the hands of the debtor which is the basis of the credit, and that if such property is taxed, and the credit which derives its value from such property is also taxed, it is double taxation. Here the debtor is a nonresident, and the property upon which these bonds are secured is in another jurisdiction, and therefore beyond the taxing power of this state. In a case arising shortly after the adoption of the new constitution, there was no question made but that credits were taxable. There the estate of Lux had on general deposit in several banks in San Francisco a large sum of money. The controversy was as to where these credits should be taxed. They were treated, not as money, but as credits, the court saying: "It is a settled rule that a general deposit is, in effect, a loan, the relation of the bank and depositor being that of debtor and creditor. Where, then, should the credits—the amounts due from the banks to the estate—have been assessed?" City and County of San Francisco v. Lux, 64 Cal. 481, 483, 2 Pac. 254. Appellants' first point cannot be sustained.

2. Appellants' second point involves a federal question, our judgment upon which may be reviewed by the supreme court of the United States. There is nothing in the case before us to distinguish it from Kirtland v. Hotchkiss, supra, where the constitutional question was expressly decided against the contention of appellants.

3. Appellants' third point is based upon section 3617 of the Political Code, as amended in 1895 (St. 1895, p. 310). Said amendment consists in the insertion after the word "bonds," in the first subdivision, the words "except of railroad or quasi public corporations." This amendment was not in force at the time this cause was tried. It is cited by counsel with the remark that the legislature "assumed to correct this evil by declaring that railroad bonds are not property for the purposes of taxation." Touching this statute, it need only be said that, if the constitution did not require the taxation of the bonds of railroad and other quasi public corporations, the amendment in question was wholly unnecessary; and, if the constitution did require such bonds to be taxed, it was not in the power of the legislature to exempt them.

The only other question made by appellants relates to the penalty for delinquency. It is contended that, as the act of 1893 (St. 1893, p. 32, which constitutes a new section of the Political Code, numbered 3819) was not in force when these taxes became delinquent, they are entitled to recover the whole of the penalty paid, for the reason, as they claim, that prior to the passage of said act they could not pay under protest until a sale was threatened, and cite Williams v. Corcoran, 46 Cal. 556. If the illegal part of the tax had been incapable of separation from the legal part, this contention should be sustained. The written protest made by appellants to the tax collector, however, shows the facts upon which such separation could readily have been made. It showed that said bonds were assessed at $1,915,000; that the state board of equalization increased that assessment 20 per cent., or $383,000; and, the rate of taxation for state purposes as well as for county purposes being known, there could have been no difficulty in ascertaining the amount legally assessed, and we think it was appellants' duty to have tendered that amount; and under the plain provisions of section 9 of article 13 of the constitution, which provides "that no board of equalization shall raise any mortgage, deed of trust, contract, or other obligation by which a debt is secured, money or solvent credits, above its face value," it would have been the duty of the tax collector to have received it. If such tender had been made before delinquency, and the tax collector had refused to receive the amount so tendered, and the penalty for delinquency had been afterwards added, and paid under protest, for the protection of the property of the estate, the case would have been different. It is true that appellants, in their protest, claimed that the bonds were not taxable at all; but they also inserted a separate clause alleging the raise made by the state board, the amount of it, and that it was unauthorized under the above-quoted provision of the constitution. In De Fremery v. Austin, 53 Cal. 380, it was held that, if a tax levy contained an illegal item, such item will not invalidate the levy as to other items, if the levy is so made that the illegal items may be separated from the others; and in Bank v. Chalfant, 51 Cal. 369, it was held that under like circumstances the tax collector should receive the legal portion of the tax if tendered to him; and it has been frequently held that an injunction to restrain the collection of a tax partly legal and partly not will not be granted except upon condition that the legal part shall be first paid. See, Cooley, Tax'n (2d Ed.) p. 763, and cases there cited. That appellants erred in their conclusion that bonds were not taxable cannot relieve them. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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113 Cal. 364

## KENNY et al. v. KELLY et al. (S. F. 72.)

(Supreme Court of California. July 18, 1896.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS —ASSESSMENT OF BENEFITS.

When an assessment for paving the intersection of streets shows on its face that a greater proportion of the expense has been assessed against the property than is authorized by the statute, the property owner may, without appealing to the city council, resist the enforcement of the assessment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Edward Kenny and others against

Joseph P. Kelly and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. Jas. P. Kelly, for respondents.

BRITT, C. Action to enforce an assessment against certain lots of land, for work done in the improvement of D street, in the city and county of San Francisco. Twenty-Fourth avenue in said city terminates in said D street, and the lots in question, having a frontage on said avenue, were assessable for the expense of the work done on the intersection of the two streets, according to the rule prescribed by subdivision 4 of section 7 of the act to provide for work upon streets, etc., as amended. St. 1891, p. 202. This allows only one-half of the expense of the work on the intersection to be charged upon the two quarter blocks cornering thereon. The court found, however, that the whole expense of the work done on the intersection was, in this instance, assessed upon such two quarter blocks, one of which included the lots of defendants, and that the lots were thus assessed for double the amount legally chargeable thereon; also, that the work done on intersections was assessed and apportioned separately from that done on the main street. The assessment upon said lots for the work on the intersection was held to be void, and defendants had judgment.

Appellants contend that the illegal assessment found by the court is no defense to this action, and that the owners should have had the same corrected by appeal to the board of supervisors, as provided in section 11 of the act. But if the form of the assessment followed the statute (section 8), it must have appeared on the face thereof that the lots of defendants could not, under any circumstances, be liable for a portion of the expense assessed against them. Counsel does not claim, indeed, that the illegality was not thus apparent. The case, then, is within the principle, several times declared or assumed, that the owner may, without appealing to the city council, resist the enforcement of an assessment void on its face. Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Buckman v. Landers (Cal.) 43 Pac. 1125; McDonald v. Conniff, 99 Cal. 386, 390, 34 Pac. 71. The judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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(113 Cal. 385)

## HEIDT v. MINOR. (S. F. 44.)[1]

(Supreme Court of California. July 22, 1896.)

APPEAL—EFFECT OF REVERSAL—LAW OF THE CASE—ACTION ON BOND OF NOTARY.

1. Where a judgment on appeal is simply reversed, the effect is to remand the cause for a new trial.

2. After the reversal of a judgment the parties have the same rights as to amendment of pleadings as before a trial, and amendments may be permitted by the court in its discretion.

3. The decision in an action where the judgment is reversed on appeal becomes the law of the case as to the issues then involved, but as to issues thereafter formed, and facts found thereunder, it has no more effect than if rendered in another case.

4. A recovery may be had on the official bond of a notary for the full amount of a mortgage purchased by plaintiff in reliance on the genuineness of the notary's certificate of acknowledgment, which was in fact false and fraudulent, where the purported maker was solvent and able to pay the mortgage debt, though he did not own the property described in the mortgage.

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Louise Heidt against Peter O. Minor. Judgment for plaintiff, and defendant appeals. Affirmed.

A. L. Rhodes and Archer & Bowden, for appellant. S. F. Leib, for respondent.

VAN FLEET, J. This is an action against one of the sureties on the official bond of a notary public, to recover damages alleged to have been caused by a certain false and fraudulent certificate of acknowledgment. On the first trial a judgment was rendered for plaintiff, which, on appeal to this court (26 Pac. 629), was reversed, on the authority of Heidt v. Minor, 89 Cal. 115, 26 Pac. 627. That appeal was on the judgment roll only, and the facts were precisely similar to those in the case cited. On the return of the case to the court below, plaintiff, by leave of the court, amended her complaint. The case was then tried before a jury, and plaintiff had a verdict and judgment, and defendant appeals on the judgment roll only. The points made by appellant are that the court below should have rendered judgment in favor of defendant on the coming down of the remittitur, and without a new trial; that the court erred in allowing the amendment to the complaint, and that the facts on the second trial were substantially the same as on the first trial; and that, therefore, the rule of "the law of the case" entitled the defendant to a judgment.

1. The judgment of this court on the first appeal was simply that "the judgment * * * in the above-entitled cause be, and the same is hereby, reversed, with costs." The effect of this unqualified reversal was to remand the cause for a new trial. Falkner v. Hendy, 107 Cal. 49, 54, 40 Pac. 21, 386. It may also be remarked that the reversal of a judgment on the ground that it is not supported by the findings does not necessarily imply that any judgment ought to have been rendered on those findings. The reversal in this case was based on the proposition that there was no finding at all upon a certain material fact. In the absence of such finding, no judgment could properly have been rendered. But appellant contends

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[1] Rehearing denied.

that the original complaint contained no allegation as to the fact in question, that the findings covered all the issues made by the pleadings, and that, therefore, the reversal was really based on the ground that the complaint stated no cause of action. No such point was made on that appeal, or mentioned in the opinion; and, had it been made, it would have been proper, on remanding the case, to give the plaintiff an opportunity to amend.

2. After the reversal of the judgment the parties in the court below had the same rights which they originally had, and that court therefore had discretion to permit any proper amendment to the pleadings. Phelan v. Supervisors, 9 Cal. 15; Gould v. Stafford, 101 Cal. 32, 35 Pac. 429. The only objection urged to the substance of the amendment is that it did not cure the defect in the original complaint, or make it state a cause of action. This question will most conveniently be considered with the next point.

3. On the first trial the findings showed that the mortgage to which the certificate of acknowledgment in question was appended had never been executed or acknowledged by the person therein named as mortgagor; that the certificate was false, and was made for the purpose of defrauding the plaintiff out of certain money; and that the plaintiff had actually parted with that money on the faith of that certificate. But the findings did not show whether the mortgage, if it had been genuine, —if it had in fact been duly executed and acknowledged by the mortgagor,—would have been of any value. And it was therefore held that upon those findings it could not have been ascertained whether or not plaintiff had suffered any loss by reason of the false certificate. The decision upon that point, of course, became the law of this case, and must control the determination of the present appeal, unless the facts disclosed upon the second trial differ in some material particular from those upon which the former decision was based. The amendment to the complaint, among other things, alleged that the supposed mortgagor did not own, or claim to own, any part of the lands embraced in the mortgage, but that he was solvent and able to pay the note set forth in the mortgage, and that, had said mortgage been genuine, he would have paid that note. The truth of these allegations is established by the verdict in favor of plaintiff. Respondent contends that these new facts make the case substantially different from that presented on the former appeal, and that they supply the defect in the findings for which the former judgment was reversed. Her contention is that, had the mortgage been genuine, the recital therein setting out the note would have been conclusive, against the mortgagor, of the due execution of the note (Code Civ. Proc. § 1962, subd. 2; Waldrip v. Black, 74 Cal. 409, 16 Pac. 226; Alvord v. Gold Co., 106 Cal. 547, 40 Pac. 27), and that in a suit to foreclose the mortgage, the mortgagor being solvent, plaintiff would have been able to collect the full amount of the note,—if not upon the sale of the property, at least upon a deficiency judgment. She therefore claims that it now appears that the mortgage, if genuine, would have been of the value of $1,515.82 (for which amount judgment has been rendered in her favor), being the amount of the principal and interest of the note recited in the mortgage, and that she has been damaged in that sum by the false certificate of acknowledgment. We think this contention sound. It is certain that when a notary certifies that the mortgagor duly acknowledged the execution of a mortgage which in fact is a forgery, the measure of damages, in an action against the notary or his sureties, brought by one who has parted with value on the faith of such certificate, is, in cases of this impression, the amount which would be the value of the mortgage if genuine. The value of a mortgage is the amount which can and will be collected thereon, and it matters not whether that amount is obtained by a sale of the mortgaged premises, or by the enforcement of a deficiency judgment. If the mortgagor has no interest in the mortgaged premises, the property may bring nothing, or only a nominal amount, on the sale; but in that case the plaintiff has an absolute right to a judgment for the deficiency against the maker of the note, and if he is solvent that deficiency will be collected. The value of the mortgage, therefore, depends, not merely on the value of the mortgaged property, but, in case of the insufficiency of that property, upon the solvency of the mortgagor. When it appears, as it does in this case, that the plaintiff, had the mortgage been genuine, would have been able to collect the whole amount named therein, he is entitled to recover that amount, without regard to the value of the mortgagor's interest in the mortgaged property. But appellant contends that, in the opinion on the former appeal, it was decided that the value of this mortgage, if valid in every respect, would have depended upon the value of the mortgaged property, and that that proposition thereby became the law of this case. It is true that that opinion does contain such language. But the "law of the case" consists, not in the reasoning of the court, or the illustrations given, but in the propositions of law actually decided, and applicable to the facts in judgment. The only propositions of law decided on that appeal (so far as this matter is concerned), and the only ones which, on the facts then before the court, could have been decided, were that the defendant is liable only for what would be the value of the mortgage if valid; that the court had not found that it would be of any value, if valid; and that, therefore, the proper basis for determining the liability of the defendant was wanting. See 89 Cal. 122, 26 Pac. 627. All beyond this was mere reasoning and illustration. It is true that ordi-

narily the value of a mortgage does depend upon the value of the mortgaged property, and in discussing this question that aspect of the matter was the only one considered. But as neither the pleadings nor the findings then contained anything as to the value of the property, or the extent of the mortgagor's interest therein, or his solvency, no statement as to the respective force of those different facts was intended to be made, nor, if made, would it have had the force of a decision. Moreover, the rule of the law of the case only applies when, on a subsequent trial, the issues and the facts found remain substantially the same. On this last trial the facts alleged and found are materially different from those considered on the former appeal. On that appeal the court did not consider, and could not properly have considered, what the rule would be where the supposed mortgagor, though not the owner of any interest in the mortgaged premises, was nevertheless entirely solvent and able to respond to the full amount of the mortgage debt. That question arises for the first time upon the present record, and its decision in favor of respondent is in no wise opposed to anything actually decided upon the former appeal. The true rule is as stated by one of the learned judges of the court below in this case: "When new issues are made, involving the finding of facts which could not be found under the pleadings which went to the supreme court, as to such new fact the opinion stands upon the same footing as if given in another case." The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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113 Cal. 437

McDONALD v. POOLE et ux. (S. F. 78.)[1]

(Supreme Court of California. July 23, 1896.)

PAROL EVIDENCE—WRITTEN CONTRACTS—COUNTERCLAIM—ASSIGNMENT—PLEADING—DENIAL.

1. Where the written contract provides for a certain payment for the work to be performed, it cannot be varied by proof of a prior parol agreement for a less price.

2. In an action by an assignee of a contract, against two defendants, one cannot set up a counterclaim consisting of an individual claim by him against the assignor.

3. In an action by the assignee of a contract, the failure to deny under oath the allegation of assignment contained in the sworn complaint dispenses with the necessity of proof of the assignment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by John W. McDonald against John P. Poole and wife. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. C. Bates, for appellants. Ash & Matthews, for respondent.

SEARLS, C. This action was brought to recover $907.50 and interest, as follows: $756.25 thereof upon a written contract entered into July 23, 1892, between James Casey and defendants, whereby the former agreed to grade, sewer, curb, macadamize, etc., Laidley street, between Fairmount and Harry streets, San Francisco; defendants agreeing to pay therefor $2.75 per foot for 275 front feet by them owned on said street. The complainant avers the assignment in writing of the contract by Casey to plaintiff on the 3d day of October, 1892, and the completion of the work on the 22d day of March, 1893, to the satisfaction of, etc. A second count of the complaint demands $151.25 for work, labor, and services performed and materials furnished to the defendants between January 1, 1892, and April 6, 1893, by said Casey, and avers the assignment of the demand therefor to plaintiff on the 17th day of April, 1893. The answer of defendants does not deny the making of the written contract, or its assignment to plaintiff, but avers that the price to be paid was $2 per front foot, and not $2.75, as alleged by plaintiff. To the second count, defendants answer, denying any indebtedness, and aver payment of $151.25, the amount claimed, prior to the commencement of the action, and deny that the contract therefor was assigned to the plaintiff. They further claim by way of answer and counterclaim: (1) That defendant John P. Poole was employed by Casey to procure the execution of the contract for the improvements by other parties on the street, and was to receive a commission of 5 per cent. therefor upon the aggregate proceeds of the contract, and also a deduction of $206.25, to be deducted from the contract price upon the lands of defendants. As a further counterclaim, defendants claim the sum of $787.70 as due them, as follows: $393.88, the amount agreed upon for services of defendant in procuring contract; also $151.25, paid to plaintiff's assignor, and being the amount specified in the second cause of action; the sum of $75.72, paid on written order of plaintiff's assignor to C. J. Wesson; and the further sum of $318.10, cash, paid to said assignor at different times on account of the contract. The court found there was due plaintiff on account of the written contract the sum of $360.75 as a balance after deducting a lumber bill of $75.75 paid by defendants, and an offset of $317.75 settled upon and agreed to by plaintiff on account of payments made by defendants to the assignor of said plaintiff. Upon the second count the court found in favor of plaintiff for $151.25, less $35 paid on account thereof, leaving a balance due of $116.25.

Upon the motion for a new trial the court required plaintiff to deduct this sum of $116.25, and interest thereon, from his judgment, which was done. This was all that defendants were entitled to claim, and had they been allowed less the result would have been justified by the evidence. John P. Poole, one of the defendants, testified as follows: "The aggregate amount of payments which I made him is $545.07. That includes the cash advanced at different times, in the account, of $315; lumber bill of $75.72, and bill of $151.25; extra work and notary's fee of $2.50." Deduct this aggregate of $545.07 from the sum of $907.50, the contract price of the grading, etc., and the $151.25 due for extra work, and, with interest added, we have substantially the sum for which the judgment now stands.

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[1] Rehearing denied.

The claim that there was a verbal agreement that the work for defendants was to be performed for less than $2.75 per front foot was properly rejected, for the reason that the subsequent written agreement fixing the price superseded all the previous oral negotiations. Civ. Code, § 1625.

The counterclaim of defendant John P. Poole on account of commissions claimed for procuring the signature of other property holders to the contract was properly denied. Conceding that it was properly proven, it was an individual demand against Casey, the assignor of plaintiff, and, as such, was not properly interposed in a joint action against the two defendants. Code Civ. Proc. § 438.

No evidence or finding as to the assignment of the written contract was required, for the reason that such assignment was averred in the sworn complaint, and not denied by the answer.

The findings cover all the material issues. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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113 Cal. 429

RAPP et al. v. WHITTIER et al. (S. F. 99.)

(Supreme Court of California. July 23, 1896.)

CREDITORS' BILL — WHEN LIES — SUIT TO SET ASIDE FRAUDULENT CONVEYANCE—REMEDY BY SUPPLEMENTAL PROCEEDINGS—FINDINGS.

1. A creditors' bill to reach property transferred by defendant to his co-defendant, and which is claimed by the latter adversely to defendant, will lie, since the remedy by proceedings supplemental to execution (Code Civ. Proc. §§ 717–720) would in such case be inadequate.

2. In a suit to subject to payment of a judgment against defendant property transferred by defendant to his co-defendant in fraud of plaintiff, in violation of Civ. Code, §§ 3449, 3457, an assignment that the court failed to make a sufficient finding as to the consideration for the transfer will not be reviewed, since the consideration therefor was immaterial.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Charles Rapp and another against W. F. Whittier and others. Judgment for plaintiffs, and defendant Whittier appeals. Affirmed.

Vincent Neale, for appellant. Mullaney, Grant & Cushing, for respondents.

BRITT, C. Appeal by defendant W. F. Whittier from a judgment whereby a transfer of personal property, evidenced by a bill of sale executed June 22, 1893, to said appellant by Henry F. Robbers and Charles Reck, who are also defendants here, was declared void, and plaintiffs were adjudged to recover of appellant the net proceeds in his hands of a sale of said property made by him subsequently to such transfer. It appears from the allegations of plaintiffs' complaint that Reck had no interest in the property described in the bill of sale. At the date of such instrument, plaintiffs had an action pending in the superior court against said H. F. Robbers, in which they sought to recover a debt owed to them by him. The said bill of sale was intended by Robbers, and accepted by Whittier, as an assignment of all the assets of the former, pursuant to an understanding between them and various creditors of Robbers, other than the plaintiffs, whereby Whittier was to hold and dispose of the property for the benefit of such other creditors, to the exclusion of plaintiffs. On September 5, 1893, in the course of their said action against Robbers, plaintiffs recovered judgment. Execution issued thereon, and, under the writ, the sheriff garnished Whittier in respect of all credits and effects in his hands belonging to Robbers. The garnishee denied the possession or control of any credits or other property of Robbers, and asserted title to said assets in himself. There was no other leviable property of Robbers, and the execution was returned unsatisfied. These allegations of the complaint were either not denied by defendant Whittier (who alone contested this action) or were found by the court to be true. It was further stated in the complaint that said transfer was without consideration. By the answer, issue was made on this averment.

The complaint being in the nature of a creditors' bill to subject property of Robbers, claimed by Whittier, to the satisfaction of plaintiffs' judgment against the former, appellant contends that the action does not lie; that with us the provisions of the statute for proceedings supplementary to execution (Code Civ. Proc. §§ 717–720) totally supplant any action of this character. Since appellant asserted title under the transfer from Robbers, and adversely to him, it would have profited plaintiffs nothing to pursue the course provided by the statute. In the face of that claim, they could not, by supplemental proceedings, reach the fund held by appellant. In such a case those proceedings do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purpose of the action. Swift v. Arents, 4 Cal. 390; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857.

It is urged, also, that the court made no sufficient finding upon the issue of consideration for the transfer; but as it clearly appears that such transfer was an attempted assignment for the benefit of creditors of Robbers, and void under the statute governing that subject (Civ. Code, §§ 3449, 3457), the question of consideration therefor was immaterial. Sabichi v. Chase, 108 Cal. 81, 85, 41 Pac. 29. The judgment should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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113 Cal. 414

## CHETWOOD v. CALIFORNIA NAT. BANK OF SAN FRANCISCO et al. (S. F. 177.) [1]

(Supreme Court of California. July 22, 1896.)

TORT—SUFFICIENCY OF FINDINGS—RELEASE OF JOINT TORT FEASORS.

1. In an action against three directors of an insolvent bank by a stockholder in behalf of the corporation, the complaint alleged that the defendants were the executive committee; that it was their duty to supervise the business of the bank; that it was the duty of each, concurrently with his associates, to exercise diligence in performing his duties; that defendants, "contriving together to injure and deceive the said corporation, neglected and omitted" to exercise care, etc.; and that, by such negligence, the money of the corporation was lost. *Held* that, under the complaint, the defendants were charged as joint tort feasors, and findings of fact which failed to find that the committee, or any member of it, as such, was guilty of conspiracy, but found that one defendant was negligent as president, were fatally variant.

2. Where several defendants are charged as joint tort feasors, a release of any one of them, by withdrawal of the action against him on the payment of a sum agreed upon between him and the plaintiff, operated to release other defendants from all further liability.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by John Chetwood, Jr., against the California National Bank of San Francisco, R. P. Thomas, and others. From a judgment for plaintiff, the defendant Thomas appeals. Reversed.

J. A. Stephens and Mr. Van Ness, for appellant. Thompson & Thompson, for respondent.

HENSHAW, J. This is an appeal from the judgment alone. Plaintiff, as a stockholder of the California National Bank, prosecuted this action against certain directors of the bank, to recover from them, and for the use and benefit of the corporation, the sum of $400,000, alleged to have been lost to the corporation by their negligent misconduct in the management of its affairs. The bank had become insolvent before the commencement of the action, and a receiver was in charge of its affairs. Plaintiff made demand upon the comptroller of the currency, upon the receiver, upon the corporation, and upon its board of directors to prosecute the action; and, upon their refusal, it was instituted in his name as plaintiff. The complaint, while it is entitled a bill in equity for an accounting and settlement of a trust, contains, as will hereafter be made manifest, nothing more than a charge ex delicto against certain directors for a breach and nonperformance of their duties. The three directors whose conduct is attacked, and who are the defendants against whom a judgment is sought, are Richard P. Thomas, president of the corporation, Robert R. Thompson, vice president, and Robert A. Wilson, a director; the three constituting the executive committee which is created, and whose powers are defined by the by-laws. The president and vice president were under the by-laws ex officio members of this executive committee. The third member, Wilson, was selected by the board. The complaint sets forth the section of the by-laws defining the powers of the president, and also that section specifying the duties and powers of the vice president. It contains likewise a by-law defining the duties and powers of the executive committee, which is as follows: "Sec. 7. There shall be appointed by the board of directors a committee known as the 'executive committee,' consisting of the president, vice president, and one or more directors, to continue to act until succeeded, who shall have and exercise immediate supervision of all the officers and business of this bank, who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, coin, and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes, and other evidences of debt discounted or purchased by them for the bank, and of concurrent and other expenses audited since their last previous report." The complaint then avers: That the three defendants named "were duly elected and by said board appointed the executive committee of said corporation and board of directors; * * * and the said three persons have constituted and been the said executive committee under said by-laws; and thereupon each of said defendants, Thomas, Thompson, and Wilson, duly accepted said office, to which they had as last herein aforesaid been elected and appointed; * * * and that, upon their said election and appointment as such officers, the said three defendants severally, and as such president, vice president, and executive committee, duly accepted the positions of the respective officers, and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed with due skill, care, attention, prudence, diligence, and fidelity." "That, as such executive committee, said three persons, Thomas, Thompson, and Wilson, as such committee, assumed the discharge of the duties thereof, and, in due performance of their duties, had from said date of their first appointment continuously, until the failure of said corporation, the immediate supervision of all the officers and business of said corporation. * * * On the said three said persons, the above-named defendants, Thomas, Thompson, and Wilson, as such executive committee, devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all officers and business of said bank for said corporation," etc. "That it was the duty of each of said members of the executive committee to exercise, concurrently with his associates on said committee, diligence and fidelity in performing the duties of said committee, as above detailed. That, well knowing each and all of said facts above recited, said three persons above named, defendants Thomas, Thompson, and Wilson, severally being fully aware of the nature and extent of said trust and the duties thereof, accepted and retained said trust, and unto the said corporation promised faithfully to discharge the same, and each and all of the said duties thereof in a proper, careful, and judicious manner." "That the business of said banking corporation was commenced shortly after October, 1886, but afterwards, and for a long space of time, the defendants above mentioned, Thomas, Thompson, and Wilson, not regarding their aforesaid duties, nor their respective and concurrent promises in that behalf, but wholly disregarding the same, and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment, and discretion in the making of loans and discounts out of the moneys in the possession of said bank, and otherwise directing the business of said bank; but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in any wise informing said defendants, or any or either of them, to lend the moneys of the said bank according to his own pleasure, by bills of exchange, without any consultation with said defendants, or any or either of them, in such manner as he (the said cashier) elected, to dispose of all the moneys of said bank." "That, by such negligence, worthless loans, and the various transactions above mentioned, the moneys of the corporation were wasted, misused, and lost." Then follow averments of specific instances of loss occasioned by improvident loans and purchases made by the cashier without the knowledge of these defendants; averments of demand upon the corporation, the receiver, and the comptroller to commence suit. It is then averred "that the defendants Thomas, Thompson, and Wilson are financially responsible, and able to make good the losses which have resulted to said corporation by reason of their said negligence"; and, in conclusion, a prayer "for a decree that the said trustees, the above-named defendants, Thomas, Thompson, and Wilson, be held to an accounting of their said trust; that they restore unto said corporation the sum of $400,000, with legal interest; that a joint and several money judgment against them, the said Thomas, Thompson, and Wilson, for the sum of $400,000, with legal interest thereon from the time of such loss, and costs herein, be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco."

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[1] Rehearing denied.

For reasons which will hereafter appear, we do not consider it necessary to meet and dispose of many of the objections raised by appellant to this complaint. Therefore it will be assumed, without deciding, that the complaint is sufficient to state a cause of action in its averments of misconduct, and that its averments of a demand and refusal to prosecute upon the comptroller, the receiver, and the corporation itself are sufficient; and so, as to other points of objection raised by appellant, the silence of this opinion is not to be construed as a determination of them.

There is no room for argument upon the question as to whether this complaint is upon a cause of action ex contractu, or upon one sounding in tort. It demands a joint and several money judgment against three men, constituting an executive committee, and charged with the performance of certain duties, for "contriving together to injure and deceive the corporation," and for injuring and deceiving it, by neglecting their duties, in the sum of $400,000. These defendants are charged throughout as joint tort feasors. If they were not, they could not be made defendants in one action. Their contrivance to injure was their joint contrivance. Their neglect is pleaded as their joint neglect to perform, not duties individually imposed upon them, but collectively undertaken as members of the executive committee. It is as members of the executive committee that they are alleged to have done the wrongs and permitted the losses. It is true that the complaint sets forth the by-laws relative to the duties of the president and of the vice president, but no charge of loss incurred by negligence is made against the president as president. If there were, then, as the other two defendants would not be chargeable with the president for his individual misconduct as president, it would be the subject-matter of a separate action, and have no place in this complaint. The prayer of the complaint, which may be looked to for aid in determining the nature of the proceeding, asks for a joint and several money judgment in the sum of $400,000, with legal interest, against the three defendants. No claim is anywhere made that there is a several and separate liability upon any one of the three, and not upon the others, for any of the acts charged against. To the contrary, from the beginning of the complaint to its prayer for a judgment, it is averred that the loss sustained was suffered through the common and collusive negligence of the three. It is alleged that the three defendants are "financially responsible and able to make good the losses which have resulted by reason of their said negligence." If the negligence did not arise in their failure to perform a common duty, they could not and would not have been made joint defendants. The trial court, moreover, found them to be jointly liable, and ordered a judgment against the three in a single amount.

The gravamen of the charge is the injury to the property of the bank by reason of the wrongful acts of the defendants. For these wrongful acts defendants are liable in tort, and the fact that there might be another cause of action ex contractu is a matter entirely apart. It frequently happens that the negligence complained of is the breach of a duty originating in contract, and in such cases the cause of action for tort may co-exist with a liability upon the contract. The negligence of a common carrier gives rise to an action ex contractu, or to one of trespass on the case. Historically, the action for tort is the older. "If a smith prick my horse with a nail, I shall have my action upon the case against him, without any warranty by the smith to do it well; * * * for it is the duty of any artificer to exercise his art rightly and truly as he might." Fitzh. Nat. Brev., 94, D. Even an intention to violate another's rights of property is not necessary to give one his action for trespass regarding his lands or goods. With or without contract, the duty is imposed upon all not to injure the property of another; and, for a failure to observe that duty, the right of action in trespass for the tort exists. Such is the cause of action here set up. The averments that defendants "promised faithfully to discharge their trust with due care and attention," etc., are unnecessary, and do not affect the cause of action. The law imposed upon them the duty of using due care when they agreed to discharge their duties as members of the committee. Their failure to use due care was a wrong, for which plaintiff is seeking redress. This wrong is charged, not to have been committed inadvertently or carelessly, which would amount to negligence pure and simple, but to have been wrought against the corporation through contrivance and collusion, with a design to injure it,—a charge which establishes that the pleader must have considered that he was dealing with a case of willful tort, partaking of the nature of a fraud.

It is claimed by appellant that the findings are not responsive to the issues joined by the pleadings, and to the understanding of this contention some explanation becomes necessary. The three defendants answered this complaint, making denial of the charges against them, and trial was had. The court, upon April 27, 1894, made and filed what it entitled an "Order of Judgment," as follows: "This cause having been heretofore submitted to the court for consideration and decision, and taken under advisement, and the court having fully considered the same, and being fully informed, it is ordered by the court that judgment be, and the same is hereby, entered in favor of the plaintiff, and against the defendants Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson, and in favor of the other defendants herein; and inasmuch as the testimony is unsatisfactory, the court being unable therefrom to determine the amount for which judgment should be entered, it is ordered by the court that a referee be appointed to take proof on that subject," etc. The referee was appointed, and directed to ascertain and report to the court the amount of the indebtedness due to the bank by certain named debtors thereof, for whose debts the defendants were to be held responsible. Upon August 17, 1894, the referee made his report, and found that there was owing to the bank from these debtors a sum of money in excess of $190,000. After this report had been filed, plaintiff accepted from two of the defendants, to wit, from Thompson and Wilson, the sum of $27,500, and, for and in consideration of said sum, renounced and withdrew his cause of action against these defendants, and dismissed the same, causing a formal judgment of dismissal to be entered therein. The judgment of dismissal follows the language of the stipulation which the parties entered into, and which declared that the plaintiff "hereby renounces and withdraws his cause of action herein as against the said defendants, and that he will not further prosecute the same"; "that, pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be, and is hereby dismissed, against the said defendants." The order for a dismissal was filed September 24, 1894, and the judgment was formally entered upon the same date. The stipulation for dismissal was, however, entered into upon September 13, 1894. Upon the 20th day of November, 1894, the court made and filed its findings of fact and conclusions of law. Throughout these findings no mention is made of any dereliction of duty upon the part of Thompson and Wilson. It is not found that the executive committee, or that any member of the executive committee, or that Thompson, or that Wilson, was or was not negligent, did or did not contrive together or with Thomas to injure and deceive the corporation. The findings are absolutely silent upon all of these material averments. In them, however, is set forth the by-law defining the duties of the president; and the findings proceed to charge the appellant herein, as president, with having himself individually committed acts of negligence, by allowing the cashier to make loans which resulted in a loss to the corporation of the sum of $166,919. It is then found that "from the defendants Robert R. Thompson and Robert A. Wilson, of, for, and on account of said loss, there has in this action been collected the sum of twenty-seven thousand five hundred ($27,500) dollars; leaving a net loss to the bank of the sum of one hundred and thirty-nine thousand four hundred and nineteen ($139,419) dollars." And, under these findings, a judgment is entered that the California National Bank of San Francisco have and recover from the defendant Richard P. Thomas the sum of $139,419, with interest.

There is here an absolute failure by the court to find upon the most material issues of the case,—the joint negligence of the three defendants, which alone it is alleged has occasioned loss to the bank. Such is the cause of action pleaded in the complaint. The findings, if it be conceded that they give evidence of a meritorious cause of action against defendant Thomas, do so because of a showing that he was negligent, not with the other defendants and as a member of the executive committee, but that he was individually and separately negligent in the performance of his duties as president. But this is not the cause of action pleaded against him, and it is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and the variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment (Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319); and the point may be raised upon appeal from the judgment alone (Putnam v. Lamphier, 36 Cal. 151).

But, while this error would necessitate a reversal, there is yet a more serious objection to be considered. This action, while in form pertaining to equity, is in its cause and substance a legal action to recover damages for tort against the three defendants pleaded as joint tort feasors. "A suit of this character," says Morawetz (Priv. Corp. § 271), "is brought to enforce the corporate or collective rights, and not the individual rights, of the shareholders. It may therefore properly be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation itself could enforce. Moreover, the essential character of a cause of action belonging to a corporation remains the same whether the suit to enforce it be brought by the corporation or by a shareholder. Thus, a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action as to limitations, etc., because a shareholder has brought suit in equity to enforce it on behalf of the company." In Hun v. Cary, 82 N. Y. 70, just such an action as the one at bar was brought by the receiver of the Central Savings Bank of the City of New York against defendants, who were trustees of the bank, to recover damages which it is alleged they caused the bank by their misconduct as trustees. Objection was made in the appellate court that the cause pertained to equity, and should have been tried before the equity branch of the court, instead of before a jury. The court of appeals used this pertinent language in disposing of the contention: "The receiver in this case represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank, and for any misfeasance or nonfeasance causing damage to the bank they were responsible to it, upon the same principle that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or nonfeasance in the business of the agency. The only relief claimed in this complaint was a money judgment, and, we think, was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum. * * * In actions ex delicto, the plaintiff may sue one, some, or all of the wrongdoers. * * * This claim was purely for unliquidated damages occasioned by a tort." While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all.

In the case at bar it is disclosed that, after the court had awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of them the sum of $27,500 for and on account of the injury and loss which the corporation had sustained, and a judgment of dismissal in their favor was accordingly entered. That this judgment, entered under the stipulation of the parties, was a retraxit, there can be no doubt. Merritt v. Campbell, 47 Cal. 542. The findings disclose that payment was made by the two defendants upon account of the judgment ordered against the three jointly, and the release was doubtless in consideration of that payment. Where a joint action is brought against two or more for trespass done, and all are held liable, the judgment must be for joint damages. All legal consequences of a joint judgment must follow. Each is liable for all the damage which the plaintiff has sustained, without regard to their different degrees of culpability, and a release to one discharges all. The plaintiff in this case, by accepting $27,500 from the two defendants for and on account of the joint trespass of the three, and by releasing them, has released his claim against the third. In Urton v. Price, 57 Cal. 270, an action for personal injuries occasioned by the explosion of chemicals was brought against Price, the demonstrator at a lecture. The charge was negligence. Thereupon plaintiff added the Mechanics' Institute, under whose direction the lecture was given, as a defendant. Subsequently plaintiff filed a stipulation discontinuing and dismissing the action as to the defendant the Mechanics' Institute. Thereafter the defendant Price filed an amended answer, setting forth that, after the commencement of the action, plaintiff had accepted $500 from the Mechanics' Institute for and on account of the injury he had received, and had dismissed the suit as to the institute. Judgment was entered in the trial court that plaintiff had received satisfaction for his injuries, and, upon appeal to this court, it was held that this constituted a release of plaintiff's claim against Price. In Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1167, plaintiff sued the Sutter Street Railroad Company and the Clay Street Hill Railroad Company for damages for personal injury, alleging that it was occasioned by their joint negligence. The court refused to instruct the jury as follows: "The defendant Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant the Sutter Street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant the Clay Street Hill Railroad Company." This court reversed the case for the refusal to give this instruction, holding it to be proper, and laying down the rule, as here set forth, and as universally accepted, that the release and discharge of one alleged tort feasor is a bar to further proceedings against the others. In this case it is true that the release is not pleaded by defendant Thomas in any supplemental answer, but the release itself was given after the court, by its order for judgment, had fixed the responsibility and the liability of the three defendants; and the record in this case and the declaration of the findings show that the money was paid for and on account of the loss which the court determined had been sustained by reason of the acts of the defendants. It clearly establishes the release, and the reason for it. Intolerable fraud and oppression could be worked if a judgment such as this, and so obtained, could stand. The circumstances of this case make that manifest. Three men are charged with having committed acts resulting in a loss to the company of $166,000. The complaint avers that these men are each and all financially able to make good the loss. The case is tried, and the court finds them jointly liable. Upon the announcement of the judgment, two go to plaintiff, and purchase their release for a small sum of money, and go free, while the third, who is adjudged by the court to be no more guilty than his fellow defendants, is cast for the whole amount of the loss. Even if the authorities were not, as they are, unanimous upon the subject, the injustice of such a procedure would be reason enough for the creation of a rule. There is no necessity for creating a rule, however, for we are called upon only to announce that which has long been established and universally followed. The judgment is reversed, and the cause remanded, with directions to the trial court to enter a judgment in favor of the defendant Thomas.

We concur: McFARLAND, J.; TEMPLE, J.

(113 Cal. 403)

## PEOPLE v. DE WINTON. (Cr. 108.)

(Supreme Court of California. July 22, 1896.)

ARSON—WHAT CONSTITUTES—OWNERSHIP.

Pen. Code, § 447, defines arson as the willful burning of a building with intent to destroy it. And section 452 provides that it is not necessary that a person other than the accused should have had ownership in the building set on fire; it is sufficient that, at the time of the burning, another person was rightfully in possession. *Held*, that the owner of a building who was in possession thereof could not be convicted of arson for the burning the same, though the building was so situated as to endanger the lives of the inhabitants of other buildings.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

William W. De Winton was convicted of arson, and from an order arresting judgment the people appeal. Affirmed.

Atty. Gen. Fitzgerald, for the People. Reddy, Campbell & Metson, for respondent.

VAN FLEET, J. This is an appeal by the people from an order arresting the judgment upon a conviction of arson, the question being whether the indictment sufficiently charges the offense. The material part of the indictment is that "the said William W. De Winton on," etc., "at," etc., "did willfully, maliciously, and feloniously, in the nighttime, set fire to and burn a building, namely, a house then situate," etc., "the property of William W. De Winton, with the malicious, willful, and felonious intent then and there to destroy said building." Then follows an averment that said house was situated in such immediate proximity to inhabited buildings, occupied by human beings, as to endanger life, etc., and did then and there threaten the lives of said human beings from said fire, etc. Giving effect to the presumption which the law raises, of identity of person from identity of name (Code Civ. Proc. § 1963, subd. 25), and it will be observed that the indictment charges the defendant with a burning of his own building. At common law, a man was not guilty of arson in willfully burning his own house, unless the house of his neighbor was thereby also burned; and this even though the burning was with intent to destroy his neighbor's house. 4 Bl. Comm. (Wend. Ed.) 221. Arson has always been regarded as essentially an offense against the security of the dwelling or habitation, rather than against the property (1 Whart. Cr. Law, § 825; 2 Bish. Cr. Law, § 24; People v. Fisher, 51 Cal. 319); and the right to destroy his own dwelling was doubtless founded upon the right which the law accords to a man of making such use of his property as he may see fit, so long as others are not thereby injured (1 Bish. New Cr. Law, § 514). In charging arson, therefore, it was always necessary, at common law, to aver the ownership of the building burned in another; and such is the rule in this country where not changed by statute. For this purpose, one in possession or occupancy of the premises at the time of the offense was deemed the owner, but it was essential that this should be averred and shown to be other than the defendant. State v. Keena (Conn.) 28 Atl. 522. If these principles are to be applied to the present indictment, it is quite obvious that it does not charge arson. It describes the building burned as the property of the defendant, and fails to aver its occupancy or possession by any one; and, being silent, the presumption is that it was in possession and occupancy of the owner. Nor is the pleading in any way aided in this respect by the averment that the house was so situated as that the burning thereof endangered the lives of inhabitants of other dwellings. It may be that this matter would make the indictment good as a charge of attempt to commit arson, but it does not help out the statement of the principal offense. The question, therefore, arises whether our statute has so changed or modified the definition of arson as to avoid this requirement of the common law; and this, we think, must be answered in the negative.

Section 447 of the Penal Code provides: "Arson is the willful and malicious burning of a building with intent to destroy it." If this section stood alone as a definition of the offense, there might be strong ground for holding the statement of the offense in the indictment sufficient, as substantially following the language of the statute. Under that section, literally construed, the burning of any building, of whatsoever character, maliciously and willfully, whether owned or occupied by the defendant or another, would constitute the offense; and the rule of the common law that a man could not be held guilty for burning his own house would be effectually abrogated. But that this result was not contemplated, and no such radical change in the law of arson intended, is, we think, made quite clear from a consideration of section 452, which relates to the same subject. That section provides: "To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning, another person was rightfully in possession of or was actually occupying such building, or any part thereof." This section is manifestly a limitation upon the sweeping terms of section 447, and implicitly contemplates that, to be the subject of arson, the building must be at least the qualified property of another,—must be at least rightfully in the possession or occupancy of another at the time of the offense. And we think that, obviously, this fact was intended to remain, as at common law, a substantive feature of the offense, which is an essential feature of its description, and must be alleged in order to charge the offense. People v. Myers, 20 Cal. 76. In that case, which arose under the statute as it existed prior to the Code (Hitt. Gen. Laws, § 1557), where the definition of arson in the first degree was, like section 447, wholly silent as to the ownership of the burned building, the court, in considering an objection to the sufficiency of the averment as to the ownership of the property, say: "It is essential that the indictment should show that the building burned is the property of another. East, P. C. 1034. And this was so held where the statute, like ours, did not say so in terms. People v. Gates, 15 Wend. 159. The allegation of the ownership of the building burned is a part of the description of the offense. It is a general rule of criminal pleading, as well as a provision of our statute (Cr. Prac. Act, § 239), that the indictment must be direct and certain as it regards the offense charged. In this indictment it is altogether uncertain whether the building burned was the dwelling house of Lemon or the Chinaman. It may be conjectured that it is intended to assert that the general property was in Lemon, and the special property or the possession with an interest was in the Chinaman, and the statement that the Chinaman was then in the dwelling house would aid this conjecture. But the meaning of such an averment, if it were admissible to make such an averment in this form, cannot be left to rest upon conjecture or to be made out by an argument. The defendant must be distinctly informed whose dwelling house he is accused of burning. It is urged in reply that surplusage may be rejected. But no allegation which is descriptive of the identity of what is legally essential to the charge in the indictment can be rejected as surplusage." In People v. Gates, 15 Wend. 163, cited in the last case, it is said in construing the statute of New York defining arson: "The statute does not say in terms that the house, the burning of which in the nighttime constitutes arson in the first degree, shall be the house of another, but such must necessarily be the construction. In defining arson in the third degree, the language is this: 'Every person who shall willfully set fire to or burn in the nighttime the house of another, not the subject of arson in the first or second degree,' shall be adjudged guilty of arson in the third degree. 2 Rev. St. p. 667, § 4. The legislature did not intend to require greater particularity in the offense in the third degree than in the first and second, in both of which the punishment is more severe than in the third. According to the literal construction of the section defining the offense of arson in the first degree, a man might be punished with death for burning his own house in his own possession. I apprehend such was not the intention of the legislature, but that the common law may be called in aid of the definition of the offense, particularly when taken in connection with the section above referred to, defining arson in the third degree. If this qualification should be annexed to the offense of arson in the first degree, it must be equally applicable to the same offense in the second degree; and, testing this indictment by the rules laid down in the books which have been cited, it will be found defective." In People v. Russell, 81 Cal. 617, 23 Pac. 418, this court would seem to have taken the same view of the provisions of the Code. In that case the information charged and described the building as the property of another than the defendant; and, in passing upon an objection to the sufficiency of the pleading in another particular, it is suggested that the information is drawn in accordance with the statute and is good. See, also, People v. Fisher, 51 Cal. 320, where impliedly the same construction was sustained.

From these considerations, we are of opinion that the indictment in this case did not charge defendant with arson, and that the judgment was therefore properly arrested. Order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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113 Cal. 444

## OWENS v. McNALLY. (S. F. 50.)

(Supreme Court of California. July 23, 1896.)

PAROL CONTRACT TO MAKE WILL—SPECIFIC PERFORMANCE — CERTAINTY IN PROVISIONS — INTERVENING RIGHTS — STATUTE OF FRAUDS — PART PERFORMANCE.

1. Part performance of a parol contract to make a will in consideration of services, by rendering such services, is sufficient to take it out of the statute of frauds, if the services are of such a peculiar nature that it is impossible to estimate their value in money, and it is evident that the parties did not intend that their value should be so measured.

2. A parol contract by decedent to leave to plaintiff all his property, real and personal, if she would leave her home and thereafter "live with him and care for him," is not so vague and uncertain as to preclude specific performance in an ordinary case; but such performance will not be decreed as against a wife who was married to decedent without notice of such contract, and who was his only heir at law.

3. Plaintiff's remedy in such case is by an action on quantum meruit.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Maria B. Owens against Alice McNally, administratrix of the estate of Lawrence McNally, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Buck & Cutler and Frank McGowan, for appellant. Chamberlain & Wheeler and Geo. D. Murray, for respondent.

HENSHAW, J. This is an appeal from a judgment, the evidence being brought up for review by a bill of exceptions. The action is prosecuted by Maria B. Owens against Alice McNally, as administratrix of the estate of Lawrence McNally, deceased, and against Alice McNally individually, with whom are joined as defendants all the other heirs at law of said Lawrence McNally. The action was to compel specific performance of a contract averred to have been entered into by and between plaintiff and Lawrence McNally. In the year 1881 plaintiff was 18 years old, and was living with her parents, in the state of Michigan. Lawrence McNally was the brother of plaintiff's mother, and at that time resided in the city of Eureka, in Humboldt county, state of California, where he continued to reside until his death. "In 1881 said Lawrence McNally had never been married, and was fifty-four years old, and in said year he went to the state of Michigan, and then and there represented to plaintiff and to her parents that he was possessed of money and property worth more than $20,000, and that he had no one to care for him, and that he desired that plaintiff should leave her home and parents, and accompany him to California, and thereafter live with him and care for him; and then and there said Lawrence McNally promised and agreed to and with plaintiff that if she would accompany him to California, and live with him and care for him, he would give or bequeath to her all property which he might own at the time of his death." Under this agreement, plaintiff left her home and parents, accompanied Lawrence McNally to California, and from that time until his marriage, in 1893, "lived with him, took care of him, and devoted her time, labor, and energy to caring for his health and comfort, and duly performed all the conditions of said contract on her part to be performed by the terms thereof." The complaint then avers the marriage of Lawrence McNally, his death intestate, and that he left separate estate in real and personal property in the county of Humboldt of a value in excess of $20,000. The court found the contract exactly in the terms of the complaint, as above quoted. It further found that plaintiff had duly performed all the conditions of the contract upon her part to be performed, in accordance with the terms thereof. It found that the contract was in parol, and that it had never been declared or acknowledged by Lawrence McNally in any note or instrument signed by him, or by any person thereunto authorized by him in writing so to do. As matter of law, it concluded that, as the contract was in relation to real property, it was within the statute of frauds; that the services rendered and the care bestowed by the plaintiff under the contract were not of so peculiar or exceptional a nature as that they could not be compensated for in money, and that her performance of these services and her bestowal of this care did not operate as such a part performance as would take the contract out of the operation of the statute of frauds; that the contract was in relation to both real and personal property, and it was therefore to be regarded as an entirety, and could not be enforced as to the personal property. Judgment for defendants properly followed these conclusions of law.

In view of the multitude of cases which have arisen in other states over contracts such as this, it is indeed curious that in nearly 50 years of juridical life these questions should be presented to this court for the first time. The result is, however, that the determination of them is not made difficult by an absence of authority, but rather is made troublesome from a superabundance of cases not always harmonious. Without entering upon any extended review of the authorities, there is, and has been from a very early date, a general concurrence among them upon the proposition that a man may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement specifically, by treating the heirs as trustees, and compelling them to convey the property in accordance with the terms of the contract. The earlier cases in which this question arose were of two general classes, the one being those cases in which there was an agreement to the making of mutual wills, as the case of Durour v. Perrara, in which Lord Camden, in 1769, decreed that an agreement to make mutual wills, when properly proved, is binding on the parties, and will be enforced by a court of equity. 2 Hag. State Trials, 304. So, in the similar case of Lord Walpole v. Lord Orford, 3 Ves. 402, while Lord Chancellor Loughborough denied specific performance because of the uncertainty and vagueness of the particular contract, the rule and doctrine previously announced by Lord Camden was never questioned, and has continued to be the accepted law to this day. The other class of early cases grew out of promises to make testamentary settlements in consideration of marriage, in consideration of compromises and the like, and such promises, upon clear proof of their execution, have been uniformly enforced. Jones v. Martin, 3 Anstr. 882; Fortescue v. Hennah, 19 Ves. 66; Logan v. Wienholt, 7 Bligh, 1, 53; Goilmere v. Battison, 1 Vern. 48. In Rivers v. Rivers' Ex'rs, 3 Desaus. Eq. 190, the chancellor says: "It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other, and he who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject. To be sure, the court would be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proofs of the fairness and justness of the transaction. I conclude, therefore, that the party had a right to bind himself to make his will in a particular way by an agreement, and the court has the power to enforce the agreement." And in the leading case from New Jersey (Johnson v. Hubbell, 10 N. J. Eq. 332), it is said: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree a specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisprudence."

This rule, it may be said without further quotation, is supported by the overwhelming weight of authority. It is so declared in New York, in Parsell v. Stryker, 41 N. Y. 480; Gall v. Gall (Sup.) 19 N. Y. Supp. 332; in Missouri, by Gupton v. Gupton, 47 Mo. 37; in Michigan, in Faxton v. Faxton, 28 Mich. 161; Wright v. Wright, 99 Mich. 170, 58 N. W. 54; in Ohio, in Shahan v. Swan, 26 N. E. 222; in Utah, in Brinton v. Van Cott, 8 Utah, 480, 33 Pac. 218; in Nebraska, in Kofka v. Rosicky, 59 N. W. 788; in Georgia, in Maddox v. Rowe, 23 Ga. 434,—while by the federal courts it is said in Jaffee v. Jacobson, 1 C. C. A. 24, 48 Fed. 24, "We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate, as a reward for peculiar personal services rendered or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisee's death." And the supreme court of the United States, in Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, enunciates the same doctrine. Under these authorities it is held—and it is the generally accepted rule—that while the payment of the purchase price, or the rendition of services, where a contract is within the statute of frauds, is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute, nevertheless, if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff, after the performance of the services, could not be restored to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule, and equity, where other objections are not present, will decree specific performance. But in such cases the reason for the interposition of equity is quite obvious. Plaintiff has rendered service of extraordinary and exceptional character,—such service as, in contemplation of the parties, was not to be compensated for in money, and, as in contemplation of law, cannot be compensated for in money. Therefore by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections. Wat. Spec. Perf. Cont. § 41; Pom. Spec. Perf. § 114. But the question whether relief should be granted or denied in a particular case addresses itself peculiarly to the conscience of the chancellor, and, before a plaintiff entitles himself to it, many considerations enter, and are to be weighed. The specific performance must not be objectionable upon other grounds. The contract, therefore, must be definite and certain, and the remedy asked for must not be harsh or oppressive, or unjust to innocent third parties, or against public policy, or equity will, with propriety, withhold its assistance.

We are justified in considering the terms of this contract to be as pleaded by plaintiff, and as found by the court. As to the services to be rendered by plaintiff, those were that she should leave her home and parents, accompany McNally to California, "and thereafter live with him and care for him." There is here much vagueness and uncertainty as to how long she was to live with him; as to what kind of service she was to render to him. Where a contract such as this, resting in parol, and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract. Ackerman v. Ackerman's Ex'rs, 24 N. J. Eq. 587. Neither the length of time which plaintiff was to spend in living with and caring for the intestate is made certain, nor the kind or character of the services which she was to render. What position she was to occupy in his household is not made plain. Whether she was to remain there in the capacity of daughter, housekeeper, or menial servant, is in doubt. In the very similar case of Lisk v. Sherman, 25 Barb. 435, the contract was that the plaintiff was to live with and take care of the testatrix as long as the latter lived, and at her death plaintiff was to have all her property. This case arose in New York, which recognizes the rule as we have given it. The court said that the uncertainties connected with the agreement forbade the idea that any pecuniary amount of compensation for the plaintiff's services could have been in the mind of either of the parties, but that the services to be rendered were uncertain, both in respect to the time they were to continue, and as to their character and extent. For these reasons the court refused specific performance, and left the plaintiff to her action at law upon quantum meruit. So, also, in Shakespeare v. Markham, 10 Hun, 311, affirmed in 72 N. Y. 400, personal services were to be rendered upon an oral contract, and to be compensated for by a devise of all the property. The court held the services to be so uncertain in their character, not only with respect to the time of their continuance, but in regard to their nature and character, and the compensation to be made for them to be so uncertain, that the contract was one which a court of equity would not be under the necessity of compelling specific performance of. On the other hand, it must be said that, looking to the evidence which supports the finding as to the nature of the services to be rendered, it fairly appears that the plaintiff entered the household of Lawrence McNally, and took and occupied the station which would have belonged to his daughter. There is thus in plaintiff's bill an omission of a term favorable to herself, which her evidence makes out; and for this reason, if this were the sole objection, the court might not be justified in withholding relief. Pom. Spec. Perf. § 137.

But we pass to a much more serious question,—whether specific performance, if decreed in this case, would not be harsh and oppressive and unjust to innocent third parties. As was well said in the leading case of Johnson v. Hubbell, supra: "The complainant has a right to the protection of this court, and its aid in enforcing and protecting his rights; but if that protection and aid cannot be afforded him without invading and disregarding the rights of others, this court may not, in its anxiety and desire to relieve one party, inflict a wrong and injury upon another, entirely innocent in the transaction." This is the precise situation presented by the peculiar facts of this case. Lawrence McNally married, and at his death left surviving him his widow, one of the defendants in this action. Marriage is a contract viewed by the law with such especial favor, and the family relation is one so deep seated at the root of our institutions, that contracts in restraint of marriage are void as against public policy, while anything which tends to prevent marriage, or to disturb the marriage state, is viewed by the law with suspicion and disfavor. The defendant widow married McNally in ignorance of the contract, and, it appears, continued in ignorance of the contract until after his death. She acquired distinct rights of heirship and succession. There might have been children born of the marriage, with similar rights. It it true that these rights vested after the contract was made, but, where a bill is brought for the specific performance of a contract, the after-acquired rights of third parties are equitable considerations to be regarded in adjudicating the questions. Curran v. Water Power Co., 116 Mass. 90; 5 Wait, Act. & Def. 775. A specific performance of this contract cannot, therefore, be decreed without sweeping aside, as of no moment or avail, the rights of the wife and widow, vested under a contract most strongly favored by the law. Specific performance, as we have said, is not to be decreed under strict rule and formula. Every consideration which may properly be urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff, and even then it will be denied if it operates by way of a hardship upon the innocent. So, while this contract was not void, as against public policy, at the time it was entered into, it must be held that the parties to it contracted in view of the fact that a subsequent marriage by Lawrence McNally might be consummated, and that the effect of this marriage would be to compel a court of equity, in justice to the widow or children, to deny specific performance. Or, viewed in another way, it must have been within the contemplation of the parties that Lawrence McNally might marry; for the contract could not have been designed as a restraint upon his marriage, or it would be void. If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy. The only permissible conclusion is, therefore, that the parties contracted in contemplation of that event. Upon its happening the rights of innocent third parties intervened, and a decree of specific performance could not be awarded. Gall v. Gall (Sup.) 19 N. Y. Supp. 332. The trial court, as has been said, found that the contract in question rested in parol. It is claimed that this finding is error, and that the trial court likewise committed error in rejecting offered evidence of a letter written and signed by Lawrence McNally, and containing the contract here in suit. Whether or not the court committed error in its ruling need not be considered. The statute of frauds and perjuries requires a writing to evidence the making of certain kinds of contracts, but, if this particular contract were in writing, the position of appellant would not be bettered. A written contract, such as this, for the reasons we have discussed, would not strengthen appellant's position, nor entitle her to the relief sought. The court by its decree denied plaintiff specific performance. We think the decree was just, and that plaintiff, for her recovery, must resort to an action on quantum meruit. The judgment is affirmed.

We concur: McFARLAND, J; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; and TEMPLE, J.

(113 Cal. 673)

## BUCKLEY v. SILVERBERG. (S. F. 156.)[1]

(Supreme Court of California. Aug. 7, 1896.)

PRINCIPAL AND AGENT—OSTENSIBLE AGENCY—TRIAL.

1. Plaintiff sold cattle to one claiming to be acting as agent for defendant, and paying by draft drawn on defendant. He had made similar sales previously, and the defendant had paid, and before the one in question the buyer had telegraphed defendant as to the price to be paid for a portion of the cattle, the message and answer being shown plaintiff. The cattle were received, and used by defendant, who refused, however, to pay the draft. *Held*, that without regard to the actual relations between defendant and the buyer, under Civ. Code, § 2300, providing that "an agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent," defendant was liable for the price of the cattle.

2. It is not competent for a party to go into a collateral matter on cross-examination, and afterwards rebut the testimony so called out.

3. Either party is entitled to have an instruction given on his theory of the case, if there is any evidence to support it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by C. F. Buckley against S. Silverberg. Judgment for plaintiff, and defendant appeals. Affirmed.

T. M. Osmont, for appellant. Mullaney, Grant & Cushing, for respondent.

HAYNES, C. This action was brought to recover from the defendant the sum of $1,032, the price of certain calves and beef cattle sold by plaintiff to defendant. A jury trial was had, and plaintiff obtained a verdict and judgment for said sum, with interest from March 5, 1894; and from said judgment, and from an order denying a new trial, the defendant appeals.

Defendant is a wholesale butcher doing business in San Francisco; and plaintiff also resides in said city, but owns a ranch at Goshen, in Tulare county, and had cattle thereon. Con O'Neill was plaintiff's manager and agent at the ranch, which is distant from the city about 240 miles. On February 28, 1894, L. D. Whitt, whom plaintiff alleges was the agent of defendant, called at the ranch, and proposed to buy a lot of 36 calves. O'Neill asked $10 per head for them. Whitt said, "I cannot pay that much, but I will go down and telegraph to Mr. Silverberg, and see what he can pay for them." He thereupon sent to Silverberg the following telegram: "Can give you car calves, average two hundred and thirty, ten dollars. Wire me. L. D. Whitt,"—and received the following reply: "You can pay only nine dollars. They must be fat. S. Silverberg." Whitt then offered nine dollars per head for the calves, and O'Neill accepted the offer. The next day, Whitt looked at some steers, for which O'Neill wanted 5½ cents per pound. Whitt again telegraphed Silverberg as follows: "March 1, 1894. Will ship car calves to-night. What can I pay for car fat steers? Will average five hundred and fifty. Answer here at once." Under same date, Silverberg replied: "Market low. Cattle must be prime and fat to pay five cents. If not fat, do not buy." Mr. O'Neill testified that he saw the first telegram and the reply, and, as to the second, Whitt told him that he got a message that he could only pay 5 cents for good beef, and after looking at the cattle a second time he said he would give $29.50 per head for the steers, and this offer was accepted, and Whitt gave him a draft on the defendant for $1,032, the full amount of both purchases. O'Neill further testified that in making these sales he acted as agent for the plaintiff, and that Whitt "said he was buying the cattle for Mr. Silverberg," the defendant. Mr. Whitt notified the defendant by telegram, on March 2d, of the shipment of both lots, and they arrived on the 3d, and were received by the defendant, who saw them as they were being driven to his stock yards. Mr. Whitt came with the cattle to Oakland, and later in the day came to defendant's office, and was informed by telephone from the stock yards by the defendant that the cattle were not worth the amount of the draft drawn in favor of the plaintiff, and he would not pay it. Mr. Whitt then said he would go and see the plaintiff, "and see what could be done;" but he did not find the plaintiff, and left town without seeing him. Later, on the same day, the defendant called on the plaintiff, and plaintiff's version of the interview is as follows: "Silverberg called at my office on the 3d of March, and informed me in very strong language that this man Whitt had about played the devil with him. I said, 'What about it?' He said he had been buying cattle for him (Silverberg), and that he had bought them entirely too high. And I wondered why he should tell me about the matter. I said, with some surprise, 'Whose cattle were they?' And he said, 'They are your cattle.' I said I had not heard a word.

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[1] Rehearing denied. Beatty, C. J., dissenting.

about it. Neither had I then. Then he told me these cattle had been bought by Mr. Whitt contrary to his instructions, and that he would not pay the draft. I said, 'I guess you will have to pay the draft, if they are my cattle.' He then said that my man and Whitt were, no doubt, in 'cahoots'; and I got angry then, and told him my man would not do anything of the kind." The plaintiff further testified, on cross-examination, that there had been some little transactions between O'Neill and Mr. Whitt which were paid by drafts on defendant, which were duly honored; and, referring to the interview above quoted, he further testified that defendant said that Mr. Whitt never was his agent, and plaintiff then asked him why he had honored his drafts previously. On March 4th, defendant wrote Mr. Whitt, at Tucson, Ariz., in relation to other matters, and added: "I saw Dr. Buckley to-day, and explained matters to him. He said, however, the draft must be paid. Now, I do not want to quarrel with him, and so will pay the draft. In this connection, will say, when you return I want you to call and see me; and in the meantime do not draw any drafts on me, as I will not pay them. There is nothing in it, either for you or for me, in buying cattle and paying more than they are worth. These cattle and calves will, I am sure, fall short about $150. When I see you, we will see what arrangements can be made, as I would like to see you make a little money, but you cannot do it the way matters stand now." On the 5th, defendant commenced slaughtering the cattle, and, not finding them as good as he had thought they were, refused to pay the draft,—which was payable that day,—but went on and slaughtered and disposed of all of them, and has paid nothing on account of them except the freight, which was to be paid by the purchaser. The deposition of Mr. Whitt was read by the plaintiff, in which he testified that he acted for defendant in making the purchase. "I considered I was acting for Mr. Silverberg. Q. 'Considered' does not answer the question. Were you, or were you not, acting for Mr. Silverberg? A. I certainly was." From the cross-examination of Mr. Whitt, it appears that he commenced shipping cattle to the defendant in November, 1893; that defendant knew that witness did not have a dollar to pay for cattle, and defendant was to advance liberally on cattle that were shipped. Defendant was then slaughtering cattle on commission; that is, he would retain the hides, tallow, tongues, and offal, and account for the proceeds of the carcasses. No instance appears in which Whitt paid any money for cattle, but payments were made by drafts drawn on defendant, and usually made payable on a day named, allowing sufficient time for the shipment to reach defendant on or before the day of payment. In two or three instances, however, the cattle were paid for by defendant at once by draft, without giving time for their arrival. Defendant charged Whitt, upon his books, with the drafts paid, and the freight, and credited him with the sales of the beef; and in case of calves, which were sold with the hides on, a commission of one dollar per head would be charged. The practical result of this arrangement, so far as compensation to each was concerned, was that defendant had the hides, tallow, tongues, and offal, and Mr. Whitt had any profit that should remain after deducting drafts and freight paid by defendant; and the form of the account was the same as it would be in case the owner had sent his cattle to be slaughtered on commission, the only difference being that in Whitt's account the amount paid for the cattle became a charge in the account. The evidence on the part of the defendant is in sharp conflict with the evidence on the part of the plaintiff as to an agency in fact, and also as to the conversation between the plaintiff and defendant, plaintiff's version of which has been given. The telegrams sent to Whitt in relation to the purchase of the calves and cattle from plaintiff's agent were explained by saying that the object was to inform Mr. Whitt of the state of the market, and were such replies as he sent to any one desiring information, and that the object of having drafts made payable at a date which would enable the shipment to arrive was that defendant might inspect the cattle, and see whether they were of sufficient value to justify the payment of the draft.

The principal question presented is whether the evidence justifies the verdict. There is no conflict in the evidence as to the facts immediately connected with the sale made by plaintiff's agent. As to whether Whitt was in fact the agent of Silverberg, there is a direct and material conflict, if the conclusions of Whitt, upon the one hand, and Silverberg, upon the other, drawn from the same circumstances, are considered. There was no misunderstanding between them as to what each was to do, but, as to what relation between them was thereby constituted, they came to opposite conclusions. In the view we take of the case, it is not necessary to consider whether Whitt was in fact defendant's agent. It is sufficient to say that, so far as third parties were concerned, that part of the business open to their observation was consistent with the existence of an agency; and, as to the transaction in question, plaintiff's agent was fully justified in believing that Whitt was dealing with him as defendant's agent. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civ. Code, § 2300. The fact that Whitt, before purchasing either the calves or the cattle, telegraphed the defendant to know what he could pay, and received in reply instructions or information so worded as to clearly show that defendant was not only interested in the purchase in some way, but that he controlled the price to be paid, would naturally lead any one to believe that he was in fact the purchaser; and, though the defendant may not have intended to hold Whitt out as his agent, he certainly did not exercise ordinary care to prevent O'Neill from believing that he was the principal, and Whitt merely his agent. He knew that Whitt, on two previous occasions, had given O'Neill drafts for purchases, drawn in favor of the plaintiff, which he had paid without question, and that Whitt had neither money nor credit to make the purchase on his own account, and that a draft would be drawn upon him by Whitt for the full amount of the purchase. As a business man, the defendant must have known that a draft upon him would not be received, and the property delivered, if the seller knew that its payment depended upon his estimate of the value of the cattle after their arrival in San Francisco, and therefore was only an advancement to Mr. Whitt, and that the natural inference of the seller would be that Whitt was the agent of defendant, and purchasing for him. If anything further were necessary to put the defendant on his guard, the wording of the telegrams sent him by Whitt should have led him to an explicit statement in reply, to the effect that it made no difference to him what Whitt paid for the cattle, but he would not pay drafts for more than he thought, upon inspection, would be realized from sales of the beef.

The defendant was not prejudiced by the rulings of the court in excluding the letter of Mr. Whitt to the defendant in regard to the cattle bought of Wright, nor in excluding the letter of defendant to Whitt of November 30, 1893. The first of these letters directed the defendant to deliver to Mr. Wright the account of sales and net returns of the cattle "shipped by me to you on commission, and which arrived here on January 8, 1894." This is conceded by counsel to be a collateral matter. It was brought out by the defendant, upon the cross-examination of plaintiff's witness Mr. Whitt, that defendant refused to pay the draft for the Wright cattle after their delivery, and that the matter was settled between the defendant and Wright upon terms unknown to him; and he was further asked the general question whether "the cattle involved in this action were bought by you under the same arrangement you had with Mr. Silverberg touching other lots of cattle purchased by you?" To which the witness replied, "Why, I would so consider it certainly." After plaintiff rested, and upon the examination of the defendant in his own behalf, the letter in question was produced and offered in evidence. In the examination in chief, plaintiff put no question to the witness in reference to any other purchase than that involved in this action; and it was not competent to go into a collateral matter upon cross-examination, and afterwards rebut the evidence so called out. The letter from defendant to Mr. Whitt, offered upon the examination in chief of the defendant, related also to collateral matters, and so far as it contained anything illustrating the relations between himself and Mr. Whitt, and their mode of doing business, was a repetition of his oral testimony.

Defendant also excepted to an instruction given to the jury upon the subject of ratification of the acts of an alleged agent by retaining the benefits of the transaction. The objection was that the evidence did not warrant the instruction. We think this exception is not well taken. Defendant knew on the 3d that the draft in favor of the plaintiff was for the full purchase price of the cattle and calves, and that plaintiff claimed that Whitt was defendant's agent in the transaction, and had declared his purpose of holding him liable for the purchase price. He knew that Whitt did not draw against a fund then in his hands, but against the cattle shipped to him, and which he had received. On the next day, March 4th, defendant wrote to Whitt that he would pay the draft, though the cattle would fall short of the amount by $150, rather than have any quarrel with the plaintiff, and on the 5th commenced slaughtering the cattle; and after he had commenced to slaughter them, and thus put it out of his power to restore the property either to Whitt or the plaintiff, he changed his mind, not because he had learned any new fact touching the transaction, but because he found that he had overestimated their value. Having, under these circumstances, slaughtered the cattle, and not only received the profit which he would have derived from slaughtering them on commission, but had the entire proceeds, which, upon any theory as to the relation which in fact existed between him and Whitt, became his upon his assuming the payment of the draft, we think there was evidence which justified the court in giving the instruction excepted to. Either party has the right to have an instruction given to the jury, based upon his theory of the case, if there is any evidence to support it; and the judgment will not be reversed because we may find such evidence insufficient to justify the verdict upon that theory, if it appears that upon other facts, covered by proper instructions, the verdict is right. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(5 Cal. Unrep. 399)

## SPAULDING v. WESSON et al. (S. F. 41.)[1]

(Supreme Court of California. July 23, 1896.)

MUNICIPAL CORPORATIONS—STREETS—DEDICATION—ACCEPTANCE—ESTOPPEL.

1. It appeared that in 1855 and 1856, under certain ordinances, a landowner had a tract subdivided into blocks and lots, with streets delineated thereon, among which was Union street, and a map was made and approved, showing such survey. In 1861 the then owner of defendant's lot made a declaration of homestead upon it, showing it to be bounded on the north by Union street. The conveyance of said lot to defendant, and a declaration of homestead and mortgage executed by him, all described the lot in a similar manner. When Union street was graded, defendant made no objection thereto. After the grading was finished the fences were adjusted to Union street as thus laid out, the street was sewered and paved, and a street railroad was placed thereon, without objection by defendant. *Held*, that Union street was dedicated to public use as a street, and accepted as such.

2. The fact that, 12 years after the city had caused Union street to be graded, it took steps to declare Union street a public street, and to procure the legal title thereto, cannot operate as an estoppel in pais to defeat a recovery for work done by the contractor who graded the street.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Water H. Levy, Judge.

Action by N. W. Spaulding against J. W. Wesson and others to recover on a street assessment for grading. From a judgment in favor of plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

J. C. Bates, for appellants. W. H. H. Hart and D. H. Whittemore, for respondent.

SEARLS, C. This is an action to recover on a street assessment for grading Union street from Larkin street to west line of Franklin street, in the city and county of San Francisco, under a contract made on the 4th day of October, 1877, with plaintiff's assignor, J. S. Dyer. Plaintiff had judgment, and defendants appeal therefrom, and from an order denying their motion for a new trial. The cause has been here before, upon an appeal by the plaintiff, and the decision is reported in 84 Cal., at page 141, 24 Pac. 377.

Was Union street, from Larkin street to the west line of Franklin street, on the 25th day of June, 1877,—the date of the resolution of the board of supervisors to order the grading thereof,—a public street of the city and county of San Francisco? This is practically the sole question in the case. It needs no argument to demonstrate that, if that portion of said street was not in fact and law a public street, the board of supervisors was without jurisdiction to order the improvement for the payment of which the assessment involved in this action was made. This question was made an issue in the case, and was solved in favor of the plaintiff by the eighth finding of the court, in the following language: "That Union street, between Larkin and Franklin streets, originally ran through a part of lot No. 15 of the Laguna survey, as designated on the official map of said city and county, but that said portion of Union street was, prior to the 25th day of June, 1877, dedicated to public use, and was then, and now is, a public street, and not owned by the defendants." This finding is assailed by the appellants as not being supported by the evidence. The answer to the objection thus made is determinative of the case. Some minor questions were made at the trial, which need not be noticed; for, as is well said by counsel for appellants, "they resolve themselves into the question of the right of jurisdiction of the board of supervisors to grade a projected street, only, through private property, and to attempt to assess the owners of the property unlawfully attempted to be taken, to pay for the work." Manifestly, if the alleged street was not private property, but an open, public street, objections predicated upon the theory of its being such private property fall to the ground. The finding is to the effect that the street became such by dedication prior to June 25, 1877. Dedication is the setting apart of land for the public use. To constitute a valid dedication to a public use, it is essential that the acts of the owner be of such a character as to conclude him, and that, as against the public, it be accepted by the proper local authorities, or by general public user. No formal act of dedication by the owner, or of acceptance by the public, is requisite. Any evidence which establishes the intent of the owner to dedicate, and of the public to accept such dedication, is sufficient to establish a common-law dedication to a public use. There was evidence tending to show that the lot of land owned by defendants, designated in the assessment as "Lot 18," and situate at the southwest corner of Union and Polk streets, originally constituted a part of lot 15 of the Laguna survey, conveyed in 1848, by an alcalde grant to Stephen Harris, under whom, by sundry mesne conveyances, defendants hold title. Upon the Laguna survey, so far as appears by the map, no streets were designated or laid off. There were, however, some streets and roads over the tract, and among them a road leading from the city to the Presidio, known as the "Presidio Road," which, from some of the evidence, it is to be inferred, was in part, at least, upon the same ground with Union street. W. S. Dyer, a witness for plaintiff, and the contractor who graded Union street, says the Presidio road was about twenty feet wide, and "ran down the hill in front of Mr. Wesson's [defendants'] lot." The exterior lines of defendants' lot (laguna lot No. 15) included Union street.

The evidence upon which the dedication of the street to public use is based may be summarized thus: In 1855 and 1856, under and pursuant to certain ordinances of the city and county of San Francisco, the land in question here was surveyed, and subdivided into blocks and lots, with streets delineated thereon, among which was Union street, and a map known as the "Van Ness Map" was made and approved, showing such survey, lots, and streets. The old Presidio road seems to have been abandoned soon after, and the streets, as laid out, used in lieu thereof. Some of these streets, owing to natural obstacles, could not be much used until graded and improved, and among these was a portion of Union street. In 1861 the grantor of defendants made a declaration of homestead upon the lot of defendant; showing it to be bounded on the north by Union street, and east by Polk street. The conveyance to defendant J. W. Wesson, and a declaration of homestead and mortgage executed by him, all described the lot in a similar manner; and some of them referred to the Van Ness map, and to Union and Polk streets, as delineated thereon. When Union street was graded, in 1878, by Dyer, the assignor of plaintiff, defendant J. W. Wesson made no objection thereto, but seemed to assent, and directed Dyer to take down a fence which extended into the street, and to place the material in the back yard. After the grading was finished the fences were adjusted to Union street as thus laid out, the street was sewered and paved, and a street railroad placed thereon and operated,—all, so far as appears, without objection by defendants. This would seem ample to warrant the court in finding that Union street was dedicated to public use as a street, and accepted as such by the public and by the municipal authorities. On the other hand, counsel for appellants contend that as in 1891–92 the city authorities took steps to declare Union and the adjoining streets public streets, to procure the legal title thereto, and did in fact receive conveyances from defendants, and other owners of property on Union street, of their rights therein, the city is thereby estopped from saying that the title did not remain in defendants until thus conveyed. We cannot concur in this view. The action of the city, 12 years after it had caused the street to be graded by plaintiffs' assignor, cannot operate as an estoppel in pais against the plaintiff here. We recommend that the judgment and order appealed from be affirmed.

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[1] Reversed in banc. See 47 Pac. 249, 115 Cal. 441.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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113 Cal. 440

## BENNETT v. SUPERIOR COURT OF SAN DIEGO COUNTY. (S. F. 194.)

(Supreme Court of California. July 23, 1896.)

APPEAL—SUFFICIENCY OF BOND.

Upon the execution of a bond on appeal from justice court, reciting that it was the undertaking of C. and N. as sureties, N. failed to appear and justify. Thereupon the bond was signed by G., who qualified, but no change was made in the body of the instrument. *Held* that, there being no promise on the part of G., the bond was insufficient. Beatty, C. J., dissenting.

In bank. Petition by Uriah Bennett for a writ of review, for the purpose of reviewing the action of the superior court of the county of San Diego. Granted.

Wittington & Carter, for petitioner. Rippey & Nutt, for respondent.

GAROUTTE, J. This is an application for a writ of review. The petitioner asks that the writ issue for the purpose of reviewing the action of the superior court of the county of San Diego in certain litigation then pending before it, as being in excess of its jurisdiction. The salient facts presented by the petition and the return to the writ may be stated as follows: The defendants in a certain action desired to appeal from a money judgment rendered against them before a justice of the peace, and in favor of this petitioner. They filed an undertaking upon appeal, with one Chase and one Newkirk as sureties thereon. Bennett, the respondent, objected to the sufficiency of these sureties; and, at the time fixed for their justification, Chase appeared and justified. Newkirk did not appear. Thereupon the appellants secured one Gassen to attach his name to the undertaking, and he qualified before the justice of the peace in the amount called for by the body of the instrument. Respondent's counsel was present at this time, and expressly reserved his right to object to the proceeding. The papers upon appeal being forwarded to the superior court, respondent there moved to dismiss the appeal, alleging that the court had no jurisdiction over the cause, inasmuch as the undertaking was void. The superior court thereupon allowed appellants to file a new undertaking in that court, and then denied the motion to dismiss.

We attach no importance to the action of the superior court in allowing appellants to file a new undertaking in that forum. As far as any question of the jurisdiction of that court to hear and determine the cause upon its merits was concerned, such action counted for nothing. If the original undertaking was fatally defective, a second could not be filed in the appellate court with jurisdictional effect. If the original undertaking was only defective in matters of minor importance, it was still sufficient to give the court jurisdiction of the cause, and no second undertaking was required. Among other things, section 978 of the Code of Civil Procedure, in speaking of appeals to superior courts, declares: "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify before the justice or judge within five days thereafter upon notice to the adverse party to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." In this case Newkirk, one of the sureties, failed to appear and justify; and if the proceedings had been left in that situation the appeal would necessarily fail, as provided by the law we have quoted. Did the appearance of Gassen in the case cure the trouble? It did not. As the undertaking is presented to us, we are clear that Gassen could not be held liable if a recovery were sought upon it. The body of the undertaking provides: "Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, E. W. Newkirk and E. F. Chase, of the county of San Diego aforesaid, do hereby jointly and severally undertake, in the sum of one hundred dollars, that said appellants will pay all costs which may be awarded against them on the said appeál, or on a withdrawal or dismissal thereof, not exceeding the aforesaid sum of one hundred dollars, to which amount we acknowledge ourselves jointly and severally bound." It appears that Gassen does not agree to do anything. He makes no promises. He does not acknowledge himself to be bound in any amount, or upon any conditions. His name is simply attached to an undertaking which, upon its face, shows that he is not a party to it. The case of Dore v. Covey, 13 Cal. 502, is not in point. There the name of one of the sureties was omitted from the body of the bond, and the court held the omission immaterial, saying it is not necessary that the names of the stipulators should be inserted in the body of the bond in order to make it obligatory, and, as a necessary conclusion from such holding, declared the omission of the name of one of the sureties from the body of the bond immaterial. That decision is clearly correct. But this is no such case. Here the names of two purported sureties are inserted in the body of the bond, and Gassen's name is not one of them. The insertion of two other names results in the necessary exclusion of his name. It cannot be assumed that his name was intended to be placed there, for there is no room for it. The space which it should occupy is already taken. In effect, his name is expressly excluded. Without an agreement of some kind, upon his part, to be bound, no obligation rests upon him; and here there is no agreement. Newkirk having failed to justify, and Gassen not being bound by the undertaking, the appeal must fail, as lacking in the essential requisite of a valid undertaking.

It becomes unnecessary to notice other objections made by petitioner. The order of the court denying the motion to dismiss the appeal should be annulled, and it is so ordered.

We concur: HARRISON, J.; HENSHAW, J.; TEMPLE, J.

BEATTY, C. J. I dissent. Gassen, by signing the bond, became a party to and was bound by it. Dore v. Covey, 13 Cal. 502. The justification was therefore sufficient, and the appeal was duly perfected, irrespective of the action of the superior court in allowing a new bond to be filed.

(113 Cal. 482)

## LADY WASHINGTON CONSOLIDATED CO. v. WOOD et al. (S. F. 69.)[1]

(Supreme Court of California. July 24, 1896.)

LIMITATIONS—PLEADING—RELIEF ON GROUND OF FRAUD—SUFFICIENCY OF PETITION.

Plaintiff corporation, by its board of directors, October 1, 1890, accepted a proposition by a mining company to assume a debt due plaintiff from an estate, and give its note for the amount, and agreed, on receipt of such note, to release the estate. The court, on petition of the executor, authorized him to sell the mining company certain property in consideration of its assuming the debt due plaintiff and the release of the estate. The contract was executed. June 4, 1892, the court made a final order of distribution, and discharged the executor. The note given by the mining company was not paid. A petition filed by plaintiff in 1894 against the executor and others, to set aside such release, etc., alleged that the whole transaction was a fraudulent scheme of its directors, the executor, and others, to exempt such estate from payment of its claim; that "it was not informed of and did not know of or discover any of the aforesaid frauds, or the facts connected therewith, until within six months preceding the filing of the complaint"; and that the directors charged with the fraud remained in office until within a year before the action was commenced. *Held*, that the complaint did not allege facts sufficient to show that the fraud was not discovered more than three years before the complaint was filed, and the right of action was barred, under Code Civ. Proc. § 338, subd. 4.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by the Lady Washington Consolidated Company against W. S. Wood and others to set aside on the ground of fraud a release by plaintiff of a claim held by it and allowed against the estate of Seth Cook, deceased, of which defendant Wood was executor. From a judgment in favor of defendants, entered after demurrers to the petition were sustained, plaintiff appeals. Affirmed.

W. T. Baggett, for appellant. Lloyd & Wood, for respondents.

HARRISON, J. The plaintiff presented a claim against the estate of Seth Cook, deceased, of which the defendant Wood was executor, for the sum of $23,540, which, on January 15, 1890, was allowed by the executor and approved by the judge of the superior court, and filed with the clerk. Thereafter the American Mill & Mining Company, a corporation, offered to the plaintiff to assume the said indebtedness of said estate, and to execute its promissory note therefor to the plaintiff, payable 60 days after date, and on October 1, 1890, the board of directors of the plaintiff passed a resolution accepting the said proposition, and authorizing its president and secretary, upon the receipt of said promissory note, to execute to the aforesaid executor a release and satisfaction of its claim against the estate of Cook. After the passage of this resolution the executor presented to the superior court his petition setting forth the said agreement, and asking for an order allowing him to sell and deliver to the said corporation certain property belonging to the estate of Cook, upon the consideration that it would assume the payment of the plaintiff's claim against the estate, and cause the estate to be released therefrom, and after due notice of said petition the court made the order prayed for. Thereupon the American Mill & Mining Company executed to the plaintiff its promissory note for said amount, bearing date October 7, 1890, payable 60 days after date, and the plaintiff executed to the executor a release of its claim against Cook's estate. June 4, 1892, an order was made and entered by the superior court finally distributing the estate of Cook to the defendant Boyd, and discharging the executor from his trust. The plaintiff brought this action to obtain a judgment setting aside the aforesaid release of its claim, that the property distributed to the defendant Boyd be declared chargeable with the payment of said claim, that the decree of distribution be vacated, and that administration of said estate be continued for the purpose of paying said claim.

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[1] Rehearing denied.

It is alleged in the complaint herein that the resolution of the plaintiff's board of directors authorizing the release of its claim against the estate of Cook, and the release afterwards executed, the petition of the defendant Wood for the aforesaid order of the court, the execution of the note by the American Mill & Mining Company, and its agreement to assume the indebtedness of Cook, were all made in furtherance of a fraudulent scheme and purpose on the part of certain interested parties to exempt the estate of Cook from the payment of said claim; that the directors of the plaintiff who authorized the said release, and the said executor of the will of Cook, were parties to the same fraudulent scheme; that the estate of Cook was solvent, and fully able to pay the said claim, and that said claim could have been readily collected from his estate; that the said American Mill & Mining Company has not paid said note, or any part thereof, and that the estate distributed to the defendant Boyd is still held by said defendant. The defendants severally demurred to the complaint upon the ground that it does not state a cause of action, and that the cause of action is barred by subdivision 4, § 338, Code Civ. Proc. The demurrers were sustained, and judgment entered in favor of the defendants, from which the plaintiff has appealed. The time at which the action was commenced is not shown by the record, but the appellant states in its brief, and it is not disputed by the respondents, that it was in March, 1894; and, for the purpose of determining the sufficiency of the complaint, that will be assumed as the date when the complaint was filed. The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. "Discovery" and "knowledge" are not convertible terms, and whether there has been a "discovery" of the facts "constituting the fraud," within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. Martin v. Smith, 1 Dill. 85, Fed. Cas. No. 9,164; Wood v. Carpenter, 101 U. S. 135; Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Lataillade v. Orena, 91 Cal. 565, 27 Pac. 924. Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute. These transactions were had in October, 1890, and their correctness remained unquestioned until March, 1894. In the meantime the estate of Cook was distributed, and its administration closed, and the executor discharged. The only right of action alleged by the plaintiff in its complaint is to be relieved from the effect of its release to the estate of Cook of the claim against that estate which had been allowed by the executor, and to recover the amount of that claim; and the only fraudulent acts to be considered herein are those by which it was induced to execute that release. It was necessary for the plaintiff, therefore, to allege not only the facts constituting this fraud, but also the facts connected with its discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that "it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith, until within six months preceding the filing of the complaint herein." It is not averred that any of these facts, or the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject. On the contrary, it appears from the nature of the transactions themselves that they were open and public. The resolution to execute the release was spread upon the records of the plaintiff at the time it was passed by its board of directors. The petition to the superior court, with a copy of the agreement for a release, and the order of the court thereon, were also public records, open to the inspection of every one. When this petition was filed, public notice thereof was given by the clerk under the order of the court; and upon the execution of the release the plaintiff received the promissory note provided for by the agreement, and the transaction was entered upon the books of its treasurer. The plaintiff ought not now to be permitted to say that it did not discover the transactions when they were spread at large upon its records and books of account.

The plaintiff, however, seeks to avoid the effect of these entries upon its books by the allegation that its directors, who are charged as confederates in the fraud, remained in office, and in the control of its affairs, until within one year prior to the commencement of the action, "and plaintiff was afforded no opportunity through innocent and honest directors to look into and ascertain the facts herein set forth, until within one year prior to the filing of the complaint herein." Whether the plaintiff was afforded an opportunity, through innocent and honest directors, to look into and ascertain the facts set forth in the complaint or not, is unavailing to relieve it from the effect of the delay. The plaintiff is but the representative of its stockholders, and can have no rights in the matter other than in behalf of its stockholders; and, if all of the stockholders authorized the release, the plaintiff was not defrauded. It does not appear from the complaint that at the time of the transactions complained of there were any stockholders of the plaintiff other than those who authorized the release. If there were other stockholders, they were chargeable with knowledge of all the acts of the directors which were spread upon the records of the corporation, and of all the facts connected therewith that the inquiry suggested thereby would have disclosed. Between the time that these transactions were had and the commencement of this action more than three years elapsed, and it is to be presumed that there were three annual meetings of the stockholders during that time, at each of which they could have ascertained all of the facts connected with the release. Whether they did ascertain them, and made no objection thereto, or whether they neglected to inform themselves, is immaterial. They cannot be permitted to question their validity after the lapse of more than three years from the time when they should have ascertained them. Nor can the plaintiff, as their representative, claim that, with such opportunities for ascertaining the facts, it had no opportunity to ascertain them. "The shareholders of a corporation cannot avoid responsibility for the unauthorized acts of their agent by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success." Underhill v. Improvement Co., 93 Cal. 312, 28 Pac. 1049. City of Oakland v. Carpentier, 13 Cal. 540, is not in contravention of this proposition. The frauds there alleged were not matters of record, or a written agreement openly executed, but were charged to result from a secret agreement for the purpose of accomplishing an act fraudulent in itself. The action was against Carpentier, who had been elected as one of the trustees of the plaintiff, and was charged to be in the enjoyment of the property which the plaintiff had chosen him to protect, and the court was discussing what would be the effect of the ordinance if it were shown that its passage had been procured by Carpentier for his own benefit, while dealing with the town of which he had been elected a trustee. These facts were not alleged in the complaint, and the language of the court which is quoted by the appellant is prefaced by the condition, "if these facts be made to appear," and is, therefore, clearly obiter. It appears from the opinion given when the case came before the court (21 Cal. 665) that the facts were not made to appear, as his complaint was not amended. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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113 Cal. 473

## PEOPLE v. RICHTER. (Cr. 156.)

(Supreme Court of California. July 24, 1896.)

CRIMINAL LAW—APPEAL BY STATE.

An appeal from an order granting defendant's motion to set aside an information for a felony will be dismissed; such order not being included in Pen. Code, § 1238, which prescribes the cases in which an appeal may be taken by the people.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

One Richter was charged with a felony, and from an order setting aside the information the people appeal. Dismissed.

Atty. Gen. Fitzgerald, for the State. Shinn & Shinn, for respondent.

PER CURIAM. After the district attorney had filed in the superior court an information against the defendant, accusing him of a felony, the defendant moved the court to set the same aside, on various grounds, and his motion was granted. From this order the people have appealed. The defendant objects to the hearing of the appeal, upon the ground that the order is not appealable. Section 1238 of the Penal Code prescribes the cases in which an appeal may be taken by the people, and the present order is not included therein. The appeal is dismissed.

113 Cal. 432

## KILBRIDE v. MOSS et al. (S. F. 19.)

(Supreme Court of California. July 23, 1896.)

GUARANTY—COLLATERAL UNDERTAKING—ORIGINAL CONTRACT—STATUTE OF FRAUDS.

1. Defendant was an officer of a corporation, and a large stockholder therein. To relieve the demands of other creditors, defendant urged plaintiff to invest $1,500 in the capital stock of the corporation, and it was verbally agreed between defendant and plaintiff that plaintiff should purchase the stock, pay the money therefor to the company, and, in the event that the stock became worthless, defendant would pay to plaintiff the said sum of $1,500. *Held*, that defendant's undertaking was an original contract, and not within the statute of frauds.

2. To make a promise a contract of guaranty, there must be a primary liability of a third person to the promisee, which continues after the promise is made.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by J. J. Kilbride against Franklin Moss, an incompetent person, and George D. Metcalf, as guardian of his estate, on a contract. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

E. M. Gibson, Welles Whitmore, and Reed & Nusbaumer, for appellants. R. M. Fitzgerald and C. H. Abbott, for respondent.

SEARLS, C. This is an action to recover $1,500 under the following circumstances: The California Lustral Company was a corporation duly organized under the laws of the state of California. Defendant Franklin Moss was a large stockholder therein, a director and vice president of the company, and, with another, held a mortgage upon the property of the company. The corporation was indebted to sundry creditors, some of whom were pressing payment. Plaintiff had $1,500, and defendant Moss proposed to him to purchase therewith 6,000 shares of the capital stock of the corporation, and at first offered to secure him therefor by a second mortgage on the corporate property. This offer was declined. Thereupon it was verbally agreed between plaintiff and defendant that the plaintiff should purchase the 6,000 shares of stock, pay $1,500 therefor to the company, and, in the event that the stock became worthless, or of no value, he, the said defendant, would return and pay to plaintiff the said sum of $1,500. This was on the 25th of May, 1891. Plaintiff purchased the stock, paid therefor the $1,500, which was used in payment of company debts. In 1892, the capital stock of the corporation having become worthless and of no value, plaintiff offered to return the same to defendant and demanded payment of the $1,500, all of which was refused. Plaintiff thereupon brought this action, and obtained judgment for said $1,500, from which judgment, and from an order denying his motion for new trial, defendant appeals.

At the trial defendant's counsel objected to all evidence tending to show a verbal guaranty by defendant of the stock or its value. The objection was overruled, and the ruling is assigned as error. A guaranty is defined by section 2787 of the Civil Code as follows: "A guaranty is a promise to answer for the debt, default or miscarriage of another person." Under section 2793 of the Civil Code a guaranty, save in the cases excepted by the following sections, "must be in writing and signed by the guarantor; but the writing need not express a consideration." Under section 1624 of the same Code "a special promise to answer for the debt, default or miscarriage of another" (except as provided in section 2794) is void, unless the contract or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent. Appellant contends that defendant was a guarantor, and that the action is brought against him as such. The complaint sets out the facts much as we have stated them, but more in detail, and more fully. If these facts constitute him a guarantor, the contention of appellant is sound, but, if the converse of the proposition is maintained, defendant is neither a guarantor nor surety. Much learning has been exhibited, many fine distinctions drawn, and, we may add, a good deal of discrepancy is to be found upon some of the many branches of the law relating to guaranty. The present case, however, seems to us to involve but a single, plain, fundamental principle, not calling for extended discussion. It is this: The contract of guaranty is a collateral undertaking. It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person, either express or implied,—that is to say, if there is no debt, default, or miscarriage, present or prospective,—there is nothing to guaranty, and hence can be no contract of guaranty. If there is no primary liability of a third person to the promisee which continues after the promise is made, it is an original promise, and need not be in writing. Applying this doctrine to the case at bar, and we fail to discern any primary liability on the part of any one to the plaintiff upon which to base a guaranty. The corporation from which he purchased the shares of capital stock owed him no duty in the premises after such purchase was consummated, except the general obligation to him, in common with all other shareholders, to fairly and impartially conduct the business of the company in such manner as would best promote the interests of all concerned. The corporation simply sold him 6,000 shares of its stock, and received payment therefor. This closed the incident so far as the company was concerned. It was the defendant who entered into contract with him, whereby, as an inducement for plaintiff to purchase, he promised to refund his money should the stock become worthless. This was an original contract. Moorehouse v. Crangle, 36 Ohio St. 130, is in point. There C., who was a large stockholder of a business corporation, and president thereof, verbally promised M. that, if he would subscribe and pay $500 to the capital stock of the company, he should, within one year, receive 15 per cent. on the amount invested. M., in consideration of this promise, subscribed and paid for the stock. No dividends were made or earned within the year. Held that this was not a contract to answer for the debt, default, or miscarriage of another, but an original contract, upon the proof of which plaintiff was entitled to recover. Johnson, J., in discussing the case, said: "The terms of the statute make it clear that a collateral promise, or one to answer for the liability of another, is one where there is a debt or obligation of another than the promisor for whose default he undertakes to be liable. An original liability of another is the foundation of the collateral liability of the promisor. * * * If this contract is not within the statute of frauds, the plaintiff is entitled to recover, as it is not doubted but that the consideration stated is sufficient. Was there any debt, obligation, or legal duty, express or implied, owing by the corporation to the plaintiff as a stockholder, for which the defendant undertook to answer upon default of the corporation?" The learned judge, after defining the duties of the corporation to its stockholders, adds: "The defendant did not undertake to answer for any debt, default, or miscarriage by the corporation growing out of a failure to perform any of these duties. * * * Defendant's contract was, in legal effect, essentially different from the obligations of the corporation in favor of plaintiff as a stockholder, and the liability created was wholly independent of any default by the corporation. It was not an undertaking to answer for the default of the corporation." In Hill v. Smith, 21 How. 283, plaintiff had sold land to a railroad company, receiving in payment therefor the stock of the company, which the defendant guarantied should be at par within three years. This was held an original, and not a collateral, contract. Stress was laid by counsel upon the use of the word "guaranty" in the contract as importing a collateral agreement, but the court held that the term, when taken in connection with the other provisions of the agreement, showed it to be an original contract. Green v. Brookins, 23 Mich. 48, is to like effect. See, also, notes to Forth v. Stanton, 1 Saund. 211. Applying the reasoning of these cases to the case in hand, and the question involved is solved in favor of plaintiff.

Objections are urged to the sufficiency of the evidence to support some of the findings. These questions need not be discussed, for the reason that there was clear and unequivocal evidence in favor of plaintiff upon each and every of the issues. That defendant's testimony contradicted some of it is not cause for disturbing the findings of the court. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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113 Cal. 479

## MARTIN v. MARTIN et al. (Sac. 169.)

(Supreme Court of California. July 24, 1896.)

NEW TRIAL—GROUNDS—STATEMENT BY COURT—WEIGHT OF EVIDENCE—JUDICIAL DISCRETION—REVIEW.

1. The superior court need not specify the grounds for granting a new trial; and, where it has not done so, its action is to be reviewed on the record on which the order was made, and will be sustained if it would, under any circumstances, authorize it to grant a new trial.

2. The superior court is authorized to grant a new trial, if, in its opinion, the verdict is against the weight of the evidence.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Thomas F. Martin against Elizabeth Martin and others for the revocation of the probate of the will in the matter of the estate of Uriah Martin, deceased. From an order granting defendants a new trial, after a verdict in favor of plaintiff and an order revoking the probate, plaintiff appeals. Affirmed.

Jas. A. Louttit, for appellant. Nicol & Orr, Nutter & De Vries, and J. H. & J. E. Budd, for respondents.

PER CURIAM. Within one year after the last will of the decedent had been admitted to probate, the appellant filed his petition for the revocation of the probate. Upon issues made by the answer of the respondents, the cause was tried before a jury, who found, upon certain special issues submitted to them, in accordance with the petition, and thereupon the court made its order revoking the probate. Respondents thereupon moved for a new trial, which was granted, and the petitioner has appealed from the order. One of the grounds upon which the motion was made is the insufficiency of the evidence to justify the verdict, and the motion was heard upon a statement of the case, in which the evidence is set out at length. The order of the court is, in general terms, granting a new trial, without specifying the grounds of its action; and, in support of the order, we may assume that it was made upon the ground of such insufficiency of evidence. The Code does not require the court to specify the grounds which govern its action in granting or refusing a new trial; and, even when such provision was contained in the statute, it was held to be merely directory. Borkheim v. Insurance Co., 38 Cal. 505. Its action is to be reviewed upon the record on which the order was made, and will be sustained if the matters contained in that record would, under any circumstances, authorize it to grant a new trial. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481.

Counsel for appellant has discussed at length the right of the trial court to disregard the verdict of a jury upon a conflict of evidence, and has cited many decisions from other states in support of the proposition that such right does not exist unless the verdict is plainly contrary to the weight of evidence. But the rule in this state is too firmly established to admit of discussion, that the superior court is authorized to grant a new trial if in its opinion the verdict is against the weight of the evidence. Its action in so doing is the exercise of a legal discretion which has been confided to it, and, like the exercise of any other legal discretion, can be reviewed by this court only when it is made to appear that the discretion was abused. Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024, and cases there cited. It is sufficient to say that the record herein fails to show such abuse, or that the trial court acted otherwise than in the exercise of a legal discretion in its estimate of the testimony before the jury. As the case is to be again tried, it would not be proper for us to point out what may have been the grounds of its action, or to indicate our views of the testimony. The order is affirmed.

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113 Cal. 498

## BACHMAN v. CATHRY et al. (L. A. 78.)

(Supreme Court of California. July 24, 1896.)

CHANGE OF VENUE—DEFENDANT DESIGNATED BY FICTITIOUS NAME—RESIDENCE—WHEN CONSIDERED—APPEAL—HARMLESS ERROR.

1. Code Civ. Proc. § 474, provides that, when plaintiff is ignorant of the name of a defendant, he must so state in the complaint, and such defendant may be designated in any pleading or proceeding by any name, "and when his true name is discovered the pleading or proceeding must be amended accordingly." *Held*, that where two of three defendants sued in K. county were designated by fictitious names, and an affidavit by the other for change of venue stated that he and his co-defendants were residents of I. county when suit was commenced, affidavits by plaintiff that such co-defendants, described by their true names, were residents of K. county, could not be considered, in the absence of an amendment of the complaint describing such defendants by their true names.

2. An affidavit, on application for a change of venue, of an attorney, not professing to have any personal knowledge, or any information other than that obtained from the affidavit of service, which stated that defendant was a resident of K. county, will not be considered, as the statement in such affidavit is only hearsay.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by one Bachman against Frank Cathry and others. From an order sustaining a motion to change the place of trial to Inyo county, on the ground that defendants resided in such county, plaintiff appeals. Affirmed.

T. M. McNamara, for appellant. W. A. Lamar and J. W. Jameson, for respondents.

HARRISON, J. The action was brought in Kern county against Frank Cathry, John Doe, and Richard Roe; and the plaintiff alleges in the complaint that he "is ignorant of the true names of the defendants sued herein under the fictitious names of John Doe and Richard Roe, and asks that, when their true names are discovered, this complaint may be amended by inserting the same in lieu of said fictitious names." The summons was served upon the defendant Cathry, in the county of Inyo, February 28, 1895, and returned to the clerk's office on the 11th of March. March 9th, Cathry gave notice of a motion to change the place of trial to the county of Inyo, upon the ground that at the commencement of the action all of the defendants named in the complaint were residents of said Inyo county; accompanying this notice with his affidavit that at the commencement of the action, and for more than 12 months prior thereto, he and each of his co-defendants were bona fide residents of the county of Inyo. After this notice was given, an alias summons was issued upon the complaint, and on the 13th of March, 1895, was returned with an affidavit indorsed thereon that the same was served by the affiant, on the 12th of March, on "Jean Brun, a then resident of the said county of Kern, and one of the defendants in the above-entitled action, sued therein under the name of John Doe." March 13th a demurrer to the complaint was filed in the action, on behalf of said Brun. Upon the hearing of the motion, in addition to the complaint and the foregoing affidavits, there was presented an affidavit by the attorney for the plaintiff that "it appears from the affidavit of service of summons" that the defendant sued as John Doe is a resident of Kern county, and that "all the defendants in said cause are not residents of the county of Inyo." The motion was heard and submitted April 1st, and, on the 3d of April, counsel for plaintiff requested leave to file affidavits of S. Heineman and Albert Lederer, to which "the court stated that he could file anything he wanted to, but that the motion had been heard and submitted, and thereupon said affidavits were filed in said cause, but not submitted to or considered by the court in determining said motion." In each of these affidavits it is stated that "Jean Brun, one of the defendants in the above-entitled action, sued as John Doe, has been for more than six months continuously last past, a bona fide resident of the county of Kern." No amendment of the complaint was made, nor was Jean Brun made a defendant by having his name substituted in the complaint for that of John Doe. April 8th the court made an order granting the motion, from which this appeal is taken.

Section 474, Code Civ. Proc., provides: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly." In McKinlay v. Tuttle, 42 Cal. 570, it was held that unless such amendment is made a judgment against individuals served under fictitious names cannot be sustained; that, though they appear and answer the complaint, their answer does not waive an amendment of the complaint describing them by their true names. In Rosencrantz v. Rogers, 40 Cal. 489, service had been made upon persons claimed to be sued under fictitious names, and an order setting aside the service was affirmed upon the ground, among others, that the plaintiff did not, in response to the motion, offer to have their names inserted as defendants. Under the principles of these decisions, the court, in considering the action of Cathry, could not consider the residence of Brun until after his name had been inserted in the complaint as one of the defendants. The affidavit of Cathry that at the commencement of the action he and his co-defendants were residents of the county of Inyo entitled him to have his motion granted, unless this fact should be overcome by affidavits on the part of the plaintiff. The plaintiff did not make any affidavit on the motion, and no showing was made by him, or on his behalf, that Brun was the individual intended by the fictitious name of John Doe. The attorney for the plaintiff, whose affidavit was read upon the hearing of the motion, did not profess to have any personal knowledge on the subject, or any information other than that which he obtained from the affidavit of service, and this latter affidavit merely states that Brun was a resident of Kern county at the date of the service. That portion of the affidavit in which it is stated that "Brun is one of the defendants in the action, sued under the name of John Doe," is only hearsay, and was not entitled to be considered. A process server, or an officer, can have no knowledge of the individual intended by the plaintiff under a fictitious name. The further statement of the plaintiff's attorney that all of the defendants are not residents of the county of Inyo was immaterial, unless one or more of them were residents of the county of Kern.

The Code allows a defendant to be sued by a fictitious name only when the plaintiff is ignorant of his name, and, although the individual who is served under such fictitious name may be substituted as a defendant, until such substitution is made the rights of other parties to the action will not be affected by such service, or by his appearance in the suit. The plaintiff made no affidavit upon the subject, and there was nothing before the court from which it could find that either of the defendants was a resident of Kern county. The complaint charged all the defendants with the same act of taking and converting the property of the plaintiff, and the court could assume, in the absence of any other showing, that the defendant who was served would know his associates. If the affidavits, which were filed under leave of the court after the motion had been submitted, had contained matter material to the motion, it would have been an abuse of discretion in the court not to consider them; but, as their purport was merely to show the residence of Brun, they were immaterial, in the absence of any showing that Brun was the individual whom the plaintiff intended to make a defendant in the action. Their statement to that effect was merely hearsay. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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113 Cal. 475

## WILLIAMS v. HAHN. (S. F. 198.)

(Supreme Court of California. July 24, 1896.)

ATTACHMENT—RIGHT TO WRIT—SECURITY BECOMING VALUELESS—SALE OF COLLATERAL.

Under Code Civ. Proc. § 537, denying to a plaintiff an attachment, where the debt sued for is secured by a pledge of personal property, except where such security has, without any act of the plaintiff or the person to whom the security was given, become valueless, collateral security which has been sold in accordance with the conditions of the pledge, and the proceeds applied on the debt, has become valueless, as security, by act or authority of the defendant, and the holder of the debt is not debarred from an attachment in an action for the amount remaining due.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Williams against Hahn. From an order denying a motion to dissolve an attachment, defendant appeals. Affirmed.

A. E. Miller, for appellant. H. M. Barstow, for respondent.

HARRISON, J. The defendant executed his promissory note to W. B. Bourn, November 8, 1890, for the sum of $2,000, payable six months after date, and at the same time delivered to him 27,000 gallons of wine as collateral security for its payment, with authority to the payee, or his assigns, in case of default in the payment of the note, to sell the same and apply the proceeds upon the note. This authority is in the following terms: "Should the note, or any part thereof, or the interest accruing thereon, remain due and unpaid after the same should have been paid according to the tenor of said note, I hereby waive demand of payment of said note, and irrevocably authorize and empower said W. B. Bourn, or his assigns, to sell and dispose of the above-described property, or any part thereof, at public or private sale, with or without notice to me of any such sale, and out of the proceeds of such sale to pay the costs and charges for the storage and care of said property, the charges and costs of such sale, and the principal and interest due upon said note, and to pay over the balance, if any, to me or my representative, upon demand." The defendant did not pay the note at its maturity, and thereafter the plaintiff, to whom the note had been assigned, sold the wine, and applied the proceeds of said sale, after deducting certain charges and expenses, as a payment upon the note. The present action was brought to recover the amount remaining due on the note, and at the commencement of the action a writ of attachment was issued at the instance of the plaintiff. The defendant moved to dissolve the attachment, upon the ground that the note was originally secured by a pledge of personal property, and that the same had not become valueless. It was shown to the court that the wine was sold by the plaintiff for more than its market value at the time of the sale, but it did not appear that the plaintiff gave any notice of the sale. The court denied the motion, and the present appeal is from that order.

By the provisions of section 537, Code Civ. Proc., the plaintiff is not entitled to a writ of attachment if the debt sued for is secured by a pledge of personal property, or, if originally so secured, unless such security has, without any act of the plaintiff or the person to whom the security was given, become valueless. It is contended by the appellant that the latter of these conditions existed in the present case,—that the security (that is, the wine which was pledged) has not become valueless, and that, if the sale of the wine has rendered the security valueless, this was by the direct act of the plaintiff. Upon the sale of the pledged property by the plaintiff, and the application of the proceeds upon the note, the plaintiff ceased to have any security for the payment of the amount then due upon the note, and the "security" originally given had become valueless. The language used in section 537, Code Civ. Proc., is not to be construed as meaning that the property pledged must itself have become valueless, before the plaintiff can have an attachment; but the provision that the "security" must have become valueless must be construed as meaning that the property pledged has ceased to have any value as a security, and, if the property has been disposed of in accordance with the very terms under which it was given and held as a security, the "security" has ceased to exist, and is therefore valueless. The sale by the plaintiff under the authority given by the defendant in the note itself has the same effect as though it had been made under the provisions of the Civil Code. It must also be held that it was by the direction and authority of the defendant that the "security" which existed while the wine was held by the plaintiff became valueless, and that it did not become valueless by the act of the plaintiff. By the terms of the agreement under which the security was given, the defendant had authorized and empowered the plaintiff to sell the wine upon his default in making payment of the note, and the sale thus made must be regarded as made by the direction of the defendant. The plaintiff was not required to give any notice of the sale. The defendant had expressly waived all notice to himself, and had authorized the plaintiff to sell the wine at private sale. The case of Bendel v. Ice Co., 82 Cal. 201, 22 Pac. 1112, is not applicable. In that case the mortgagee was merely empowered to sell the mortgaged property "by proceedings had and taken as in cases of pledges." The mortgagor waived notice to himself of the time and place of sale, but did not authorize a private sale of the property. It was held that the sale should have been at public auction, and upon such notice to the public as is usual at the place of sale in respect to auction sales of similar property, as required by section 3005, Civ. Code. In the present case these provisions were superseded by the agreement of the parties, as well in respect to the notice as to the manner in which the sale should be made. "Conventio vincit legem." The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(113 Cal. 532)

## VANCE v. ANDERSON et ux. (S. F. 1.)[1]

(Supreme Court of California. July 28, 1896.)

EJECTMENT — COMPLAINT — AIDER BY ANSWER — MORTGAGE — WHAT CONSTITUTES.

1. A complaint in ejectment, defective for failure to allege that plaintiff was entitled to possession at the commencement of the action, is cured by a denial in the answer that plaintiff was entitled to possession.

2. Plaintiff held the overdue note of defendants, secured by a mortgage on two tracts of land. Defendants authorized a real-estate agent to induce plaintiff to take a deed for one tract in payment of the debt, and to secure, if possible, an agreement for a reconveyance. Plaintiff took a deed thereto, the consideration being the amount of the debt and interest, and executed an agreement for reconveyance on the payment of such amount within a certain time, the agreement expressly reciting that the trans-

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[1] Rehearing denied.

action was not intended as a mortgage. *Held*, that the conveyance was an absolute conveyance, and not a mortgage.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunler, Judge.

Ejectment by Phoebe A. Vance against Leander Anderson and wife. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Ernest Sevier and Denver Sevier, for appellants. A. J. Monroe, for respondent.

SEARLS, C. Action of ejectment to recover a lot of land in the city of Eureka, Humboldt county. Plaintiff had judgment, from which judgment, and from an order denying a motion for a new trial, defendants appeal.

The first point made by appellants for reversal is that the complaint does not state facts sufficient to constitute a cause of action. To properly present the question thus raised, it is necessary to quote from the complaint and answer, and to state some facts bearing upon the case. The complaint is, in part, as follows: "That on the first of May, 1894, she [the plaintiff] was seised in fee, and possessed, and entitled to the possession, of that certain tract of land situate in," etc. (describing the land and its location). "That, while the plaintiff was so seised, the defendants, afterwards, on the 1st of May, 1894, and without right or title, entered into possession of the demanded premises, and ousted and ejected the plaintiff therefrom, and now unlawfully withhold the possession thereof from the plaintiff, to her damage." Defendants interposed a general demurrer to the complaint, but, before a hearing, voluntarily withdrew such demurrer, and took leave to answer within 20 days. The answer is, in part, as follows: "Deny that plaintiff was on the 1st day of May, 1894, or at any other time, or at all, or is now, seised in fee, and possessed, and entitled to the possession, or seised in fee or otherwise, or possessed, or entitled to the possession, or otherwise, of that certain tract of land set forth and described in the said complaint." The pleadings were verified, and at the trial no objection to evidence was predicated upon the insufficiency of the complaint. It will be observed that while the complaint avers seisin and possession in the plaintiff on the 1st day of May, 1894, it fails to state that she was so seised at the date of the suit brought, which was May 19, 1894, or at any time after May 1st. This was, we think, a failure of an essential allegation in the complaint. It is true that in some of the earlier cases in this court a complaint in ejectment was, in effect, differentiated from those in other actions, and precisely similar complaints with this were held sufficient. Salmon v. Symonds, 24 Cal. 260; Kidder v. Stevens, 60 Cal., at page 420; Yount v. Howell, 14 Cal. 465. We shall, however, assume that it was the duty of the plaintiff to tender to the defendants an issue as to her seisin or ownership at the date of the bringing of the suit. But the defendants did not wait, as they might well have done, for such tender; for in their answer they not only denied the seisin and right to possession of the plaintiff on the 1st of May, 1894, but added, "or at any other time, or at all, or is now, seised in fee," etc., as above quoted. When defendants thus tendered an issue as to the seisin of plaintiff up to the time the action was brought, and that issue was tried and determined against the defendants, it was too late to raise the objection here. It is a familiar rule of pleading that defects in a complaint may be cured by the averments of an answer thereto. County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644; Harkness v. McClain (Utah) 29 Pac. 964; Code Civ. Proc. § 475; Diefendorff v. Hopkins, 95 Cal. 344, 28 Pac. 265, and 30 Pac. 549; Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. 807; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215. Pomeroy is of opinion that this rule of the curative property of an answer should be confined to cases in which the answer affirmatively alleges the very fact which is omitted from the complaint, but says it has sometimes been "enforced, although the answer simply contained a denial of the necessary facts which should have been averred by the plaintiff." Pom. Rem. § 579. The practice in this state has been to treat express denials as sufficient to cover the defect. See cases cited supra. Under these circumstances, the contention of appellants cannot prevail.

2. The more important question to be solved relates to the character of the conveyance under which plaintiff claims title. There was a deed of conveyance offered in evidence, executed and acknowledged in due form by the defendants on the 16th day of October, 1893, conveying the property in question to the plaintiff. The consideration mentioned in the deed was $500, and the deed was recorded October 17, 1893. The defendants, at the trial, for the purpose of showing that the foregoing conveyance was intended to operate as a mortgage, and not as an absolute conveyance, introduced in evidence an agreement between the plaintiff and Leander Anderson, executed October 16, 1893, whereby the plaintiff covenanted and agreed to and with said defendant Anderson, that she, the said plaintiff, would sell, and he, the said defendant, would buy, the certain premises therein described, and being the same premises described in the conveyance to plaintiff by the defendant. Such sale was to be made within six months, upon the payment by said Anderson to plaintiff of the sum of $4,193.70, with interest at 11 per cent. per annum from date until sale, which sum defendant covenanted to pay. If defendant failed to pay within six months, the agreement to convey was to be considered null and void, etc. The

agreement contained the following clause: "It is expressly understood and agreed that this instrument is not a mortgage, but an agreement to sell and buy real estate; nor is it the intention of the parties hereto that this instrument should be or operate in any way as a mortgage." The instrument was duly acknowledged and recorded, but at what date does not appear. The deed and agreement, when taken together, do not, upon their face, constitute a mortgage, for the reasons: (1) It does not appear therefrom that the parties were the same; the deed being executed to plaintiff by the two defendants, while the agreement runs to one only of such defendants. (2) They present no evidence of any pre-existing, existing, or future debt to be secured thereby. (3) The agreement to convey expressly provides that it is not, and shall not be considered, a mortgage. It follows from these circumstances, and some others which might be mentioned, that the instruments. taken together, do not, on their face, in law. constitute a mortgage. This is not, however, conclusive. A deed absolute on its face may be shown by parol to be intended as a mortgage. It may be stated, as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is in equity a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter, are subjects for consideration. Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113; Pierce v. Robinson, 13 Cal. 116; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957; Ross v. Brusie, 64 Cal. 245, 30 Pac. 811; Taylor v. McLain, 64 Cal. 513, 2 Pac. 399. We need not multiply authorities under this head.

The question of fact as to the intention of the parties here was decided by the jury against the contention that the deed and so-called defeasance were intended by the parties as security for an existing liability on the part of the defendants. In favor of the verdict, there was evidence tending to show that, prior to the execution of the deed and agreement, plaintiff held a mortgage upon the lot involved in this action, and a timber tract, given by defendant Leander Anderson to secure his promissory note for $3,700, with interest at 11 per cent. per annum from August, 1892, the date of the note. The note was due, and nothing had been paid thereon. Plaintiff desired payment of the note, and Anderson was unable to pay. Under these circumstances, Anderson and wife (the other defendant), being desirous of saving their timber claim, placed the lot here in question in the hands of Farris & Cooper, real-estate agents, and authorized them, in writing, to sell it for $3,700 and the interest due on the note, amounting to $400. They were unable to sell it at that price. They then suggested to Anderson that they be permitted to try to get plaintiff to take a deed of the town lot, and release the timber claim, as that would be equivalent to a sale of said lot and payment of plaintiff. Anderson agreed to this. They also advised Anderson to get a bond from plaintiff for a reconveyance of the town lot, if he could. The plaintiff, being desirous of avoiding the expense of a foreclosure, agreed to the proposition, whereupon the deed and agreement were drawn and executed. The note of defendant was marked "Paid," and delivered up to him, and the mortgage satisfied. When the agreement was drawn, the attorney asked if it was intended as a mortgage, and Anderson answered in the negative, whereupon the clause which we have quoted therefrom was inserted, and agreed to by the parties. Anderson thereafter mortgaged the timber claim to other parties. There is a house upon the town lot, and witnesses placed the value of the premises at from $4,500 upward, and the monthly rental at $10. Plaintiff supposed the premises were vacant at the date of the deed, but, when her agent called upon defendant, for the key to the house, he found defendants had moved thereto; and they declined to take a lease of the premises, or, upon demand, to deliver possession thereof to plaintiff. Prior to the execution of the deed, defendant Maria Anderson had filed a declaration of homestead on a portion of the premises; hence her joinder in the deed, and as a party defendant. The only testimony on the part of the defendants was that of Leander Anderson, which was not at all clear, and scarcely sufficient to constitute a substantial conflict. Indeed, the main circumstances in favor of considering the transaction a mortgage are to be found in the fact that the agreement was of even date with the deed, and the sum for which plaintiff agreed to convey was the exact sum due upon her previous note secured by mortgage. These circumstances are important, but not conclusive, and, we think, are outweighed by other attendant circumstances; and, on the whole case, we are of opinion the jury was not only warranted in its verdict, but that any other result would have been a surprise.

The instructions given by the court clearly embodied the law applicable to the case, and contained all that was pertinent in the instructions asked on behalf of defendants and refused. It would be more satisfactory to set out all of these instructions given and refused, but their length, coupled with the fact that they involve no new propositions, are deemed sufficient reasons for their omission.

There is nothing in the proposition that defendants were tenants at will of the plaintiff, and therefore entitled to notice in writing, under section 789 of the Civil Code. If the conveyance to plaintiff was a mortgage, it conveyed no title, and did not entitle her to possession of the property. If it was an absolute deed, she was, upon its execution, entitled to immediate possession, and upon her demand, and the refusal of defendants to deliver such possession, was entitled to maintain an action for its recovery. There is nothing in the agreement entitling the defendants, or either of them, to possession before the contract is consummated. We recommend that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 403

## CRAWFORD v. HARRIS. (S. F. 18.)

(Supreme Court of California. July 28, 1896.)

BUILDING CONTRACT—DAMAGES FOR NONPERFORMANCE—EVIDENCE—HARMLESS ERROR—MISCONDUCT OF JURORS.

1. In an action for services for construction of a building, defendant, after testifying that plaintiff left the job uncompleted, and that he (defendant) thereafter superintended the work himself, and that it took up his time so that he could not attend to his business (which, it appears, was that of a merchant) for two months, was asked "the value of the time he lost" while personally superintending the work. *Held*, that the question was objectionable, as calling, not for the reasonable compensation of a superintendent, but for the value of his time.

2. Allowing defendant, on cross-examination, in an action for construction of a building which he claimed he had to complete himself, to be asked if he had not told the brickman that he would not pay him, but that if he got anything he would have to get it out of plaintiff, even if error, is harmless, defendant's answer being "No."

3. The presumption being that jurors have faithfully performed their duty, a new trial is properly denied where the affidavits charging misconduct of jurors are fully met by counter affidavits of the jurors.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by S. T. Crawford against I. Harris. Judgment for plaintiff. Defendant appeals. Affirmed.

M. J. Platsheck, for appellant. W. H. Jordan, for respondent.

SEARLS, C. Action to recover $500 for work, labor, and services performed by plaintiff for defendant, and for $353.35 as a balance due for money paid, laid out, and expended by plaintiff for defendant, and to recover interest on said two several sums. Defendant denied his indebtedness to plaintiff, and, by way of cross complaint, set out that plaintiff was indebted to him in the sum of $1,000, for so much money by him (the said plaintiff) had and received to and for the use of defendant, and, in a separate count, claimed a like sum of $1,000 on an account stated; and, in a third count, defendant claimed damages in the sum of $500 for the violation by plaintiff of a contract to superintend the erection and construction of additions and alterations to two certain buildings owned by defendant, and demanding judgment against plaintiff for $2,500. The cause was tried by a jury, and a general verdict returned in favor of plaintiff for $916.46, for which sum judgment was entered. The appeal is from such judgment and from an order denying a motion on behalf of defendant for a new trial.

Defendant was the owner of two buildings at the corner of Grove street and Van Ness avenue, in the city and county of San Francisco, which he desired to have remodeled, in part rebuilt, and converted into a single structure. About the month of June, 1892, as the result of sundry interviews on the subject, he entered into a verbal contract with the plaintiff, by the terms of which the latter agreed to furnish, and did furnish, plans, and was to superintend the alterations, construction, etc., all for $500. Plaintiff took charge of the work, had the necessary grading done, moved the buildings as required by the necessities of the case, employed a foreman, ordered materials, employed, by himself or through the foreman, all needed mechanics and laborers; usually paying the mechanics, etc., and calling upon the defendant for money to reimburse himself. The work progressed until, say, the month of November, when plaintiff called upon defendant for some $309.10 to reimburse himself for moneys alleged to have been expended in the payment of mechanics, which defendant refused to pay, averring that the bills were unjust, fraudulent, etc. Plaintiff left the building the last of November or first of December, 1892, at which time he claims it was substantially completed, except in some minor particulars not requiring his attention. There was a sharp conflict in the evidence, not only upon this last point, but also upon the general conduct of the business, and reasonableness of the expenditures incurred by plaintiff on behalf of defendant. The jury, by a general verdict in favor of plaintiff, has passed upon all the issues involved; and as there was testimony which, if believed, was sufficient to support such verdict, it can subserve no useful purpose to examine such evidence in detail, where the inevitable conclusion must be that, in the face of the substantial conflict which characterizes the testimony, we are not authorized to substitute our views for those of the jury. The verdict must therefore stand, unless there are other and more cogent reasons for its reversal.

Two errors of law only are predicated upon the rulings of the court during the trial:

1. The defendant had testified on his own behalf to the effect that plaintiff left the job about November 24, 1892, and that thereafter he (the defendant) had superintended the

work himself, and that it took up his time so that he could not attend to his business for, say, about two months. Defendant's counsel then put the following question: "What was the value of the time which you lost during the months of December, 1892, and January, 1893, during which you personally superintended the work?" Plaintiff's counsel objected upon the ground that the question was immaterial and irrelevant. The objection was sustained, and the ruling is assigned as error. We think the ruling should be upheld. It appeared, inferentially at least, that defendant was a merchant; and, as the question, in the form it was put, called, not for a reasonable compensation of a superintendent, but for the value of his time,—the value of the time he lost,—it was not sufficiently definite. He may well have considered his time worth $1,000 per month, but it would not follow that a superintendent of the building in question was entitled to any such compensation. Defendant was permitted to prove, and did thereafter show, the value of his services as a superintendent of the building, viz. that such services were worth $3.50 per day, and there was no contradiction of this testimony.

2. Plaintiff's counsel was permitted by the court, against the objection of defendant's counsel, to ask the defendant, on cross-examination, if he (the said defendant) had not told one Tarp, the brickman, that he (defendant) would not pay him a cent for his work, and if he got anything he would have to get it out of plaintiff. It is sufficient to say of this question that, while the question was, within the discretion of the court, a proper one, in view of the direct examination, yet if it be conceded that it was not, as the answer was, "No, sir," no injury accrued to defendant.

One other point only remains to be noticed. It relates to alleged misconduct on the part of several of the jurors. A number of affidavits are filed, tending to show that several of the jurors admitted to the affiants either that they were familiar with the building, the subject of the controversy, before the trial, or, as to some of them, that they visited and examined the structure pending such trial. In every instance the jurors thus impugned filed their counter affidavits, in which they emphatically denied every fact from which any inference of misconduct could be fairly deduced. The most that can be said is that two or three of the jurors had frequently passed the building, and one of them, having a friend residing therein, had been in the building; but none of them knew anything of the character of its construction, its owner, or those who made the improvement. In short, their knowledge was only such as we all gain by the casual observance of the buildings which we pass or enter without any circumstance calling our attention thereto. Jurors will be presumed to have performed their duty faithfully and well, until the contrary is made to appear; and, as all charges of improper conduct are fully met, and negative the allegations of the charging affidavits, the motion for a new trial, so far as based upon the misconduct of the jury, as well as for other causes, was properly overruled. We recommend that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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(113 Cal. 526)

## CHRISTIE v. SHERWOOD et al. (S. F. 269.)[1]

(Supreme Court of California. July 28, 1896.)

UNRECORDED MORTGAGE—NOTICE.

The articles of incorporation of a bank provided that "it is to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent." Its cashier made a loan for a customer who had money deposited therein, took the acknowledgment to the mortgage securing the loan, had possession of the unrecorded mortgage, and received two or three installments of interest, which he placed to such customer's credit, on his pass book. *Held*, that the knowledge of its cashier was the knowledge of the bank, affecting it with notice of such unrecorded mortgage.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by R. J. Christie against Dwight Sherwood, the Bank of Lake, and others, to foreclose a mortgage executed by defendant Sherwood to plaintiff. From a judgment in favor of plaintiff, defendant bank appeals. Affirmed.

Woods Crawford, for appellant. Hudson & Sayre, for respondent. Thos. B. Bond, for defendant Sherwood.

HAYNES, C. Defendant Dwight Sherwood executed his note and mortgage to the plaintiff on December 3, 1887, and that mortgage was recorded December 20, 1890. On March 4, 1890, Sherwood executed to the Bank of Lake another note and mortgage on the same lands and certain other parcels, and this mortgage was recorded March 5, 1890. Plaintiff's mortgage is for $2,000; that of the bank, for $4,000; and the property mortgaged is insufficient to satisfy both. The court below held that plaintiff's mortgage, though last recorded, was the first lien on that part of the land described in both mortgages, and judgment was entered accordingly. This appeal is by the bank from the judgment, upon the judgment roll and a statement containing the evidence; and the only question is whether the bank, at the time it took its mortgage, had notice of the prior mortgage to the plaintiff.

The uncontradicted facts are that the plaintiff, at and prior to the date of his note and mortgage, had $3,000 or more on deposit with the Bank of Lake; that Marshall Arnold was then the cashier of said bank, and continued to be such cashier until after the execution of the mortgage to the bank; that, about the date of the mortgage to plaintiff, Arnold asked plaintiff if he wanted to lend the money he had in the bank; that plaintiff replied that he might need it soon; that Arnold then said, "If you want to loan the money, we can loan it for you, and the bank will settle your mortgage off any time you want the money on it," and plaintiff told him he could lend it in that way; that plaintiff did not personally see Sherwood, or negotiate the loan; that Sherwood's acknowledgment of his mortgage to Christie was taken and certified by Arnold, as notary public. The plaintiff testified that the bank paid him the interest three different times, the first time $200, at another time $300, but the amount of the third payment was not stated; that said sums were credited to him by the bank, in his pass book, and he was told by the cashier that they were interest on the loan to Sherwood. The date of the $200 payment is given as February 20th,—year not stated,—but as that is the amount of one year's interest, which became due December 3, 1888, we assume that it was paid February 20, 1889. The only other date given was May 7, 1890. The books of the bank were also put in evidence, showing the same deposits. The articles of incorporation of the bank, and its by-laws, were also put in evidence by the plaintiff, by each of which it appears that its business was, among other things, "to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent." The by-laws further show that the cashier, with the president, "shall negotiate loans," and that "no loan shall be made without their concurrence." The president of the bank testified that he did not know of the mortgage from Sherwood to Christie at the time Sherwood made his mortgage to the bank, and that neither he nor the board of directors ever had any notice of the mortgage to the plaintiff. No other evidence was given, on behalf of the bank, affecting the question before us. The indorsement on the plaintiff's mortgage showed that it was recorded at the request of Marshall Arnold, and the plaintiff first received the mortgage after it was recorded.

It is contended by appellant that "notice to the bank is not inferred from notice to its cashier in respect to a matter beyond the scope of his employment, and outside of the ordinary business of the bank"; citing Wilson v. McCullough, 23 Pa. St. 440. If it be conceded that Arnold, though cashier of the bank at the time plaintiff's money was loaned to Sherwood, was not acting as the agent of the bank in that transaction, but was then acting as the agent of Christie, his knowledge of the fact that the loan was made and the mortgage taken may be notice to the bank in the subsequent transaction in which he, being authorized, loaned the money of the bank to Sherwood, and took as security a second mortgage upon the same property; but whether it is notice to the bank depends upon whether the previous transaction was present in his mind at the time the loan was made by the bank. Yerger v. Barz, 56 Iowa, 77, 8 N. W. 769; Distilled Spirits, 11 Wall. 366. In the case last cited, after reviewing the English cases, it was said: "If he [the agent] acquires the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend upon the lapse of time, and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject." Whether the prior transaction was present in the mind and recollection of the cashier at the time the mortgage was taken by the bank, there is no direct evidence. The cashier was not examined. The circumstances would seem to show that it could not well have escaped his recollection. The mortgage itself was in his possession, either as agent of Christie, or as cashier of the bank. Interest on the loan to Sherwood was also received, and placed to the credit of Christie in the books of the bank, and in Christie's pass book, and Christie was informed on both occasions that these deposits were moneys paid by Sherwood as interest on his loan. If, however, the bank was the agent of Christie in making the loan, then the bank was bound to recollect the prior loan at the time when it subsequently loaned its own money and took a mortgage upon the same property. Distilled Spirits, 11 Wall. 366. Appellant contends that it is not within the power of the bank to act as such agent, and that, therefore, Arnold did not represent the bank when the loan was made for Christie, and cites authorities to the effect that it is outside of the business of a banking corporation to make loans for depositors. But that must depend upon the purposes of its organization, and the powers given by the statute and its articles of incorporation. Under our Civil Code, "private corporations may be formed for any purpose for which individuals may lawfully associate themselves" (section 286); and the articles of incorporation of the Bank of Lake, among other purposes for which it was organized, state that it is "to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent." It is clear that in lending its own money the bank acts as a principal, and can only act as an agent when it invests the funds of others; and therefore the provisions of its articles of association, above quoted, gave it ample authority to act for Christie in making the loan to Sherwood, and it cannot be presumed that Arnold acted in his individual capacity, and not as cashier, in doing that which the bank was organized for the purpose of doing. It is true, the by-laws of the bank provide that the cashier, with the president, "shall negotiate loans," and that "no loan shall be made without their concurrence"; but the president testified that "Marshall Arnold, the cashier, never consulted me about making any loans." Under such circumstances, we think the bank should not be permitted to say that it did not make the loan of Christie's money. The knowledge of its cashier of the prior mortgage to Christie was the knowledge of the bank, and therefore not within the provisions of section 1214 of the Civil Code. The judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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(113 Cal. 503)

## CULLEN et al. v. GLENDORA WATER CO. (No. 19,360.)[1]

(Supreme Court of California. July 25, 1896.)

IRRIGATION DISTRICTS—ISSUANCE OF BONDS—ESTIMATE OF COST.

Under St. 1891, p. 147, § 15, providing that the board of directors of an irrigation district must determine the amount necessary to be raised for the purpose of providing for the work of irrigation, and shall call a special election, at which shall be submitted to the electors the question whether or not the bonds shall be issued, the estimate of money required must be based on some definite plan for the construction of works or for the acquisition or distribution of a water supply. 39 Pac. 769, affirmed. Board v. Tregea, 26 Pac. 237, 88 Cal. 357, distinguished.

In bank. On rehearing. For former report, see 39 Pac. 769.

Chapman & Hendrick, for appellant. A. W. Hutton and C. L. Batcheller, for respondents. Anderson & Anderson and Joseph H. Call, amici curiæ.

BEATTY, C. J. This cause was formerly heard and decided by the court in bank, upon grounds stated by Commissioner Vanclief in an opinion reported in 39 Pac. 769. The case arises out of a special proceeding, under an act supplemental to the Wright act, for obtaining a decree of court approving and confirming the regularity of the issue of the bonds of an irrigation district. By the decree of the superior court, the proceedings for the formation of the district, and the issuance of the bonds, were held to have been regular, and the bonds were declared valid. By the decision here, all the rulings, findings, and conclusions of the superior court were approved, excepting only a finding to the effect that the directors of the irrigation district had made a proper estimate of the cost of works, etc., before ordering the issue of the bonds. This finding was held to be contrary to the uncontradicted evidence in the record, and upon that ground, and none other, the judgment of the superior court, and its order denying a new trial, were reversed. Subsequently a rehearing was granted, upon the contention of respondents that there was no issue raised by the answer of appellant as to the fact alleged in the petition for confirmation,—that a proper estimate had been made of the cost of works, etc., before the sale of bonds was ordered. At the rehearing, counsel not only discussed the pleadings and evidence relating to this particular question, but counsel for appellant asked the court to consider again the various points which had been ruled against him in our former decision. We have therefore again carefully considered the entire case, with the result that we adhere to the views expressed in Commissioner Vanclief's opinion, except in so far as they may be qualified by what we shall have to say with reference to the point upon which the judgment was reversed.

It was alleged in the petition for confirmation "that as soon after said district was organized as was practicable, to wit, at its meeting of May 10, A. D. 1892, said board of directors of said district did, in order that sufficient water may be furnished to each landowner in said district for irrigation purposes, and for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of said act under which said district was organized, deem it necessary that the sum of one hundred and seventy thousand ($170,000) dollars should be raised; and said board of directors did thereupon estimate and determine that said amount of one hundred and seventy thousand ($170,000) dollars was and is necessary to be raised for said purposes." By its answer the appellant denied that "said board of directors of said district did, in order that sufficient water might be furnished to each landowner in said district for irrigation purposes, and for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the said act under which said district was organized, or did otherwise or at all, estimate or determine that the amount of $170,000 was or is necessary to be raised for said or any purposes." If the answer had stopped here, the allegation that an estimate was made would have been very clearly met; but in the very next paragraph of the answer the appellant goes on to aver the truth to be "that on the 10th day of May, 1892, the said persons, claiming to be sitting as a board of directors of the Glendora irrigation district, did order that it was necessary that the sum of $170,000 should be raised, in order that sufficient water might be furnished to each landowner in said district for irrigation purposes, and for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act under which the district is organized, to wit, the act approved March 7, 1887, as amended, and did further estimate and determine that $170,000 was necessary to be raised for the said purposes." This averment would seem to have destroyed the whole effect of the previous denial, but the parties evidently supposed that the pleadings presented an issue on this point, for in stipulating as to the facts of the case they included the following: "That as soon after said district was organized as was practicable, and on May 10, 1892, said board of directors of said district made an order calling a special election to be held in said district, at which said election should be submitted to the electors of said district possessing the qualifications prescribed by said act the question whether or not the bonds of said district, in the amount determined by the board, to wit, $170,000, should be issued, of which said order the following is a copy: 'On motion, duly seconded, the following order was made and adopted by the board of directors of Glendora irrigation district, Los Angeles county, California, to wit: "Be it ordered that this board, being fully advised in the premises, and having duly considered the matter, do now find and order that it is necessary that the sum of one hundred and seventy thousand dollars should be raised, in order that sufficient water may be furnished to each landowner in said district for irrigation purposes, and for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act under which this district is organized, to wit, an act of the legislature of the state of California entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, as amended." And said board of directors of said district do now estimate and determine that the following amount of money is necessary to be raised for said purposes, to wit, the sum of one hundred and seventy thousand dollars ($170,000).'" And the bill of exceptions shows that the cause was submitted in the superior court upon this stipulation.

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[1] For modification of opinion, see 45 Pac. 1047.

Considering the ambiguity of the pleadings, the court may well be excused for having followed the lead of the parties, in treating the question whether a preliminary estimate of cost of works had been made as one of the issues in the case. But a critical examination of the commissioner's opinion will show that the real question considered and decided by the court was not whether the directors of the district had declared an estimate, or resolved that they did estimate, but whether, as a legal possibility, they could have made the estimate contemplated by the Wright act, in the absence of any sort of plan for the construction of works, or for the acquisition or distribution of a water supply. And this is the issue which the appellant raised, or attempted to raise, by its answer. An examination of the whole tenor of the pleadings will show that the appellant intended to admit that the board of directors passed the resolution and took the action disclosed by that part of the stipulation above quoted, but intended to deny the legal sufficiency of such action, upon the ground that the board had never "adopted any plan of any canal or canals, storage reservoirs, or works, or provided for the acquisition of any property or rights whatever," or made any provision for distributing water among the owners of the land in the district. It was with reference to this question that witnesses were examined in the superior court, and findings made, and the exception to the findings was upon the specific ground that the evidence showed "that the board had never formed any plan, or made any plans or specifications, for acquiring water, or constructing necessary canals and works, or acquiring necessary property and rights therefor, and that the board of directors never have done anything looking to the acquisition of any waters or water rights, or the construction of any waterworks, or acquiring any property, except only the purchase of the Glendora waterworks, and that they have not paid anything for that." This statement in the exceptions to the findings was, as shown by the commissioner's opinion, very fully and sufficiently borne out by the unconflicting evidence in the record; and the question therefore was and is presented for decision, whether there can be, under the Wright act, an estimate of money required, without any plan for the acquisition and distribution of water. Counsel for respondents contend that this question has already been decided in their favor in the case of Board v. Tregea, 88 Cal. 357, 26 Pac. 237, where the following language was used by the court: "The authority to issue bonds is wholly independent of the source of supply of water, or any plans for obtaining it." This language was not very happily chosen, and taken in its largest sense, for universal application, is misleading. But read with its context, and construed with reference to the point under discussion, it is correct. The sole question there considered grew out of this state of facts: The directors, upon a plan to get a supply of water from one source to irrigate the district as originally laid out, had estimated the cost at $800,000, and ordered that amount of bonds to be issued. Subsequently the size of the district had been reduced, and the plan had been modified with respect to the source of supply and the amount of water to be used, and the directors had modified their order for the issuance of bonds by reducing the amount to $400,000. The question was whether the electors could be held to have ratified this order for the issuance of a smaller amount of bonds, and the decision of the point at issue is really embodied in the language immediately following that above quoted: "There is nothing in the law to prevent the directors from changing their plans in this respect whenever they find it to the advantage of the district to do so." In other words, we held that the authority to issue bonds is not so bound up with the preliminary plans as to sources of supply, upon which the estimate is based, that the proceeds of a valid issue of bonds cannot be used to carry out a modified plan, if the change is deemed advantageous. But we did not hold—and we think it would lead to very unfortunate consequences if such a construction were placed upon the law—that the board of directors have complied with their duty, or acted within their powers, by merely resolving that a certain amount of bonds should issue, or by merely declaring that they have estimated the cost, when they have no plan or basis for an estimate of cost. We think that the language of the act (St. 1891, p. 147, § 15) clearly implies that there must be some plan or plans in the alternative, before an estimate can be made, and that without such plan or plans there can be no real estimate. The judgment and order are reversed.

We concur: GAROUTTE, J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.

(118 Cal. 524)

## HIGGINS et al. v. CITY OF SAN DIEGO et al (No. 19,459.)

(Supreme Court of California. July 25, 1896.)

MUNICIPAL CORPORATIONS — CONTRACTS ULTRA VIRES— SUBSIDY TO RAILROADS — ORDINANCES AND RESOLUTIONS — VALIDITY—CONSTITUTIONAL LAW—EXCEEDING DEBT LIMIT—VOID CONTRACTS —PART PERFORMANCE BY CITY—RECOVERY ON QUANTUM VALEBAT—ESTOPPEL.

1. A contract by a municipal corporation to pay money in aid of the construction of a railroad is invalid, in the absence of any authority therefor in the charter.

2. An agreement by a city, not authorized to expend corporate funds in aid of railroads, to pay a stipulated monthly rental for a waterworks plant on condition, inter alia, that the lessor will thereafter construct a railroad between certain points, is void; an indefinite and inseparable part of the rent being payable in consideration of an unlawful object.

3. Such contract being void in its inception, the fact that the lessor never constructs the railroad, or that compliance with that clause of the agreement is waived by the city, is immaterial.

4. A water company, in order to avoid a lease of its plant directly to a city which had no authority to aid in the construction of railroads, executed a lease to certain individuals on condition, inter alia, that the lessor should thereafter construct a railroad between certain points, it being stipulated that the lessee should have the option to terminate the lease in case any of the conditions were not complied with. On the same day, and as a part of the same contract, the lessees, who were merely nominal parties, made a sublease to the city, containing substantially the same provisions as the original lease, but omitting the clause in reference to the construction of a railroad. *Held* that, as a part of the amount to be paid by the city, under the name of rent, was in consideration of the undertaking to construct the road mentioned in the original lease, the contract was void, whether the option remaining in the nominal lessees to terminate the agreement for failure to build the road was to be exercised by them for their own advantage or for the benefit of the city.

5. Where the common council passes a resolution authorizing the mayor to contract for the expenditure of corporate funds, without first presenting such resolution to the auditor, as required by charter, and obtaining his certificate thereon that the indebtedness can be lawfully incurred under the charter, the contract is void; the defect of power being patent on the face of the resolution.

6. Under Const. art. 11, § 18, forbidding municipal corporations to incur indebtedness exceeding in any year the revenue provided for it for such year, a contract extending over several years is not invalidated by the fact that the aggregate amount to be paid during the whole period exceeds the revenue provided for a single year, if a sufficient revenue for the purpose may be provided in each year without exceeding the limit. McBean v. City of Fresno (Cal.) 44 Pac. 358, followed.

7. A contract by a city council for the lease of a waterworks system for a period of 20 years is not necessarily void as a suspension of the legislative power of succeeding councils. McBean v. City of Fresno (Cal.) 44 Pac. 358, followed.

8. Where an agreement by a municipal corporation for the lease of a waterworks plant is void, because a part of the consideration to be paid by the city is, in effect, a subsidy to a railroad, no recovery can be had on the express contract, even for the time the city retains possession of the plant, such contract being incapable of direct or indirect ratification; but if a general power to contract for a water supply exists, the city will be liable on a quantum valebat for the reasonable value of the use of the plant.

9. In such case the city is not precluded, by the allowance of bills presented by the lessor for the stipulated rent, from showing that they were in excess of the reasonable value.

Harrison, J., dissenting.

In bank. Appeal from superior court, San Diego county; J. W. McKinley, Judge.

Action by T. J. Higgins and another, on behalf of themselves and other taxpayers, against the city of San Diego and others, to set aside a lease of a waterworks plant from the San Diego Water Company and others to the city, and to enjoin further payments thereunder. The water company filed a cross complaint against the city and its auditor and treasurer, seeking, in one count, to recover the rent stipulated for in the lease, and, in another count, to recover on a quantum valebat for the use of the

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[1] Rehearing granted 50 P. 670.

plant. The city and its officers having answered the cross complaint, the original plaintiffs dismissed their action, and from a judgment against the water company on its cross complaint said company appeals. Reversed.

Works & Works, for appellant. W. H. Fuller and C. L. Barber, for respondents.

BEATTY, C. J. This appeal presents another phase of the varied litigation that has arisen out of the several contracts discussed in the two cases of San Diego Water Co. v. San Diego Flume Co., reported in 100 Cal. 43, 34 Pac. 656, and 108 Cal. 549, 41 Pac. 495. A portion of the transactions out of which the present controversy arises is very fully stated in the opinions delivered in those cases, but for the sake of clearness it will be necessary to restate the same matters here, at least in outline, and to present some others in fuller detail.

The San Diego Flume Company and the San Diego Water Company are California corporations, organized for the purpose, among others, of furnishing water to the city of San Diego and its inhabitants. The flume company was owner of a water supply and a system of pipes by which it brought water to the city limits, but had no distributing system within the city. The water company had pipes laid throughout the city and all the necessary facilities for distributing water to consumers. This being the case, on November 6, 1890, the two companies entered into an agreement in writing by which the water company was constituted the sole agent of the flume company for the sale of its water to consumers within the city. Under and in pursuance of this contract the pipes of the two systems were connected at the city limits, and the water company commenced to sell the water supplied by the flume company, and to deliver the same through its distributing system to consumers within the city, and so continued to do until the 1st day of June, 1891, when its entire distributing plant was turned over to the city of San Diego under a contract, the validity of which is the principal question involved in this appeal. In form this contract was a lease from the water company to Bryant Howard and four other citizens of San Diego, and a sublease from them to the city of the entire plant of the water company with a daily supply of 3,000,000 gallons of water from the flume company for the term of 20 years from and after June 1, 1891, at a monthly rental of $9,166.65. The lease from the water company to Howard and others was dated April 13, and their sublease to the city April 18, 1891, but the court finds that both were executed on the 18th, and that "the said lease of said water plant and the sublease thereof constitute a single contract, which was intended to be a lease of said water plant from said water company to said city; that said Bryant Howard and his associates were not interested in said lease from said water company to them, or in said sublease from them to said city, nor was it intended by any of the parties thereto that they should have any interest therein. They were nominal parties only, and their names were used for the sole purpose of effecting a lease of said water plant from said water company to said city, and to avoid making said lease direct from the water company to the city. It was intended and agreed that the said Howard and associates should not be under any liability of any nature, and also that the lease to them should be null and void if the city did not consent to receive from them a transfer or sublease thereof." These facts in regard to the lease and sublease are not only found by the court, but they are clearly evident from the terms of the instruments themselves, which are fully set out in the record, and are confirmed by the fact that the sublease, with the covenants of the city for payment, etc., was immediately assigned by Howard and others to the water company, by which means the city became directly liable to that corporation, if the contract was valid, for the stipulated monthly payments.

In pursuance of this agreement the water company, on the 1st day of June, 1891, delivered its water plant to the city, and from that time until after the commencement of this action supplied to its mains so much of the flume company's water as the city required for the use of itself and its inhabitants. From the time it took possession of the plant the city collected the dues of water consumers, so far as they were collected, and with the exception of two months it regularly allowed and approved the bills of the water company for the monthly rental of $9,166.65. It also applied to the payment of these bills the moneys collected from water rates, less the cost of collection and management. But the payments so made fell far short of the stipulated rent; that is to say, when the rent due according to the terms of the lease amounted in round numbers to $200,000 but $90,000 had been paid, leaving $110,000 still due. And this deficiency was caused in great part by the action of the city authorities in reducing water rates to an unreasonably low figure after obtaining possession of the distributing plant, and by neglecting to collect the rates so reduced. Such being the situation, the plaintiffs Higgins and Llewelyn, taxpayers of San Diego, in September, 1892, in behalf of themselves and other taxpayers of the city, commenced this action to obtain a decree declaring the lease to the city void, and enjoining the city and its auditor and treasurer from allowing and paying any further claims for rent. The defendants named in the complaint were the city of San Diego, its treasurer and auditor, Bryant Howard and his associates, the flume company, and the water company. Of these defendants only the city, the auditor and treasurer, and the water company answered the complaint, and these answers, owing to the subsequent action of the plaintiffs in dismissing their action, will not call for further consideration. The water company, in addition to its answer to the complaint, filed a cross complaint against its co-defendants, the city and its auditor and treasurer. In the first count of its cross complaint the water company alleged the making of the lease and sublease, and the assignment of the latter to itself, its full compliance with all the covenants on its part to be performed, and the failure of the city and its officers to pay the stipulated rent; counting, in other words, upon the written contract. The second count of the cross complaint was upon a quantum valebat for the reasonable value of the use of its plant during the time it had been held and used by the city. The third count was for damages for the unlawful withholding of the plant by the city after demand for its return. To this cross complaint the city and its auditor and treasurer made answer, asserting the invalidity of the lease and sublease upon all the grounds suggested by the plaintiffs and upon other grounds, and defending against the claims for value of the use and for damages. Upon the filing of this answer to the cross complaint the original plaintiffs dismissed their action, leaving the contest to be waged between the water company on one side and the city and its officers on the other. The cause was tried by the court, and very full findings made, upon which the court concluded that the water company had no right to recover upon either count in its cross complaint, and judgment was entered accordingly. From the judgment so entered the water company appeals, contending that, upon the facts found by the court and admitted by the pleadings, the judgment should have been in its favor.

The main question in the case is as to the validity of the written contract between the city and the water company, and this involves an inquiry into the capacity and powers of the respective parties to the contract, the terms of the written instruments, and the objects of the transaction. As to the powers and capacities of the parties: The San Diego Water Company is and then was a corporation organized under the laws of the state of California for the purposes, among others, of supplying, furnishing, and selling water to the city of San Diego and its inhabitants for domestic purposes, and to acquire, by purchase or otherwise, the rights, franchises, works, and equipments, and the real and personal property, of other persons and corporations supplying, or authorized to supply, water for said purposes, and to use, control, sell, convey, or lease all such property. The San Diego Flume Company was also a California corporation, organized for the purposes, among others, of diverting water from the San Diego and other rivers, and conveying the same by means of aqueducts to the city of San Diego and other places for sale for domestic purposes, irrigation, etc. The city of San Diego is a municipal corporation of the state of California, organized under a freeholders' charter ratified by the legislature March 16, 1889. St. 1889, p. 643. The general features of the lease from the water company to Bryant Howard and others have been sufficiently indicated, but it is necessary here to state more in detail some of its conditions. After providing for the lease of the distributing plant, the sale of 3,000,000 gallons daily of the flume company's water, and so much more as the city may require, at the rate of 5 cents per 1,000 gallons, the payment of the rent, the assignment of the lease to the city, and the immunity of the lessees from any personal liability for the rent, the agreement proceeds as follows: "This lease is made and executed and the amount above agreed to be paid by the parties of the second part on the following conditions, stipulations, and agreements, viz." (except as indicated by quotation marks, the substance only of these stipulations is given): (5) That the party of the first part do cause a railroad to be constructed and operated from the city of San Diego to San Quintin, in Mexico, or to Ft. Yuma in California; work to be commenced thereon within 30 days, and 50 miles of road to be completed and in operation within one year; 65 miles per annum to be thereafter constructed; road to be American standard gauge, well constructed; and, after completion of first 50 miles, daily and continuously operated for accommodation of freight and passengers. "(7) It is further agreed that, should any extensions of the pipe lines or plants of the party of the first part be necessary, during the term of this lease, the parties of the second part or their assigns or sublessee shall have the option to put in such extension, the same to be of the kind and quality now being put in and used by the said party of the first part; or said parties of the second part or their assigns or sublessee may require such extensions to be made by the party of the first part, in which case the party of the first part shall be allowed for the amount actually invested in such extensions the sum of six per centum (6 per cent.) per annum, interest payable at the time of paying the monthly amounts called for by this lease; and in case said party of the first part shall fail or refuse to make such extensions when required so to do by the parties of the second part, then the second party may cause such necessary extensions to be made, and deduct the cost thereof from the subsequent rentals falling due." (8) The party of the first part agrees to keep in good repair and look after and care for its plant, free of expense to the parties of the second part, etc. "(10) It is also agreed that the parties of the second part, or their assignee or sublessee, shall pay to the party of the first part, for the deterioration of the extension of the pipe lines, or any part of the system, three per centum (3 per cent.) per annum on the cost of such extensions; said parties of the second part to have the option of purchasing such extensions and the entire plant at any time during the term of this lease, at the actual first cost thereof to the party of the first part, less the amount paid for deterioration." "(12) And it is expressly understood and agreed that the parties of the second part have the option to terminate this lease in case any of the conditions, stipulations, or agreements above mentioned shall not be complied with, by giving notice of such option to the party of the first part of one month, and upon returning to the party of the first part, in as good condition as when this lease is executed, ordinary wear and tear and damages of the elements excepted, of the property above described; or, in case of failure to return any part or piece thereof, to pay said party of the first part the value of all property not returned as aforesaid, and from the time of such notice and surrender the party of the first part shall be restored to all the rights and privileges it now has."

On the same day that this lease was executed—April 18, 1891—Douglass Gunn, as mayor of the city, signed the name of the city to the sublease, which was also signed and delivered by Bryant Howard and others. The sublease, after reciting the execution and substance of the lease, and referring to the conditions upon which it might be terminated, and providing that in case of its termination the sublease itself shall terminate, and all parties be freed from liability thereunder, is in its terms a substantial repetition of the lease itself down to the clause providing for the construction of the railroad, which is wholly omitted. The ensuing stipulations of the lease as to repairs, extensions, care of plant, interest on costs of extensions, allowance for deterioration, etc., are repeated in the sublease, which concludes as follows: "And it is expressly understood and agreed that the party of the second part has the option to terminate this lease, in case any of the conditions, stipulations, or agreements above mentioned shall not be complied with, by giving notice of such option to the parties of the first part of one (1) month, and upon returning to the parties of the first part, in as good condition as when this lease is executed, ordinary wear and tear and damages by the elements excepted, of the property above described; or, in the case of a failure to return any part or piece thereof, to pay said parties of the first part the value of all property not returned as aforesaid; and from the time of such notice and surrender the parties of the first part shall be restored to all of the rights and privileges they now have; and in the case of the termination of this contract the first parties shall be released from all liability for damages or otherwise by reason of such termination or failure of conditions, terms or agreements."

The foregoing full statement of certain features of the lease and sublease has been made in view of the contention of counsel for respondent that the manifest purpose of the whole transaction between the water company, Howard, and his associates and the officers of the city was to accomplish by indirection what could not be done openly and directly, viz. to secure a subsidy from the city, or a loan of its credit in aid of the construction of a railroad. This, however, is not the sole or principal objection to the validity of the contract, and is not the ground upon which the superior court held it invalid. It appears from an opinion of the judge of the superior court, printed as an appendix to one of the briefs, that his conclusion was based upon the provisions of section 18, art. 11, of the constitution, and certain provisions of the charter of San Diego. Section 18, art. 11, of the constitution reads as follows: "No county, city, town, township, board of education or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." Section 11, art. 2, c. 2, of the city charter (St. 1889, p. 658), provides: "No expenditure, debt or liability shall be made, contracted or incurred during any fiscal year that cannot be paid out of the revenues provided for such fiscal year. Except as otherwise authorized by this charter, the city shall not, nor shall the common council, the board of education, or any board, department or officer incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such fiscal year. All contracts, indebtedness or liabilities incurred contrary to the provisions of this section shall be void, and shall not be paid out of the treasury, or constitute or be the foundation of any claim, demand or liability, legal or equitable, against said city. The words expenditure, indebtedness and liability herein used shall include official salaries and the pay of all employés of said city, or of any of its departments." Chapter 2 of article 6 provides for the contracting of bonded indebtedness, and in section 12 (page 709) reiterates in more emphatic terms the inhibitions quoted from article 2, respecting unsecured or floating indebtedness, and declares that "all officers of said city are charged with notice of the condition of the city treasury and extent of the claims against the same." Section 14, art. 2, c. 2, of the charter (page 659), provides: "All ordinances or resolutions appropriating money or for the incurring of indebtedness or liability against the treasurer, introduced in either board of the common council, or in the board of education, or other department or authority, must, before being passed, be presented to the auditor, and until he certifies in writing upon such ordinance or resolution that such appropriation can be made or indebtedness incurred without the violation of any of the provisions of this charter, no further action shall be had upon the same."

The findings in relation to these matters are that the resolution authorizing the mayor to execute the sublease in behalf of the city was passed by the council without obtaining or requesting the certificate of the auditor as provided in the section last quoted, and "that the debt and liability attempted to be incurred by the said city by said lease and sublease, the sum of $110,000 per year, could not, at the date of said instruments, or at any other time since, be paid out of the revenues of the said city provided for the fiscal year then current, or any fiscal year since the date of said instruments; nor was any provision made for the collection of an annual tax to pay the interest of said indebtedness or to constitute a sinking fund for the payment of the principal. And no election was called or held at which the electors of said city voted upon the question of incurring said liability or consented thereto." For these reasons, and for these alone, the contract was held invalid by the learned judge of the superior court. As to the other objection above stated, he says in the opinion referred to: "While it is very evident from the terms of the contract that the hope that a railroad would be constructed was one of the moving causes for the city authorities entering into the contract, it was not, in my opinion, a consideration of the contract, but merely a condition subsequent, which falls, because invalid, without affecting the other provisions of the contract." And in his conclusions of law he holds "that said lease and sublease were not void because the amount agreed to be paid was a subsidy to or in aid of the construction of a railroad." These conclusions are based upon findings to the effect that the city waived the construction of the railroad, and that neither the city, nor its mayor acting in its behalf, was induced to enter into the contract by any promises or representations of the officers or agents of the water company that the railroad would be built.

For all these reasons counsel for appellant assumes that this particular objection to the contract is wholly eliminated from the case, and that the appeal must be determined upon other grounds. Counsel for respondents, on the other hand, insists that the conclusions of the judge of the superior court as to this matter are at variance with his findings of fact, and that the findings must control. He contends, in other words, that, considering the character and situation of the parties, the terms of their agreements, the circumstances under which these were entered into, and the purposes of the transaction, as found by the superior court, this court cannot avoid seeing and declaring as matter of law that a part of the consideration for the $9,166.65, which the city promised to pay monthly, was the agreement of the water company to cause the construction of a railroad. These propositions require consideration, and in considering them it will be assumed, for the purposes of the discussion, that the contract of the city was entirely free from any objections except those founded upon the condition in the lease to Howard and others, as to the construction of the road. It is claimed by counsel for respondents, and seems to be conceded by counsel for appellant, that a contract by a municipal corporation of California to pay money to any person or corporation to secure the construction of a railroad would be void, because in violation of section 31 of article 4 of the constitution, which reads as follows: "The legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, in aid of or to any person, association or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided that nothing in this section shall prevent the legislature granting aid pursuant to section twenty-two of this article; and it shall not have power to authorize the state, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever." It does not seem entirely clear that such a contract would come within the strict terms of this provision, but certainly it would involve, in part at least, the evils which the constitutional restriction was designed to prevent, because it would afford a ready means of accomplishing by indirection what could not be done openly and avowedly. It is not necessary, however, to decide this question here, for there is no suggestion that the charter of San Diego confers authority upon the common council to expend any portion of the municipal funds in constructing or aiding the construction of railroads; and, in the absence of such authority, an agreement of the character supposed would necessarily be invalid.

This brings us to the question whether the city made or attempted to make such an agreement, or whether the other parties to the transaction managed to secure the advantages of such an agreement by means of the elaborate contrivance to which they resorted. The solution of this question may be simplified by considering what would have been the consequence if a lease from the water company directly to the city had been executed in the same terms as those contained in the lease from the company to Bryant Howard and associates. In such case it seems clear that the agreement of the city to pay the so-called "rent" would have been wholly void, because an indefinite and inseparable part of the stipulated amount would have been payable in consideration of the unlawful object of subsidizing the railroad. And it is no answer to this proposition to say that the provision for the construction of the road was a condition subsequent and void, or that it was waived by the city. If the city had no power to expend corporate funds in aid of the construction of a railroad, it does not help a contract, based in part upon such unlawful consideration, to show that the city waived compliance with that part of the undertaking of the water company. The vice of such a contract consists in the attempted misapplication of the public funds, and is not cured, but is rather aggravated, by foregoing the advantages bargained for. If a city could not be compelled to pay for a railroad actually built on the faith of its promise to pay, still less could it be compelled to pay for a road not built. But if we have mistaken the position of appellant—and the argument of counsel goes to the extent of claiming that, because the provision for the construction of the railroad was put in the form of a condition subsequent, it therefore constituted no part of the consideration for the stipulated payments—we can only say that the position is untenable. The option to terminate a contract calling for the monthly payment of large sums of money is certainly valuable to the party charged with such payments, and burdensome to the party against whom it may be exercised unless he performs some onerous condition. It is, therefore, a good consideration for an agreement to pay money. And if the option is valuable, the condition upon which it may be exercised is equally valuable to the party who is to pay and burdensome to the party who is to receive payment.

We conclude, for these reasons, that if this had been a lease direct from the water company to the city, it would have been rendered wholly void by the railroad clause. But in form, at least, it was a lease to Howard & Co., and a sublease to the city, and it remains to consider the effect of the elimination of the railroad clause in the sublease. If the transaction had been in fact what it was in form, this part of the case would have presented no difficulty. There could have been no objection to Bryant Howard, or any citizen of San Diego, stipulating for the construction of a railroad in connection with a lease of the water plant and sale of a water supply; and they, having obtained such a contract, might lawfully have sublet the water plant and water supply to the city in consideration of any agreement on the part of the city which its officers were authorized to make. But, as we have seen, the transaction was not in fact what it formally assumed to be. It sufficiently appears from the instruments themselves, but more plainly and certainly from the findings of the court, that the whole object of the parties was to effect a lease of the distributing plant and water supply to the city, and that Bryant Howard and others were made formal parties for the single purpose of avoiding a lease direct from the water company to the city. But why this desire to avoid making the lease direct? If the water company had the right and power to lease its plant and water supply to Howard & Co., it had the same right and power to lease to the city, and if the city could agree for a sublease from Howard & Co. it could equally well agree for a lease from the owner of the plant. There is but one conceivable motive, therefore, for the circuitous course pursued. The parties to the transaction evidently understood that a lease direct to the city with the railroad clause included would be void, but felt that such a provision was necessary in order to induce the city authorities to enter into the agreement. This, however, is a conclusion, not of law, but of fact, and cannot be assumed by this court as the basis of its decision in the absence of a finding by the superior court, and, in view of the finding to the effect that the city was not induced to enter into the agreement by any representations that a railroad would be built, the motives and purposes of the water company and its agents became immaterial. The city, according to the findings, was entirely willing to take a lease of the water plant and water supply, and pay the rent, irrespective of any condition for the construction of a road, and in making the agreement the members of the common council were wholly uninfluenced by the lure which the water company took such unnecessary pains to hold out to those interested in the growth and expansion of the city.

This being so, the validity of the contract depends upon the true construction and legal effect of the writings in which it is embodied. As to this our conclusions may be very briefly stated. They are that the city acquired by the sublease all the rights secured to Bryant Howard and others by the original lease, excepting only the right to terminate the agreement for failure to construct the railroad. This, in our opinion, remained in Howard and his associates. But whether, under the circumstances, it remained in them to be exercised in their own behalf, and at their own discretion, is not so clear. It may be that they held it as mere trustees for the benefit of the city which, by their contrivance, had been induced to pay, or agree to pay, the whole consideration upon which it was granted. It makes no difference, however, whether they held this right for their own benefit or for the benefit of the city. In either case it remains undisputed that the city, by the connivance of the water company and Howard & Co., had been induced to agree to pay, under the name of rent, the whole consideration for the undertaking, such as it was, to build the railroad. This vice, inherent in the contract from its inception, rendered it wholly void; for we have shown that, if the original lease, with the railroad clause, had been made directly to the city, it would have been void, not because there is anything unlawful in an agreement for the construction of a railroad, but because it was unlawful to use the revenues of the city to subsidize a railroad; and, if this could not be done directly, it could not be done indirectly, as was here attempted. If the city could not use its revenues to subsidize a railroad, it could not use them to buy an option to terminate its agreement to pay rent under a lease otherwise valid if its lessor failed to build a railroad. If it could not buy such an option to be exercised by itself, it could not buy it for trustees, and still less for strangers. If these conclusions are correct, it seems unnecessary to advert to the fact that the water company never operated or constructed the railroad, or, so far as appears, ever commenced its construction. The contract being void, the question whether it was performed or not becomes as immaterial as the fact found by the superior court that the condition for building the railroad was waived by the city.

It seems also to be unnecessary to discuss at length the various remaining objections to the validity of the contract, but they will be briefly noticed. The first of the grounds upon which the superior court held the contract invalid was that the resolution of the council authorizing the mayor to execute the sublease was fatally defective, because previous to its passage it had not been presented to the auditor, and lacked his certificate that the contemplated indebtedness or liability could be incurred without a violation of the restrictions imposed by the charter. This defect in the proceedings is conceded, but the appellant contends that the provision of the charter above quoted is void, because it is an attempt to invest a ministerial officer with powers and functions purely judicial. This proposition is not, in our opinion, sustained by the authorities cited, or by any authority. The provision in question does not seek to invest the auditor with any power to determine what the law is, or what the rights of any parties are, with reference to any past transaction. It merely requires the certificate of an officer peculiarly conversant with the fiscal affairs of the city that there are or will be available funds, or that available funds may lawfully be provided to meet any proposed expenditure, before the passage of an ordinance or resolution incurring the liability. It is a restriction upon the legislative power of the council, consisting only in a requirement that they must go to the best source of information for the fact upon which their right to act depends. It is easily conceivable that an arbitrary exercise by the auditor of the power so conferred might in particular instances be detrimental to the public interests, but so might the arbitrary exercise of an absolute or qualified veto by the mayor or other executive officer; and, since there is no constitutional objection to the conferring of a veto power upon the mayor, we can see no reason why a similar power with respect to a certain class of legislation may not be conferred upon the auditor of a municipal corporation. But the appellant further contends that, notwithstanding the resolution was passed in the teeth of a prohibitory restriction in the charter, the city is nevertheless bound by the action of the mayor in executing the sublease, because the water company had the right to presume that the council would not have authorized the mayor to act without the proper certificate of the auditor. This proposition, also, we think is unsustained by authority or reason. It is no doubt true, as was said in Moore v. Mayor, etc., 73 N. Y. 245, that "it is indispensable to any government, state or municipal, that full faith and credit be given to the acts of the governing body, and that individuals having occasion to deal with agents of the government should be permitted to regard the acts of the government valid in the absence of any apparent defect either in the power or the manner of its exercise." And upon this principle it may be conceded that as to acts in pais, which cannot appear upon the records of the proceedings, they will be presumed, so far as necessary, to sustain the action of municipal officers in matters falling within their general authority. But this is not a case for the application of the doctrine invoked. The mayor of San Diego had no authority, under the charter or other law of the state, to execute the contract in question. All the authority he had was derived from the resolution of the council, and the water company was bound to know that he could act only in pursuance of authority so conferred. They knew, in other words, that he was, for the purpose of executing that contract, the special agent of the city, and were bound to examine his warrant of attorney. If they had done so, they would have discovered its invalidity by mere inspection, because they must have seen that it did not bear the certificate which the law required to be indorsed upon it. The deficiency here was not merely of an act in pais, but was a defect of power, patent on the face of the writing which professed to confer it, and for this reason, also, we are of the opinion that the contract was void.

The further objection by counsel for respondents that the resolution authorizing the mayor to execute the sublease was nugatory because the council could only contract by ordinance, need not be noticed further than to say that no authority to proceed by joint resolution in such a matter has been called to our attention, and there is this material difference between the two proceedings: that an ordinance cannot take effect without publication, while a joint resolution is not subject to that condition. The resolution in question does not appear to have been published. The only authority conferred upon the council by the charter "to adopt, enter and carry out means for securing a supply of water for the use of the city and its inhabitants" is found in the enumeration of matters as to which the council is empowered to pass ordinances. St. 1889, p. 651, § 1; Id. p. 653, § 29.

The second ground upon which the superior court held the contract invalid was that it violated section 18, art. 11, of the constitution, and the similar provisions of the city charter above quoted. It was found that the sum of $110,000 per year could not have been paid out of the revenue provided for the city for the year in which the contract was made, or for any subsequent year. But this finding is attacked by the appellant, and the evidence clearly shows, without conflict, that the annual revenue of the city, exclusive of the amount collected from consumers of water, has been largely in excess of $110,000, but that most of it has been expended for other purposes, so that the surplus was very much less than $110,000. But there is nothing to show that the claims upon which the revenues were expended were valid claims, or for the necessary expenses of the city government. For aught that appears, the amount required to pay the rent may have been used to satisfy claims upon contracts entered into subsequent to the date of the lease. It is found, moreover, that a revenue sufficient to pay the necessary expenses of the city government and the rent of the water company could be raised by the levy of a tax not exceeding the charter limit of 90 cents on the $100. In view of these findings the conclusion of the superior court on this point evidently was not based upon the ground that a sufficient revenue to pay the rent could not have been provided year by year without transgressing the limitations of the taxing power imposed by the charter. In fact, it appears from the opinion of the superior judge that his conclusion was based upon a construction of the word "liability" as used in the constitution and charter, according to which a contract extending over several years, and providing for annual payments for services to be rendered or materials to be supplied from year to year, is void if the aggregate amount of all the payments that may become due under the contract from first to last exceeds the revenue of the city provided for the year in which the contract is made. That is to say, he held this lease for 20 years void because the aggregate rent for the whole period, $2,200,000, exceeded the revenues of 1891. This construction of the constitution is not without authority to support it, but most of the cases cited by the learned judge of the superior court in his opinion, and by counsel for respondents in his brief, are considered in the opinion of Justice Henshaw in McBean v. City of Fresno, 44 Pac. 358, where it was held, in accordance with a conflicting line of decisions in other states, and in this state, that a contract of a municipal government extending over several years is not rendered invalid by the fact that the aggregate amount to be paid during the whole period is in excess of the income provided for a single year, and that such a contract, so far as this particular objection is concerned, is valid if an income sufficient for the purpose may be provided in each year without exceeding the charter limit of taxation. The opinion in that case also discusses another objection, which is made in a different form to the contract here in question, viz. that a contract calling for services or supplies for a number of years beyond the term of office of the members of the council by whom it is made is void because it operates as a restraint or suspension of the legislative powers of the council. It is sufficient, for our present purposes, to say that we approve what was said in McBean v. City of Fresno with respect to this question, as well as the decision therein upon the point last above mentioned.

The remaining objections to the contract are without merit, and do not call for particular notice.

The result of the foregoing discussion is that the contract of the city with the water company is held invalid upon at least two grounds: First, because the city was led by the contrivance of the water company to agree to pay, under the name of "rent," a subsidy to a railroad; and, second, because the mayor had not sufficient authority to execute it on the part of the city. This brings us to the proposition of appellant that, although the contract may have been invalid, the city is nevertheless estopped by its own conduct to deny its validity, at least in so far as it has been executed. The acts of the city most relied upon as creating such estoppel are, in addition to matters already stated, that the city required the water company, in pursuance of the terms of the sublease, to expend more than a hundred thousand dollars in extending its plant for supplying water to consumers, and refused to redeliver possession of the plant when demanded. It is doubtful if the doctrine contended for by appellant could be sustained without setting aside previous decisions of this court, but this point need not be determined, for none of the decisions of other states go beyond the proposition that a municipal corporation may be estopped to deny the validity of a contract which it had the general power to make, or to deny the validity of a contract, so far as executed, when the only objection to it is that it is for too long a term. But here one of the principal objections to this contract is that it contains a subsidy to a railroad, and is, therefore, beyond the power of the city, and incapable of ratification, directly or indirectly. Our conclusion is that there can be no recovery upon the express contract, even for the time the city kept possession of the water plant.

But the city had the general power to contract for a water supply for itself and its inhabitants, and under this power could undoubtedly have taken a lease of the water company's plant for a year, and could have renewed such lease from year to year. In effect it has done this very thing. Its express contract to pay $9,166.65 was invalid for the reasons above stated, but there is no reason why it should not pay the reasonable value of the use of the plant which it has actually enjoyed. The decisions cited by counsel for appellant from the reports of other states very clearly sustain his contention in this respect, and so we think do the decisions of this court. We cite the following: Light Co. v. Dunn, 62 Cal. 580; opinion of Field, J., in San Francisco Gas Co. v. City of San Francisco, 9 Cal. 469; County of Los Angeles v. City of Los Angeles, 65 Cal. 476, 4 Pac. 453; Argenti v. City of San Francisco, 16 Cal. 276 (opinion of Field, C. J.); Zottman v. City and County of San Francisco, 20 Cal. 96. We think the superior court erred in holding the city not liable on its implied contract to pay the value to it of the use of defendant's plant, as found in the thirty-eighth finding.

Counsel for appellant contends that the city is concluded by the allowance of the bills of the water company for the stipulated rent, and to sustain this proposition cites Light Co. v. Dunn, 62 Cal. 580, McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113, and other cases. These cases are not in point, because they merely hold that the auditor, in mandamus to compel the drawing of his warrant for an allowed claim, cannot question the amount of the allowance. But here the city itself is contesting the claim, and is not precluded from showing that an amount allowed in pursuance of a void contract is in excess of reasonable value. The claim that the city is liable for damages for withholding possession of the water plant after demand made for its return is not supported by any argument, and, since it is not pressed by counsel, we deem it sufficient to say that, in view of the findings of the superior court and our conclusions upon the points above discussed, this position is not tenable. For the reasons above stated, the judgment is reversed, and the cause remanded, with directions to the superior court to enter judgment upon the findings in favor of the water company for the reasonable value to the city of the use of the water company's plant during the time it was actually retained by the city, with authority to take additional evidence, if necessary, to ascertain the exact sums payable for the different fiscal years; said sums to be made payable out of the revenues of the fiscal years during which they respectively accrued, according to the suggestion made as to the proper form of such judgments in Weaver v. City and County of San Francisco (decided Feb. 21, 1896) 43 Pac. 972.

We concur: McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

HARRISON, J. I dissent, and, if my duties will permit, will hereafter file an opinion expressing the grounds of my dissent.

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5 Cal. Unrep. 406

## DIETZ v. KUCKS et al. (S. F. 55.)

(Supreme Court of California. July 28, 1896.)

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—APPEAL.

1. In the absence of an agreement to the contrary, a tenant who assigns his lease for the whole term remains liable thereon to the landlord, as surety for the assignee.

2. Where there is any evidence to support a verdict, and a motion for a new trial is denied by the trial court, its judgment will not be reversed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by A. C. Dietz against C. H. Kucks and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. E. McElrath, for appellant. Geo. E. Degolia, for respondents.

SEARLS, C. Action to recover $755 rent reserved in a lease of real estate situate and being in Oakland, Alameda county. Verdict and judgment for defendants. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

Two points only are made for reversal:

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[1]Rehearing denied

First. That there is no evidence to justify the verdict of the jury. Second. That the court erred in permitting defendant Fugel to testify to the declaration of Stillwell, an agent of plaintiff, that he, the said Stillwell, had a letter from plaintiff authorizing him to agree to an assignment of a certain lease made by plaintiff to C. H. Kucks and Hugo Fugel, partners, and by them assigned to Fugel and Wettstein, partners.

The second point urged is wholly immaterial, as there was no issue upon the question of the consent of plaintiff to the assignment. His complaint, after averring the assignment of the lease, proceeds as follows: "And that the plaintiff agreed, in writing, to the said assignment."

The facts essential to an understanding of the real question involved are that plaintiff leased certain premises to C. H. Kucks and Hugo Fugel, co-partners under the name of C. H. Kucks & Co., for the term of four years from the 1st day of January, 1890, at the monthly rental of $75 for the first year, and $100 per month thereafter, payable monthly in advance. On or about September 1, 1892, Kucks sold his interest in the co-partnership to A. Wettstein, who formed a co-partnership with Fugel under the firm name of A. Wettstein & Co. The lease was assigned to the new firm, as before stated, with the consent of plaintiff. The new firm paid the rent reserved in the lease for some time, but finally became insolvent; and, Kucks having paid the rent up to the assignment of the lease, the real question is, did he continue liable for the rent accruing thereafter, or was he released therefrom by operation of law, or by the act or agreement of the parties? In the absence of some agreement to the contrary, the tenant who, as in this instance, assigns his whole term, remains liable as a surety. The assignee becomes liable directly to the lessor upon all the covenants of the lease which run with the land, and his assignor remains his surety to the lessor for the performance of such covenants. Armstrong v. Wheeler, 9 Cow. 88; Babcock v. Scoville, 56 Ill. 461; Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; Greenleaf v. Allen, 127 Mass. 248; Wilson v. Gerhardt, 9 Colo. 585, 13 Pac. 705. But the question remains, was there a substitution of tenants, by consent of the parties, with an agreement that the original tenants should be released from further liability? The jury, under proper instructions from the court, found in the affirmative on this issue. The evidence in support of the verdict cannot be said to be entirely satisfactory. Still, as there was some testimony in favor of the finding of the jury, and as the court below, by refusing a motion for a new trial, evidenced its satisfaction with the verdict, we do not feel at liberty to crystallize our doubts into action by setting aside such verdict. Meyer v. Insurance Co., 104 Cal. 381, 38 Pac. 82; Mahan v. Wood, 105 Cal. 12, 38 Pac. 507; White v. Beer, 105 Cal. 9, 38 Pac. 513; Warner v. Cleaning Works, 105 Cal. 409, 38 Pac. 960. We recommend that the judgment and order appealed from be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(113 Cal. 541)

## PACHECO v. JUDSON MANUF'G CO. (S. F. 243.)[1]

(Supreme Court of California. July 28, 1896.)

DEFECTIVE MACHINERY—FAILURE TO INSPECT—LEADING QUESTIONS—COLLATERAL ISSUE—OPINION EVIDENCE.

1. An employé injured by the breaking of shears used in cutting iron is entitled to go to the jury on the question of negligence,—there being evidence that there was an old crack part way across the lever which broke; that it could have been detected by reasonable and practicable tests, which were not applied, though it was not perceptible by ordinary observation, and was not known; that such shears sometimes break in use; and that shears of similar character, though somewhat lighter, had broken in defendant's manufactory.

2. A question whether instructions were given by those in charge "about picking out quick and active men [to work at the shears], so that they might get away from the shears in case of an accident," is leading, and calls for an opinion.

3. Where an employé seeks recovery for injury from the breaking of shears used in cutting iron, on the ground of negligence in not having them inspected, plaintiff, while he may show that similar shears used by defendant broke, because tending to establish the propriety of inspection, cannot show that they broke because of faulty construction, as this would raise an irrelevant, collateral issue.

4. While an expert may establish that a crack in iron machinery could have been ascertained in certain ways, he cannot testify as to whether it "could not have been discovered by the exercise of ordinary care and precaution"; this being part of the ultimate question of negligence for the jury.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Action by Maurice Pacheco against the Judson Manufacturing Company. Judgment for defendant. Plaintiff appeals. Reversed.

M. C. Chapman, for appellant. Fitzgerald & Abbott, for respondent.

BRITT, C. Defendant is a corporation engaged in the business of manufacturing iron and steel machinery. On April 7, 1892, plaintiff was employed at its works, and while he was assisting in cutting up a plate of boiler iron by means of a pair of shears weighing some 12 tons, and operated by steam, the casting forming the body of the lever or upper jaw of the shears broke. A fragment thereof fell upon plaintiff, and he sustained serious injury. He prosecutes this action to recover damages, claiming that defendant was negligent, both in the construction of the shears, and the oversight of them after completion. At the trial, plaintiff having

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[1] Rehearing denied.

closed his evidence, the court directed a nonsuit, observing that a case of ordinary neglect by defendant was not made out.

It seems to have been assumed by the court and the parties, on the trial, that danger to the person of plaintiff was to be apprehended as a result of the breaking of the shears. This being predicated, there was evidence that the shears were made by defendant itself about October, 1891. The jaw or lever which broke was a heavy casting, having a perpendicular section of two feet or more, and a breadth of about eight inches. It moved on a horizontal journal, which was lubricated through a tube extending from an oil hole at the top of the casting to the journal. Oil poured into this tube sometimes ran over on the outside of the casting. When the casting broke the line of the fracture extended through the same from a point close to the oil hole diagonally downward to the lower side. There was further evidence—not without conflict—that one side of the sectional area exposed by the fracture looked blue and fresh, as if then just broken, and that the other side, nearly one-half of the broken surface, was black, and more or less stained with oil, as if it had been previously cracked, and oil had run down the crack. The exterior of the casting was covered with dust, and it is not claimed that the crack, if any there was before the event in question, was known to any one, or was perceptible by ordinary observation. It was, however, in evidence that such a crack, if it existed, might have been detected by applying tests, as by sounding the casting with a hammer; that the only test of the shears ever made was in their practical operation about the work for which they were constructed, they having previously cut metal much heavier than the piece on which the lever broke; that such shears sometimes break in use; and that shears of similar character, though of lighter construction, had broken in defendant's works. Defendant owed to plaintiff, as its servant, the legal duty to exercise ordinary and reasonable care—First, in the original provision of safe appliances with which he was to work, and, secondly, in keeping them safe; employing, if necessary for this purpose, such practicable means and tests as common prudence shows to be proper for discovering defects which might occur with time and use. While we have not found in the record any sufficient evidence that the defendant was negligent in the original construction of this machine, yet the evidence was such that the jury might have deduced as inferences therefrom that, previously to the breaking which was the immediate occasion of injury to plaintiff, the shears were cracked and weakened; that this condition was so far to be reasonably anticipated as to render prudent the adoption of measures for its discovery, and would have been detected by the application of reasonable and not impracticable tests; that such tests were not applied; and that the shears broke on account of such discoverable defect. Whether these inferences, and the conclusion of negligence thereon, should be drawn from the evidence, was a question of fact, "to be determined from all the circumstances and surroundings of the case." Sappenfield v. Railroad Co., 91 Cal. 56, 27 Pac. 590. As is sometimes said, whether negligence can be inferred from the evidence is for the determination of the court, but whether it ought to be inferred is a question for the jury. Here it might have been, and the court erred in ordering a nonsuit. Sappenfield v. Railroad Co., supra; Alexander v. Mill Co., 104 Cal. 532, 38 Pac. 410; Bowman v. White (Cal.) 42 Pac. 470; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Baker v. Railroad Co., 95 Pa. St. 211; Brann v. Railway Co., 53 Iowa, 595, 6 N. W. 5; Busw. Pers. Injur. § 194.

Plaintiff complains of the action of the court in sustaining objections to sundry questions put to his witnesses. Thus, he inquired of a witness whether instructions were given by those in charge "about picking out quick and active men [to work at the shears], so that they might get away from the shears in case of accident." If such instructions were given, plaintiff was entitled to prove the fact, as tending to show that defendant knew the shears to be a dangerous instrumentality. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. But the objection made included the points that the question was leading, and asked the opinion of the witness, and we cannot see that it was error to sustain it on these grounds. So, the court refused to allow a question which counsel said was designed to show that many other shears made by defendant for cutting iron at its works had broken, from defendant's ignorance in their manufacture. While it was permissible to show that similar shears used by defendant broke,—which, in fact, was shown,—because this tended to establish the propriety of inspecting such machinery for defects, yet it was not competent to inquire whether such other shears broke because of faulty construction. Defendant would have had equal right to rebut the imputation, and so an irrelevant, collateral issue would have been tried. 1 Greenl. Ev. 448. The court rightly sustained an objection to the question put to an expert witness, whether a crack descending through one side of the casting "could not have been discovered by the exercise of ordinary care and precaution." He could properly testify (as, in effect, he did subsequently) that the defect was ascertainable by employing some of the methods described by him; but whether this would have been the "exercise of ordinary care and precaution" was part of the ultimate question of negligence, for determination by the jury.

Other assignments of error either are unfounded, or relate to matters not of probable occurrence on a new trial, and do not require discussion. The judgment should be reversed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

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113 Cal. 561

ORTON v. BROWN et al. (S. F. 290.)

(Supreme Court of California. July 28, 1896.)

APPEAL—BILL OF EXCEPTIONS—IRREGULAR SALE ON EXECUTION—LIABILITY OF SHERIFF.

1. It is the duty of counsel for an appellant to see that the evidence is fully set out in a bill of exceptions when he desires to have questions of fact reviewed; and where he has assented, by stipulation, to the manner in which it is stated in amendments proposed by appellees, he cannot be heard to complain that the trial court settled the bill as stipulated.

2. A sale of personal property by a sheriff on execution in bulk, when it should have been sold in several lots, is irregular, but not void; and, not being subject to confirmation, the purchaser is entitled to possession of the property on payment of the bid, and the sheriff can only be held liable for it thereafter in case he wrongfully fails to retake it after the sale is set aside.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by William Orton, assignee, against T. M. Brown and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Turner, for appellant. Buck & Cutler, for respondents.

HAYNES, C. Action upon sheriff's bond. Judgment was entered for defendants upon the verdict of the jury, and plaintiff appeals only from the order denying his motion for a new trial. Plaintiff is the assignee of the Consumers' Lumber Company, an insolvent corporation, which operated in Humboldt county, and defendant Brown is the sheriff of said county. On May 2, 1891, and prior to the insolvency proceedings, one Georgeson obtained judgment against said corporation for the sum of $1,031.58 and costs, in which action the plaintiff attached certain lumber and shingles; and on May 7th an execution was levied on said property, which was afterwards, on May 20, 1891, sold by the sheriff in one lot, and not in separate parcels, for the sum of $700, to H. H. Buhne, Jr. On May 23d said corporation served notice upon the judgment creditor, the sheriff, and said purchaser, that on May 28th it would move the court to set aside said sale, upon the ground of irregularity, specifying that the sale was conducted in disregard of the requirements of section 694, Code Civ. Proc., in that 596,000 feet of lumber and 326,000 shingles were sold in one lot for a grossly inadequate price. Said motion was heard on June 3d, and an order was made vacating the sale, and ordering "that the money paid by the sheriff to satisfy preferred claims be returned to the sheriff by the parties receiving the same, and that the $700 paid by Mr. Buhne for the property be returned to him by the sheriff," and ordering a resale of said property to be made according to law. On June 23, 1891, Buhne appealed from said order, and on November 21, 1892, the supreme court affirmed the order. 31 Pac. 257. On June 20, 1891, certain creditors of said corporation commenced proceedings in insolvency against it; and on August 14, 1891, it was adjudged an insolvent debtor, and said judgment was, on appeal, affirmed May 20, 1893 (33 Pac. 196), and plaintiff was thereafter appointed assignee. The foregoing facts, alleged in the complaint, are not disputed; but the complaint further alleged that it was the duty of the sheriff to take and hold said lumber and shingles under the said process and order of the court, and to safely keep the same in his custody and possession, so that the same could be subjected to sale, and, on information and belief, further alleged that he did not do so, but that he colluded, confederated, and conspired with said Buhne, and willfully and in violation of his duty agreed that Buhne should take said lumber and shingles out of his possession, and "that said lumber and shingles were taken out of his custody and possession by said Buhne," to the damage of said corporation in the sum of $6,300; "and thereby the said sheriff placed it beyond his power to again sell said lumber and shingles, in obedience to the lawful commands of said court." The prayer was for judgment for the said sum of $6,300, with interest from May 20, 1891. The answer admitted the levy upon and sale of the property to Buhne in the manner and for the sum alleged, and that said sale was set aside, and that Buhne appealed from said order, and denied specifically all allegations of the complaint charging the defendant Brown with misconduct or neglect.

Upon the trial, the plaintiff introduced several witnesses, whose testimony, we assume, sustained his allegation as to the value of the lumber and shingles. He also put in evidence the execution under which said property was sold, with the return of the sheriff thereon. The return, after reciting the levy and notice of sale, and giving a list by numbers and dimensions and quality of the lumber, and the quantity of the shingles, proceeded as follows: "And sold the whole of the same in one lot or parcel to H. H. Buhne, Jr., for the sum of $700, United States gold coin, said purchaser being the highest bidder, and said sum being the highest bid for the same. And I further certify that thereafter, on the 3d day of June, A. D. 1891, the sale was vacated and set aside by the Honorable G. W. Hunter, superior judge of Humboldt county, California, and a resale ordered, and thereafter H. H. Buhne appealed to the supreme court from such order. Dated July 6, 1891." The plaintiff called said sheriff as a witness, and he testified as follows: "I remember the sale of lumber and shingles under that execution. I made it myself. I sold it to Buhne for $700. I had notice that the sale was set aside by the court. I gave a certificate of sale to Buhne. After the sale was set aside, I did not retake the lumber from Buhne. The greater portion of it had been taken away. I don't know when the lumber was taken away. I only know by hearsay. It was never sold under the order of the court. I remember after the supreme court affirmed the order of the court setting aside the sale that you talked to me about it. I don't know when the lumber was removed." No other evidence was given or offered on behalf of the plaintiff. As to the evidence on behalf of the defendants, the bill of exceptions does not set it out, but proceeds to state that "defendants introduced evidence tending to prove the following facts:" That after the sale and delivery of the lumber to Buhne, and before the sheriff had notice that the sale had been vacated, the purchaser had taken and converted the same to his own use and placed it out of the power of the sheriff to retake or resell the same. "Defendants also introduced evidence tending to prove" that the lumber was so spoiled in manufacturing, and by being covered with sand, that it had no market value at the time of sale. "Defendants also introduced evidence tending to prove" that it was not the duty of the sheriff to retake said lumber after said sale, or to keep it in his custody or possession until disposed of under the order of the court; that said sheriff did not collude or conspire with Buhne in contempt of the process and orders of the court, or at all, or consent that said property should be taken out of his custody or possession, except as the same was delivered to said Buhne as the purchaser at said sale and by virtue thereof. The specifications upon which plaintiff's motion for a new trial was based are that the evidence is insufficient to justify the verdict; that the verdict is against law; and that the court erred in giving and refusing certain instructions.

The opinion of the court in passing upon the motion for new trial is printed in the transcript, and a considerable portion of it, and a larger portion of appellant's brief, are devoted to criticising the bill of exceptions upon which said motion is based as to the manner in which the evidence on behalf of the defendants is stated. Appellant's counsel prepared the proposed bill, from which was omitted all reference to the evidence on behalf of defendants. Defendants' counsel prepared amendments in the form hereinbefore stated, viz.: "That defendants introduced evidence tending to prove" certain facts, which were briefly stated. It was stipulated by counsel for the respective parties that "the judge of said court may sign the bill of exceptions presented herein as correct," and the judge, "upon the foregoing stipulation," settled and allowed it. There are many cases in which such reference to the evidence is sufficient and proper, as where the exception goes to some ruling upon a question of law, where the weight or conclusiveness of the evidence is not involved, but only the fact that some evidence has been given upon a particular point or issue; but it is not proper where the weight or effect of evidence is to be considered, as upon motion for new trial, where the ground of the motion is the insufficiency of the evidence to justify the verdict or finding. It was the duty of counsel for the moving party to incorporate in his bill of exceptions all of the evidence which, in his judgment, was material to the questions he intended to urge upon the hearing. Not having done so, it was the right of counsel for defendants to propose amendments, and, if these were not properly prepared, he should have aided in their correction, or refused to stipulate that the bill might be settled as amended; but, having so stipulated, he has no right to assail court or counsel for the result, or contend that it was the duty of the court to insert the evidence on behalf of the defendants in order that he may have the facts reviewed by this court. In his reply brief, he asks: "What is there for this court to review? In this case appellant is prevented from having the testimony introduced by defendants reviewed by this court. Can such a method of settling a bill of exceptions be approved? No." It is quite true that it is the duty of the court, in settling a bill of exceptions, to see that it speaks the truth, notwithstanding the parties assent to an inaccurate statement; but it is not contended that the bill in question contains any false or inaccurate statement, but the complaint is that the manner in which defendants' evidence is stated is not proper, and that it was the duty of the court, notwithstanding counsel's assent to the form and matter of the amendments, to write out the evidence in full,—a duty not imposed upon the court, but which rested upon counsel for appellant if he desired to have that evidence reviewed. The position of counsel would justify this court in refusing to consider the evidence, and in affirming the order denying a new trial, so far as questions of fact are concerned. At the least, we shall be compelled to hold that the statement of defendant's evidence is sufficient to show a material conflict as to all questions of fact therein stated, and, unless the order denying a new trial should be reversed upon other grounds, it must be affirmed.

The plaintiff requested the court to give to the jury the following instruction, which was refused: "I further charge you that the return made by the sheriff to the writ of attachment or the writ of execution, while prima facie evidence in his favor, is conclusive against him and also his sureties in this action, and that he and they are estopped disputing the truthfulness of the same and the legal effect thereof." The return to said writ has been quoted herein. It shows a sale made thereunder on May 20, 1891, in one lot, of all the lumber and shingles to Buhne, for $700, and that on June 3d said sale was vacated, and a resale ordered. All these facts were alleged in the complaint, and not denied in the answer, and were therefore admitted; and the jury had already been instructed that it was admitted by the pleadings that the sheriff had taken the property into his possession under the execution, and the court added: "I charge you that the return made by the sheriff to the writ of execution in said action is prima facie evidence of the facts in such return stated." The instruction requested by the plaintiff only added that it was conclusive against him. But it could be conclusive only as to the facts shown by such return, and, these facts being admitted, the instruction given, which was excepted to only so far as it declared the return to be prima facie evidence, fully informed the jury that there was no controversy as to any fact stated in the return.

But, conceding that the return of the sheriff is conclusive against him, of what facts is it conclusive? It is conclusive of the fact that he levied upon the property, and had it in his possession; that he sold it in the manner and for the price therein stated, and that the sale was set aside. Such sales are not subject to confirmation by the court, nor has the execution defendant any right of redemption. The sale is completed by the payment of the sum bid, and the purchaser is then entitled to the immediate possession of the property, and it was not thereafter in the custody or possession in fact of the sheriff, nor did he have the right to regain the possession until the sale was set aside by the court; and any subsequent possession of the property could only be acquired by a retaking. If the sale had been absolutely void upon the face of the return, such return would show the legal custody and possession of the property still in his hands. But the sale was not void, though it was irregular. San Francisco v. Pixley, 21 Cal. 56; Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, and 8 Pac. 46; Frink v Roe, 70 Cal. 303, 11 Pac. 820; Marston v. White, 91 Cal. 40, 27 Pac. 588. The liability of the sheriff, if he is liable, could only be for his failure to retake the property after the sale was set aside; and whether he was liable for such failure involves questions of fact, as to which the record, as already stated, shows such conflict in the evidence as will not permit the verdict of the jury to be disturbed.

Plaintiff's second request, which the court also refused to give, is sufficiently covered by what has been said above. It is based upon the theory that the property was lost because not sold, as required by law. The argument of counsel is that, because the sheriff once had the property in his possession, he could only be discharged by an affirmative showing, and that no discharge is pleaded. But the facts alleged in the complaint showed that Buhne, the purchaser, acquired the actual and lawful possession, and the burden was therefore upon the plaintiff to show that, in the proper discharge of his official duty, the sheriff could have retaken the property after the sale was set aside; and here, again, we are brought face to face with a question of fact. We see no error in the refusal of the court to give these instructions.

That the verdict is not against law sufficiently appears from what has been said, nor is it contrary to the allegations and admissions in the pleadings. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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5 Cal. Unrep. 408

## BECKER v. FEIGENBAUM. (S. F. 103.)

(Supreme Court of California. July 31, 1896.)

CONVERSION—PRINCIPAL AND AGENT—DEMAND—TRIAL.

1. Where error is predicated on the court's failure to give certain instructions, they must appear in the record.

2. In conversion, where plaintiff alleges that she placed in the hands of defendant, as her agent, a sum of money to be loaned on security, and defendant denies the agency, plaintiff need not allege or prove a demand on him for the money before suit.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Susan Becker against Ludwig Feigenbaum for conversion. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. F. Coonan and J. N. Gillette, for appellant. Chamberlain & Wheeler, for respondent.

BRITT, C. It is alleged by plaintiff that she placed in the hands of defendant, as her agent, a sum of money, to be loaned on security, and that he converted a large part of it to his own use. She had a verdict and judgment for the amount thus converted. Defendant denied the agency, and resisted the action on the ground, alleged among others, that an account had been stated between the parties, by which a sum was found due to plaintiff much less than that now demanded by her. At the trial an exception was taken to the refusal of the court "to give the two instructions in reference to account stated asked for by the defendant." It is his main contention here that such refusal was error. It is admitted that the contents of those instructions in no manner appear in the record. Counsel has suggested no means by which we may divine their import, and our own ingenuity has been unequal to the difficulty. We discover, therefore, no error in the action of the court. It is not clear that appellant means to argue that the verdict was unsustained by the evidence. Plaintiff was indebted to defendant, and he attempted to apply part of the money in question upon such indebtedness. Of course, he had no right to do this, if he had received the money for the specific purpose alleged by plaintiff. There was direct conflict in the evidence upon the question whether he did so receive it, and the verdict of the jury is conclusive of the matter. By denying the agency, defendant rendered unnecessary allegation and proof of demand on him for the money before suit. Parrott v. Byers, 40 Cal. 614; Waddell v. Swann, 91 N. C. 108. The judgment and order denying a new trial should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

113 Cal. 558

## THOMASON et al. v. GRACE M. E. CHURCH. (S. F. 7.)

(Supreme Court of California. July 28, 1896.)

RELIGIOUS SOCIETIES—POWERS—TRUSTEES—ACT OF SECRETARY—ESTOPPEL IN PAIS.

1. The powers of a religious corporation are vested in its trustees, and can only be exercised by them in their collective capacity, or by their accredited agents.

2. The secretary of a religious corporation possesses no inherent power to bind the corporation by entering into a contract in its name and behalf.

3. Where the secretary of a religious corporation has, without authority, contracted for paving the street in front of its property, the doctrine of estoppel by acceptance of benefits cannot be invoked to sustain the contract, where the work done thereunder was wholly worthless, and the act of the secretary was expressly repudiated, at the completion of the work, for that reason.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by Thomason & Williams against the Grace Methodist Episcopal Church on a contract for paving, and to foreclose a mechanic's lien. From a judgment in favor of defendant, and from an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. Wm. F. Gibson, for respondent.

SEARLS, C. This is special assumpsit upon a written contract, to recover from the defendant (a corporation) the sum of $425.25 for paving 2,025 square feet of Capp street, in the city and county of San Francisco, together with interest, counsel fees, etc., and to foreclose a mechanic's lien taken to secure the payment thereof. Defendant had judgment for costs, from which judgment, and from an order denying their motion for a new trial, plaintiffs appeal.

The complaint sets forth a written contract according to its legal tenor and effect, and not hæc verba, whereby several parties, and among them the defendant, severally, and not jointly, agreed with plaintiffs to pay the prices therein mentioned, to the latter, for paving the roadway of Capp street in front of their several lots; the material to be furnished and the work done by said plaintiffs, "all in accordance with specifications on file in the office of the superintendent of public streets," etc., "to the satisfaction of the said superintendent of public streets," etc. The amended answer of the defendant denies that it entered into the contract, and substantially denies all the material allegations of the complaint, etc. The answer further avers that the expense of improving the streets devolves upon the adjacent property owners, until they are improved and accepted by the board of supervisors, when their further improvement becomes a city charge, and that the object of an approval of street work by the superintendent of public streets, etc., is that such street will be accepted, etc.; that plaintiffs commenced to perform certain work on Capp street, but used material so inferior, and performed the work so badly, that the board would not accept it, of all of which plaintiffs had notice as the work progressed, etc.; that defendant desires Capp street to be paved, and is ready and willing to pay therefor when the same has been done in such manner as to entitle it to acceptance by the board of supervisors. The pleadings are verified. The court found that defendant was a corporation "organized to provide a place and means for divine worship by its members"; that the board of trustees of said corporation consists of nine persons, including the president, Robert Husband, and the secretary, William H. Codington; that five members thereof constitute a quorum for the transaction of business; that the corporation defendant never entered into the contract, and never authorized or ratified it. The contract was in fact signed by the secretary of defendant, as follows: "Grace Methodist Episcopal, by W. H. Codington, Secretary Board of Trustees." There was nothing in the charter or by-laws of the corporation giving any authority to the secretary to enter into contracts without the order of the board of trustees. The findings proceed at length to detail the circumstances under which the contract was signed, and the action of the board of trustees touching the matter. The following is a brief synopsis of the facts as thus found: On the evening of November 2, 1892, after a prayer meeting, the solicitor of plaintiffs called at the church, and found the secretary and two other trustees of the corporation present. He presented the contract, and after consultation the secretary, at the suggestion of the two other trustees, signed it. No meeting or action by the board of trustees was ever had on the subject until the work was performed, when the board met to protest, and did protest, against the manner in which the work was performed, and against its acceptance. A majority of the members composing the board knew the contract had been signed by the secretary before the work was performed, but had no meeting and took no action in relation thereto until the meeting and action protesting, as above stated. The work was not done according to the contract, "but was constructed of very inferior materials, and in a very inferior manner, and is wholly worthless and insufficient, all of which was known to said plaintiffs." The superintendent of streets accepted and approved the work, and the board of supervisors repudiated and refused to accept it, as their committee had notified plaintiffs they would do when the work was progressing.

The court found that the corporation defendant never executed the contract. This finding is supported by the evidence. The powers which a corporation may exercise are vested in the trustees, and can only be exercised by them in their collective capacity, or by such agents, real or ostensible, as they have accredited, or by their conduct are deemed to have accredited. The secretary of a religious corporation, like the defendant here, possesses no inherent power to bind the corporation by entering into a contract in its name and behalf. There is no evidence tending to show that any custom or usage existed whereby the secretary executed contracts in the name of or for the defendant, and hence no inference of authority can be drawn from the previous conduct of the corporation in approving contracts of a similar character, as is frequently done in case of business corporations. Defendant did not approve the contract, for its first act in the premises, as a corporation, was to repudiate it. "A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Civ. Code, § 1589; Borel v. Rollins, 30 Cal. 409; Gribble v. Brewing Co., 100 Cal. 67, 34 Pac. 527, and cases there cited. But that doctrine has no application here, for the reason that the defendant neither received nor accepted any benefits from the transaction. The court finds expressly that the work "is wholly worthless." Under such circumstances, the doctrine of estoppel in pais cannot be invoked. Under the circumstances noticed, all other questions raised become false quantities in the problem, and need not be referred to. We recommend that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

113 Cal. 590

## McLAUGHLIN v. SAN FRANCISCO & S. M. RY. CO. (S. F. 26.)

(Supreme Court of California. July 31, 1896.)

PLEADING—COMPLAINT FOR PERSONAL INJURIES—DOCTOR'S BILLS INCURRED.

Under an allegation, in a complaint to recover damages for personal injuries, that plaintiff has "necessarily expended in doctor's bills" a stated sum, evidence is not admissible to show the amount of liabilities he has incurred for such bills, but has not paid.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Michael McLaughlin against the San Francisco & San Mateo Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Morrison, Stratton & Foerster, for appellant. E. Crisp, for respondent.

SEARLS, C. This is an action to recover damages for injuries sustained by plaintiff while a passenger upon the electric railroad of the defendant, as is alleged, through the negligence of said defendant. Plaintiff had a verdict and judgment for $1,000, from which judgment, and from an order denying its motion for a new trial, defendant appeals.

A single question is raised on the appeal. Plaintiff, in his complaint, after averring the nature and extent of his injuries, averred "that in attempting to be cured he has necessarily expended, in doctor's bills, the sum of $750 (seven hundred and fifty dollars)." Under this allegation the plaintiff was permitted to prove, against the objection of defendant, not that he had expended $750, or any part thereof, but that he had incurred an indebtedness therefor, which was not paid. Counsel for defendant afterwards moved to strike out the evidence, which was refused. The court also instructed the jury, in substance, that if, through the negligence of the defendant, plaintiff sustained injuries whereby medical services became necessary, he was entitled to the reasonable expense incurred therefor, and that the fact that plaintiff had not paid the bill would not preclude his recovery of the expenses so incurred. In all this, we think, the court below erred. In cases of personal injury of a plaintiff through the negligence of a defendant, there is no doubt but that, under a proper pleading, the injured party may recover for such necessary medical expenses as he may have become liable to pay, though not in fact paid before suit brought. Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546. It will be observed here, however, that the allegation of the complaint is that he (the plaintiff) "necessarily expended in doctor's bills the sum of," etc. To expend is to pay out, to disburse, etc., and implies an act performed, a thing accomplished. To incur a liability to do the same thing is quite different. As was said by McFarland, J., in his concurring opinion in Donnelly v. Hufschmidt, supra, "The law is, I think, that a plaintiff, in such a case, cannot prove that he has incurred a physician's bill, under an allegation that he has paid it"; citing Ward v. Haws, 5 Minn. 440 (Gil. 359); Pritchet v. Boevey, 1 Cromp. & M. 775; Jones v. Lewis, 9 Dowl. 143; Sedg. Dam. (7th Ed.) 197, note a. See, also, Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857. We are of opinion the evidence that plaintiff had incurred a liability to pay $750 was not admissible, under the allegation of his complaint that he had expended such sum; and we recommend that the judgment and order appealed from be reversed, and the cause remanded for a new trial, with leave to plaintiff to amend his complaint if he shall be so advised.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to plaintiff to amend his complaint if he shall be so advised.

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113 Cal. 463

## SAVINGS BANK OF ST. HELENA v. MIDDLEKAUFF et ux. (No. 15,902.)

(Supreme Court of California. July 23, 1896.)

MORTGAGES—ASSIGNMENT OF INSURANCE POLICY—FORECLOSURE—ISSUES—PLEDGE.

1. Where a mortgagee has taken an assignment of an insurance policy on a house standing on the mortgaged premises, as further security for the debt, and the house is destroyed before an action is begun in foreclosure, Code Civ. Proc. § 726, which provides that there can be but one action for the recovery of any debt secured by mortgage, does not apply to the insurance policy, and defendants cannot introduce into foreclosure proceedings any question concerning it.

2. The assignment of an insurance policy on mortgaged premises, as further security for the debt, is a pledge, within Civ. Code, § 2987, which provides that "every contract by which the possession of personal property is transferred as security only is to be deemed a pledge."

Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action in foreclosure by the Savings Bank of St. Helena against E. D. Middlekauff and wife. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

E. S. Pillsbury, for appellants. J. W. Goodwin, A. J. Hull, and Thos. Watt, for respondent.

McFARLAND, J. This is an ordinary action to foreclose a mortgage made by the defendants, E. D. Middlekauff and his wife, Addie, to secure a promissory note made by said defendants to plaintiff for $3,500. The said defendants first filed a short answer, in which they merely denied generally all the allegations of the complaint. Some months afterwards, when the case was called for trial, the said defendants presented, and asked leave to file, an amended answer, and also a cross complaint. The court denied leave to file either of said offered pleadings. The case then proceeded to trial, and judgment was rendered for plaintiffs, foreclosing the mortgage, in the usual form; and said defendants appeal from the judgment.

The only question raised by the appeal is whether or not the court erred in denying the motion of the appellants to file said answer and cross complaint. No question is made by respondent as to the time when the offer to file the said pleadings was made, or that the defendants were guilty of laches. The court denied the motion upon the ground that the proposed answer constituted no defense to the action, and that the matters therein set forth could not be litigated in this action, and upon the same ground denied the motion to file the cross complaint. The matters set out in the proposed answer and cross complaint are, briefly, that at the time of the execution of the mortgage the appellants also assigned and delivered to plaintiff a certain fire insurance policy, issued by the Sun Insurance Company, in the amount of $3,000, upon a certain house standing upon the mortgaged premises, as further security for said note, and that the said house was consumed by fire before the commencement of this action. It is further alleged in said rejected pleadings that the defendants had made all the proper proof of the loss to said insurance office, and took all the steps necessary, under the law and the conditions of the said policy, in order to render said money due under said insurance, and requested the plaintiff to collect said insurance money, and apply it upon the said note secured by said mortgage as aforesaid, and that plaintiff has refused so to do. It is also alleged in the cross complaint that there was a conspiracy between the plaintiff and the said insurance company to defeat said insurance. It is prayed in the said answer and cross complaint that plaintiff be compelled to proceed and collect said insurance money, and apply it to the note and mortgage sued on in this case. The court was right in denying the motion to file said pleadings; for they do not set up any defense to this action, or any cause of complaint against the plaintiff that can be litigated in this action. Appellants have presented no authority applicable to the contention which they make. Section 3433 of the Civil Code has no applicability to the position of the parties in this case. That section applies only to a case where one creditor is entitled to resort to each of several funds of a debtor, and another creditor of said debtor is entitled to resort to some but not all the said funds. Section 726 of the Code of Civil Procedure provides that there can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real or personal property; and the form of such action is set forth in said section. The assignment and delivery of the insurance policy by appellants to respondent was a mere pledge. It was "a deposit of personal property by way of security for the performance of another act." Civ. Code, § 2986. "Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge." Id. § 2987. A pledgee may sue to recover the debt for which the pledge was given, without first exhausting the subject of the pledge (Ehrlich v. Ewald, 66 Cal. 97, 4 Pac. 1062); and therefore, while in the case at bar the respondent was compelled to bring the suit to foreclose the mortgage on the land, the principle stated in section 726, Code Civ. Proc., did not apply to the insurance policy. We therefore see no principle upon which, in this case, the defendants can introduce into the litigation any question about said policy. Whatever difference there may be between the parties as to that matter must be determined in another action. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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113 Cal. 547

## HOWETH v. SULLENGER et al. (S. F. 102.)

(Supreme Court of California. July 28, 1896.)

MINING CLAIM—LOCATION—BOUNDARIES—OFFICIAL SURVEY—JUDGMENT—INCONSISTENT FINDINGS—REVIEW.

1. Under Rev. St. U. S. § 2324, which provides that the location of a mining claim "must be distinctly marked on the ground, so that the boundaries can be readily traced," there is a sufficient identification of a lode claim where a stake or monument is placed at each corner and at the center of each end, with one or more notices of location.

2. Where the existence of an ultimate fact must be conclusively inferred from the probative facts found, the finding of an ultimate fact inconsistent therewith may be questioned on appeal without bringing up the evidence.

3. It is immaterial that the lines and monuments of the official survey of a mining claim are not identical with those of the original location, the location being void only so far as it exceeds the statutory requirements.

Commissioners' decision. Department 1. Appeal from Superior Court, Napa county.

Action by W. S. Howeth against J. C. Sullenger and others to determine the rights of the parties to a mining claim. From a judgment dismissing the action, defendants appeal upon the judgment roll. Reversed.

John P. O'Brien and C. S. Harker, for appellants. F. E. Johnson, for respondent.

HAYNES, C. The defendants commenced proceedings under the mining laws of the United States to obtain a patent for the "White Rock Deposit" mining claim. The plaintiff in due time filed an adverse claim in the United States land office, claiming the same ground under an alleged location thereof; and this action was brought to determine the rights of the parties to the ground in controversy. The cause was tried by the court without a jury. Findings were filed, from which, as a conclusion of law, the court found that neither party was entitled to the premises, and dismissed the action, each party to pay his own costs; and from the judgment entered thereon the defendants appeal upon the judgment roll.

The findings show that appellants attempted to locate the ground in question on November 4, 1882, under the name of the "Comet," and all the facts necessary to show a valid location are recited, except that it was said that "the marking of said location claim on the ground was such that its boundaries could not be readily traced"; and it was further found that from that time until the 29th day of April, 1890, they were in the sole and undisputed possession, holding the same by virtue of their attempted location. The sixth and seventh findings are as follows: "(6) That having formerly discovered a lode or deposit of mineral or mineral-bearing rock bearing magnesite, on the 29th day of April, 1890, defendants attempted to make a relocation of the said lands and premises, under the name of the 'White Rock Deposit,' by posting thereupon in conspicuous places, viz. on a pine tree near the ledge, and on the said south center stake of the land so claimed, notices in which the names of the locators, the date of location, and description of said lands and premises, by reference to permanent monuments sufficient for identification of said claim, were given, and thereupon marking said location on the ground by erecting a stake three or four inches in diameter and four or five feet high, in a mound of rocks two or three feet across, and eighteen to twenty-four inches high, at the north end, and another at the south end of the center line, and a like stake and mound at each of the four corners of their claim, which marking and location embraced the lands and premises in dispute. (7) Said locations were not distinctly marked on the ground, so that their boundaries could be readily traced." The court further found that the location notice was duly recorded; that the requisite amount of work was performed; that it had been surveyed under the direction of the United States surveyor general, "showing accurately the boundaries of the claim distinctly marked by monuments on the ground."

Without referring more particularly to the findings, it may be said that the only question is whether the relocation was sufficiently marked upon the ground, all other requirements essential to a valid location appearing to have been complied with. The record gives no intimation of the defect upon which the conclusion of the trial court was based. The sixth finding shows that notices of the location were posted in conspicuous places, containing a "description of said lands and premises sufficient for identification"; that stakes and mounds of rock were erected at the north and south ends of the center line, and a like stake and mound at each of the four corners of the claim, and "which marking and location embraced the lands and premises in dispute." Section 2324, Rev. St. U. S., provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," but does not prescribe how it shall be marked. That matter is left to the regulation of the local laws. Carter v. Bacigalupi, 83 Cal. 188, 23 Pac. 361. The mining claim here in question is alleged in the answer to be in "no mining district," and is therefore governed by the general provisions of the United States Revised Statutes. This statute was considered in North Noonday Min. Co. v. Orient Min. Co., 6 Sawy. 299, 310, 1 Fed. 522, 533. The court, instructing the jury, said: "Any marking on the ground claimed by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient." In Southern Cross G. & S. Min. Co. v. Europa Min. Co., 15 Nev. 383, 9 Morr. Min. R. 513, it was held that "stakes and stone monuments, set at each corner of the claim, and at the center of each end line, is a sufficient marking of the boundaries, under the most stringent construction of the act of congress." In Gleeson v. Mining Co., 13 Nev. 442, it was held that setting stakes at the four corners of the claim is a sufficient marking of the boundaries. In some cases, in other jurisdictions, it has been held that a stake and notice at each end of the center line, with a claim of a given number of feet on each side, is a compliance with the statute; but no case requires more in marking the boundaries of a lode claim than a stake or monument at each corner, and at the center of each end, with one or more notices of location.

The sixth finding having shown that the claim was so marked upon the ground that its boundaries could be readily traced, the seventh finding is a mere conclusion from the specific facts found, and is wholly inconsistent therewith. If the seventh finding stood alone as the finding of an ultimate fact, it would support the judgment; but, if the specific findings of probative facts set out in the sixth finding are true, the seventh cannot be true, and in such case the specific findings cannot be disregarded. Geer v. Sibley, 83 Cal. 1, 23 Pac. 220; People v. Reed, 81 Cal. 76, 22 Pac. 474. In Smith v. Acker, 52 Cal. 219, it was said: "It has been held that, where facts are found from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as the finding of an ultimate fact; but, when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the principal finding." The qualifying words in this quotation must not be overlooked. If the existence of the ultimate fact must be conclusively inferred from the probative facts found, it is the equivalent of a finding of an ultimate fact; but, if the probative facts found simply tend to show that the ultimate fact was found against the evidence, the finding of the ultimate fact cannot be questioned on appeal without bringing up the evidence. In the case before us, we can conceive of no ground upon which it can be said that defendants' location was not so marked upon the ground that its boundaries could be readily traced, if the specific facts stated in the sixth finding are true; and those facts are strengthened, if that is possible, by the fact found by the court that defendants' claim has been surveyed by or under the direction of the United States surveyor general, "showing accurately the boundaries of the claim distinctly marked by monuments on the ground," though such marking by the surveyor general requires no greater number of stakes or monuments than were erected by the locators. Nor is it material that the lines and monuments of the official survey do not correspond to or be identical with those of the original location, since the courses and distances are simply estimated by miners in making their locations, and hence it often happens that claims are located covering more than 1,500 feet in length and 600 feet in width; and in such case the surveyor contracts the lines and draws in the monuments so as to make the location conform to the requirements of the statute, the location being void only as to the excess.

The plaintiff not having appealed, the judgment against him is conclusive; but, the findings upon the defendants' case being inconsistent and conflicting, the judgment against them is reversed, with directions to the court below, upon the evidence already heard, and such further evidence, if any, as defendants may introduce, to so correct its findings in the particular herein discussed as shall make them consistent and in accord with this opinion.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment against the defendants is reversed, with directions to the court below, upon the evidence already heard, and such further evidence, if any, as defendants may introduce, to so correct its findings and conclusions of law as shall make them consistent and in accord with this opinion.

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113 Cal. 552

## PHILLIPS et al. v. HAGART. (Sac. 85.)

(Supreme Court of California. July 28, 1896.)

EJECTMENT—PLEADING—JUDICIAL SALE—REDEMPTION.

1. Allegation of title in defendant in an answer to a complaint in ejectment is but a general denial in an argumentative form, and does not constitute a cross complaint, requiring a denial of its allegations by plaintiff.

2. By Code Civ. Proc. § 701, two classes of persons are given the right to redeem from judicial sales made subject to redemption: First, the judgment debtor or his successor in interest; and, second, creditors having subsequent liens by judgment or mortgage, the latter class being termed "redemptioners." *Held*, that a grantee by deed from the judgment debtor after foreclosure sale is a successor in interest, and not a redemptioner, and is entitled to all the rights of redemption given by the statute to his grantor, to be exercised in the same manner.

3. A sheriff's deed executed on a foreclosure sale, from which the proper steps have been taken to redeem, by one having the right of redemption, is a nullity, and may be attacked at law in an action of ejectment for the property.

Department 1. Appeal from superior court, Placer county; Matt F. Johnson, Judge.

Action by J. P. M. Phillips and M. J. Healy against Peter Hagart. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wallace & Wallace, Pullen & Armstrong, and Bruner, Henley & Costello, for appellant. John M. Fulweiler and F. P. Tuttle, for respondents.

GAROUTTE, J. This action involves the right of possession to a certain tract of land, and the complaint is in the usual and ordinary form for such cases. The appeal presents but few questions for the court's consideration.

One Morrison was the owner of the land. While such owner, a mortgage resting upon it was foreclosed, and the defendant, Hagart, became the purchaser at the sale under the foreclosure proceedings. Thereafter, and within the time allowed for redemption, Morrison transferred the property by deed to these plaintiffs, who at once took steps to redeem from the sheriff's sale. Notwithstanding the acts of plaintiffs in attempting to redeem, the sheriff refused to issue a certificate of redemption, and, in due course, gave a deed of the property to the defendant, as a purchaser at the sale. Defendant relies upon this deed for title, while plaintiffs assert title by reason of their deed from Morrison, coupled with the claim that the acts performed by them looking towards a redemption were sufficient in law to accomplish that result.

As already suggested, the complaint was in the simple and ordinary form as for an action in ejectment. Defendant, by answer, denied the allegations of the complaint, and set out his title in detail, consisting of the sheriff's deed and the proceedings upon which it was based. Plaintiffs answered defendant's pleading by denials. It is now claimed by defendant that the affirmative matters set out in his answer constituted a cross complaint, and that certain allegations thereof must be deemed to be true by reason of insufficient denials thereto. Upon the insufficiency of these denials we will not dwell, for the contention seems to be immaterial. The affirmative matters set out by defendant in no sense constituted a cross complaint, and no denial of them was necessary. A recital by defendant of his title was no more than a denial of plaintiffs' title, and opened the door no wider for the admission of evidence. Whatever defendant was entitled to prove under his pleading as he framed it, he was entitled to prove under a general denial. An allegation of title in himself, in an action of ejectment, by defendant, is but a general denial in an argumentative form. Marshall v. Shafter, 32 Cal. 192. See Cooper v. Miller (Cal.) 45 Pac. 325.

Did plaintiffs, as successors in interest of Morrison, the judgment debtor, redeem from the sheriff's sale to defendant, Hagart? It is conceded that the sheriff refused to issue a certificate of redemption to plaintiffs, but, as to the fact of a redemption, that circumstance is immaterial, for the issuance of the certificate is no part of the redemption. Appellants, who attack the sufficiency of the redemption, insist that plaintiffs were "redemptioners," in the sense of the word as used in section 705 of the Code of Civil Procedure, and, as such redemptioners, failed to comply with the demands of that section, and therefore failed to perfect their attempted redemption. Upon the part of plaintiffs, it is insisted that they were not "redemptioners," as the term is there used, but "successors in interest" of the judgment debtor, and, consequently, not required to follow those provisions of the statute. Section 701 of the Code of Civil Procedure declares: "Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons or their successors in interest: (1) The judgment debtor, or his successor in interest in the whole or any part of the property; (2) a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners." It is thus observable that judgment debtors and their successors in interest do not come within the class termed "redemptioners," and therefore are not required to follow the demands of section 705 in making a redemption. While the successor in interest of the judgment debtor is mentioned only in section 701, and the succeeding sections refer to the judgment debtor and redemptioners alone, still that fact is not material. The statute declares that successors in interest have the right to redeem, and further declares, in effect, that they are not to be considered "redemptioners" as the word is there used. Under such conditions, successors in interest stand in the place of judgment debtors; and when the statute uses the term "judgment debtors," as contradistinguished from "redemptioners," the words should be construed broadly enough to include successors in interest of judgment debtors. That such was the intention of the legislative mind there can be no question, and that the successor in interest of the judgment debtor possesses the rights given by the statute to the judgment debtor, rather than those of the redemptioner, there is likewise no question.

It is insisted that the recital in the sheriff's deed given to defendant, Hagart, that there had been no redemption from the sale to defendant, was conclusive upon the judgment debtor, Morrison, and his successors in interest, these plaintiffs; and that, until such deed was attacked and set aside in equity, it was beyond and above any attack at law which these plaintiffs could make upon it. It is insisted that, being the sheriff's deed, it was the judgment debtor's deed, and the sheriff's recitals therein were the judgment debtor's recitals; and that, consequently, the debtor was estopped from gainsaying their truth. The position here assumed by appellant is unsound. It is not true that the sheriff's deed cannot be attacked by the judgment debtor except in equity, as numberless cases found in the reports of this state fully prove. Mr. Freeman, in his work on Executions (section 351), in speaking as to the judgment debtor's defenses in ejectment, says: "He may certainly resist the action with success if he can show that his interest in the property was of a character not subject to levy and sale under execution. He may also avail himself of any defect in the judgment, execution, or proceedings of so serious a character as to render the sale void." The power of the sheriff to make the deed primarily depends upon a valid judgment and execution, and that the execution and judgment are void, can always be shown by the debtor in defending against an action for possession. It has been held that a recital of those matters in the deed is not even evidence of the fact of their existence, and that their production in evidence is absolutely necessary to support the deed, or no title is shown. Section 703 of the Code of Civil Procedure declares that, if the judgment debtor redeem, the effect of the sale is terminated, and he is restored to his estate. In this case it is shown by oral evidence that a redemption took place. The court has so found the fact, and, the moment a redemption occurred, all interest to the realty possessed by the purchaser at the sale ceased, and the title of the judgment debtor stood as if no sale had ever taken place. Such being the fact, the power of the sheriff to pass title by deed no longer existed, and any deed made by him was a nullity. It would sanction gross injustice to hold that any recital of a fact made in the deed by the sheriff would be conclusive upon the judgment debtor. Such a holding would give him authority to recite himself into a power which he in no way had, and make his deed valid when it was void at all points. It should not be held that the false recital in a sheriff's deed that no redemption had taken place can be binding when at that time the sheriff was shorn of all power to make any recital, or even to make any deed. This whole question is well disposed of by Mr. Freeman at section 325 of his work upon Executions: "A deed made by an officer is merely the execution of an authority created by statute. Unless the essential conditions prescribed by statute exist, the power to execute the deed cannot be affirmed; and an officer's deed, executed where he had no power or authority to make it, is in legal effect no deed whatever. It is absolutely void. It is impossible, owing to conflicting decisions, to say precisely what must in all cases exist to confer authority upon an officer to execute a deed. These four things may, however, be unquestioned, be affirmed to be indispensable, for without them a deed purporting to be made by an officer has no legal effect: There must exist a judgment and an execution, neither of which is void; the time for redemption must have expired without any redemption having been made; and the lands which the officer undertakes to convey must be situate within the territorial jurisdiction in which he is authorized to act."

For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(113 Cal. 569)

## PEOPLE v. WORDEN. (Cr. 110.)[1]

(Supreme Court of California. July 29, 1896.)

HOMICIDE — INSTRUCTIONS — ALIBI — REASONABLE DOUBT—MURDER IN SECOND DEGREE—EVIDENCE.

1. Under Pen. Code, § 1126, which requires the jury "to receive as law what is laid down as such by the court," it is not error for the court to say, in charging the jury, "You should receive the law as I state it to be, notwithstanding you may firmly believe that I am wrong, and that the law is, or should be, otherwise."

2. It is not error for the court to correctly state the theory of the prosecution, where the jury are carefully informed that such a statement is not one of facts, but only what was claimed by the prosecution.

3. Where the record shows that two matters mentioned by the judge as defenses were in fact the only ones involved, possible error in his stating, as introductory to the charge, that de-

fendant had introduced evidence tending to establish two defenses (describing them), was without prejudice.

4. It is not error to charge that, "when a defendant undertakes to establish an alibi, the evidence which he offers, taken with the other evidence in the case, must account for him during the whole period," where the proposition of reasonable doubt as to defendant's whereabouts is embodied in another part of the charge.

5. On a trial for murder, where defendant presented his case entirely upon the theory that he did not participate in the acts ascribed to him, and not that the acts, if proved, would not constitute murder in the first degree, and the judge, in his charge, gave the statutory definition of murder in the second degree, and did not refuse any instruction asked upon the subject by defendant, it was not error for the judge to fail to affirmatively suggest to the jury that they might convict defendant of a lesser offense.

6. In an instruction on reasonable doubt, referring to a belief founded on the evidence, the clause, "A juror is not at liberty to disbelieve as a juror what he believes as a man," is not misleading or erroneous.

7. The question, "Wouldn't the engineer have seen the rail in that position?" after stating the supposed position of the rail, is inadmissible, as asking for the opinion of the witness.

In bank. Appeal from superior court, Yolo county; W. H. Grant, Judge.

S. D. Worden was convicted of murder in the first degree, with the death penalty attached. From the judgment of conviction, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

J. E. Strong and E. R. Bush, for appellant. Atty. Gen. Fitzgerald and Carroll Cook, for the People.

McFARLAND, J. The information charges the defendant, together with several other persons, with the murder of one Samuel C. Clark; and he was convicted of murder in the first degree, with the death penalty attached. He appeals from the judgment, and from an order denying his motion for a new trial.

The bill of exceptions, which forms part of the transcript, contains a full statement of the evidence given at the trial; but the evidence seems to have been brought here mainly for the purpose of pointing certain exceptions taken to instructions given the jury by the trial judge, for the point is not made that the evidence does not sustain the verdict. Moreover, the record shows that only three exceptions were taken to rulings of the court on the admissibility of evidence, and only one of these exceptions is presented or mentioned in appellant's briefs. The whole strength and stress of appellant's argument is upon asserted errors committed by the judge of the court below in charging the jury. We have carefully examined all the instructions given; and, considering them as a whole, we see nothing in them erroneous, or prejudicial to the appellant. The appellant presented 11 written instructions, and they were all given, except the second, in lieu of which an instruction was given substantially the same as the one asked; and these instructions presented appellant's side of the case very fully, and as favorably as he could reasonably have expected. No other instructions were asked by appellant. The only hostile criticism with which the charge can be justly assailed is that upon some points it is perhaps too lengthy and elaborate, but we think that it presents a fair and correct statement of the law applicable to the case. But counsel for appellant, in a brief exceedingly well constructed, endeavor, with great acuteness and ability, to separate the charge into detached fragments, and to attack each singly, and unaided by the context. Of course, if any one independent instruction contains an absolute error upon a particular point of law, such error is not always cured by the fact that the law upon such point is correctly given in another instruction; but, as a general rule, dividing a long charge into minute parts, and analyzing and criticising each part as though it stood independent of all the others, is not a proper method of arriving at the correctness or incorrectness of the whole charge. All the features and modifications of a principle of law cannot usually be stated in one sentence. As was said by Mr. Justice McKinstry when delivering the opinion of the court in People v. Doyell, 48 Cal. 93, "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." The briefs of counsel for appellant have many divisions and subdivisions, but we deem it necessary to notice only the leading objections which they make to the correctness of the charge.

We see no error in the language, "You should receive the law as I state it to be, notwithstanding you may firmly believe that I am wrong, and that the law is, or should be, otherwise." The latter part of the sentence was unnecessary, but it in no way affects the correctness of the proposition that the jury must take the law from the court, as declared in section 1126 of the Penal Code, which provides that, although the jury have the power to return a general verdict, "they are bound, nevertheless, to receive as law what is laid down as such by the court."

The statement by the judge of the theory of the prosecution was not, as contended by appellant, a statement of facts. The jury were carefully informed, both at the commencement and close of said statement, that the judge was only stating the "theory" of the prosecution,—what the prosecution claimed. There was no error in this; for instructions should be made, as far as possible, applicable to the particular features of the case on trial,—to the issues and contentions developed by the evidence and arguments of counsel. And it appears from the record that the theory of the prosecution was correctly stated. Neither was there any error in the statement of the judge of the defenses of the appellant. The deceased, Clark, was killed in this way: He was a locomotive engineer on a train moving westerly on a railroad track from the city of Sacramento towards Davisville. About two and a half miles west of Sacramento there is a trestle or bridge over a slough on which the track runs; and when the train reached that trestle the locomotive and several of the cars were thrown from the track over the trestle on the north side, and down into the water, and Clark and several other persons on the train were killed. As stated in the bill of exceptions: "The people introduced a large amount of testimony to the effect, and tending to prove, that the first rail on the east end of the trestle, towards Sacramento,—the direction from which said train of cars was coming, and on the north side of said track,—had been removed by human agency, and that the trestlework beneath the rails on the north-hand side had been weakened or destroyed by explosives in the form of giant powder applied by human agency also, and that the weakening of said track was caused by the above-mentioned facts." The people also introduced a great amount of evidence directly to the point that the appellant, with others, on the day of the catastrophe, and a short time before the approach of said train, did the acts above described which caused the wreck and the death of Clark. Now, the judge said, in his charge, that appellant had introduced evidence tending to establish two defenses, namely, that the misplaced rail was caused by climatic influences,—that is, by expansion by heat; and, secondly, "that he was not engaged in the wrecking of the train, but was in the city of Sacramento for some hours both before and after the wrecking occurred." He also said, "This second defense is called, in law, an 'alibi.'" We see nothing in this erroneous or prejudicial to appellant. In the first place, it was not said that no evidence was introduced as to other points, and the statement was properly introductory to instructions upon the two defenses named. In the second place, the record shows that the two matters mentioned by the judge as defenses were in fact the only two involved. Appellant introduced eighteen witnesses, and of these the testimony of six (Marston, Creamer, Griffith, Forsythe, Bradshaw, and Sims) was entirely confined to the condition of the tracks of roads operated by the company owning the road on which the killing of Clark took place, the general purpose being to show that the rails were too close together at the ends to allow of expansion by heat. The testimony of nine (Castello, Hinby, De Riso, Curry, Conrad, Hafer, Knox, Fickett, and Thompson) was confined entirely to the subject of an alibi; that is, it went to the point that at the time when, according to the evidence of the people, appellant was engaged in preparing the trestle for a collapse, he was at Sacramento city, or on or near the bridge wihch spans the river between said city and Yolo county,—about 2½ miles away from said trestle. And the testimony of the other three (Barton, Freeman, and Fisk) merely tended to weaken somewhat the testimony of one or two of the people's witnesses about a matter of but little importance. It is clear, therefore, that this part of the judge's charge could not have been prejudicial to appellant.

The judge charged the jury that, "when a defendant undertakes to establish an alibi, the evidence which he offers, taken with the other evidence in the case, must account for him during the whole period"; and it is contended that this part of the charge is erroneous, because it does not include the proposition of reasonable doubt whether the appellant was present. But, as before stated, it is not to be expected that all the limitations of a principle will be given in every separate sentence of a charge; and in the case at bar the doctrine of reasonable doubt was given in almost all conceivable forms, and made applicable to every phase of the case, and upon the specific question of the alibi the judge said: "But if you entertain a reasonable doubt as to his guilt, or as to his whereabouts when his presence is material, you should give him the benefit of that doubt." Therefore we see no error in the charge on this point.

The court prepared, and gave to the jury, three forms of verdict; and it is contended by appellant that in doing so the court erroneously neglected to give, as one form, "Guilty of murder in the second degree." As to this matter the bill of exceptions shows that the judge said to the jury, "There have been prepared for you, gentlemen, three blank forms of verdict, which, by consent of counsel, you will be allowed to take to your jury room"; also, that "no objection was made by the defendant or his counsel in response to such charge by the court relative to such forms of verdict, defendant's counsel remaining silent"; also, that "no instruction was, upon the trial of this cause, requested by the defendant or his counsel as to what verdicts the jury could render, or as to what constituted either the crime of murder in the first degree, murder in the second degree, or manslaughter, nor was the court requested by the defendant or his counsel to instruct the jury that it was within their province to find the defendant guilty of any lesser crime than the crime charged in the information." Moreover, it is plain from the evidence introduced by appellant, and the instructions asked by him, that he presented his case entirely upon the theory that he did not do the appalling and "most horrible" acts ascribed to him, and did not participate in such acts,—not that the acts, if proven, would not constitute murder in the first degree. In the general charge the judge gave the statutory definition of murder in the second degree, and did not refuse any instruction asked upon the subject by appellant.

Under these circumstances, it was not the duty of the judge to affirmatively suggest to the jury that they might convict appellant of a lesser offense, when not asked by appellant to do so, and when such suggestion apparently would have been against appellant's wishes; and no error was committed by not doing so.

In the briefs of counsel for appellant the subject of legal malice is largely discussed, —an admirable subject for refined disquisition; but we see nothing in the charge upon that subject that is erroneous, or substantially different from the definitions of "malice" to be found in the Codes. The same can be said as to the charge about reasonable doubt. Of course, it would be much the better course for trial judges, as has frequently been said by this court, to limit their description of reasonable doubt to language which has received repeated judicial approval; but they usually desire to add something in their own language, and in the case at bar the judge added something to the well-known definition of Chief Justice Shaw. We see nothing, however, in his charge on this subject that was erroneous, or likely to mislead the jury, even if it did not make the matter any clearer. The judge said, "If, after considering all the evidence, you can say you have an abiding conviction," etc., and then immediately said as follows: "A juror is not at liberty to disbelieve as a juror what he believes as a man." This latter clause, of course, referred to a belief founded on the evidence; and a similar instruction was held in People v. Whitney, 53 Cal. 420, to be "useless," but not erroneous or misleading. The charge fully informed the jury that an intent to take human life is a necessary element of murder in the first degree. They were told that, in order to convict the appellant of murder in the first degree, they must be convinced beyond a reasonable doubt that the appellant, either personally or in concert with others, killed the deceased, with malice aforethought, by some kind of willful, deliberate, and premeditated killing, and that "in order to constitute murder in the first degree, the intent to kill must be the result of deliberate premeditation." This principle was given to the jury in various forms, and it is beyond question that the evidence abundantly warranted the jury in finding the appellant guilty of murder in the first degree,—murder of a most aggravated and shocking character. There was an unnecessary allusion to the fact that the derailing of a train is a felony, but that in no way changed the general nature of the charge.

The one exception to the ruling of the court on the admissibility of evidence arises upon the sustaining of an objection by the prosecution to the following question asked by appellant of his witness Sims: "Q. Now, I will ask you (you need not answer, because I think there will be an objection) if this rail had been placed that way, so the flanges of the wheel would come through here (pointing), wouldn't the engineer have seen the rail in that position?" Waiving the claim made by the respondent that this exception is not properly incorporated in the bill of exceptions, the ruling of the court was not erroneous. If the matter inquired about was material, the witness could have been questioned about the supposed condition and situation of the rail, the appearance which it would have presented, etc., but whether the engineer would have seen it was certainly not a question to be determined by the opinion of the witness. If that was an issue in the case, it was one to be determined by the jury upon the facts proven. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

(5 Cal. Unrep. 410)

## WILLIAM HILL CO. v. LAWLER. (S. F. 178.)[1]

(Supreme Court of California. July 31, 1896.)

PROBATE COURTS—EFFECT OF DECREE DIVIDING PROPERTY.

A decree of the superior court, in a probate proceeding, making division of the property of a testator in accordance with a petition and stipulation of the widow and residuary devisees, filed with the final account of the executors, and without notice to other parties in interest, does not affect the rights of a prior grantee of the widow, by deed conveying her interest in community property, who was not a party to the proceedings, though such decree set off the property in severalty to other devisees. Such a decree can, in any event, extend only to the succession or testamentary rights in the property.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the William Hill Company against John Lawler. From the judgment, plaintiff appeals. Affirmed.

Lyman Green, T. J. Geary, and A. B. Ware, for appellant. J. C. Sims, for respondent.

BRITT, C. The court below rendered judgment quieting the title of plaintiff, a corporation, to an undivided one-half interest in a certain tract of land, containing about 140 acres situated in Sonoma county. Plaintiff claims to be the sole owner of the land, and to be aggrieved by the refusal of the court to so adjudge. Patrick Lawler, father of the defendant, died on September 8, 1887, being then the owner of a large ranch which included the tract in dispute. He left a will wherein he declared his whole estate to be community property, and confirmed the legal right of his wife, Bridget Lawler, in the undivided one-half thereof, made pecuniary bequests to several persons (defendant among them), and gave the residue to James Lawler and P. H. Lawler, two of his sons. The will was regularly admitted to probate in the superior court. Pending the administration of the estate of said deceased, on December 21, 1887, said Bridget Lawler made a deed of grant to the defendant, John Lawler, of an undivided one-half interest in and to the specific parcel of land which is the subject of this suit, and the deed was recorded on the following day in the office of the recorder of said county. On June 18, 1889, the court made its decree of final distribution of said estate; reciting, among other matters, that said Bridget, James, and P. H. Lawler had, by written stipulation, agreed among themselves respecting the division of the property of the estate, and that the court approved the same, and, in terms, distributing and partitioning the lands of the deceased among the three persons last named in such manner that the tract now in controversy was apportioned to said James and P. H. Lawler,—no mention being made of any interest of John therein, or of the deed to him from his mother, said Bridget. The title of James and P. H. Lawler has passed by mesne conveyances to plaintiff, and thereon it founds its right in the premises.

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[1] Reversed in banc. See 48 Pac. 323, 116 Cal. 359.

Plaintiff argues that, in virtue of the deed from his mother, defendant took an interest in the land subject to administration; that one object of administration is the distribution of the property of the deceased among the persons entitled thereto; that the decree operated in rem, and so defendant is estopped to assert any claim to the res. Had measures been taken to ascertain the persons entitled to share in the distribution of the estate pursuant to section 1664, Code Civ. Proc., or to make distribution and partition among the heirs or devisees and those claiming under them, as provided in sections 1675–1686 of the Code, and the decree or order of distribution had followed thereon, then it may be that it would have the effect contended for by plaintiff; for, in either of those modes of procedure, John Lawler would have been apprised, as prescribed by the statute, of the design to determine and declare his interest, and that, as grantee of Bridget Lawler, he must, if necessary, litigate his claim. But no such course was pursued. The order of June 18, 1889, was made upon petition, accompanying the final account of the executors, and proceedings taken under sections 1634, 1665, 1666, Code Civ. Proc. There was no attempt to make partition in the manner marked out by said sections 1675--1686; the decree merely conforming, it seems, to the stipulation of the widow and residuary devisees under the will. Conceding that the court had jurisdiction to allot in this manner the lands of the estate in severalty, still the effect of its action must be measured by those provisions of the statute under which it proceeded. These make it conclusive as to the rights of heirs, legatees, and devisees (Code Civ. Proc. § 1666); that is, upon persons claiming in the capacity of heirs, legatees, or devisees. Such was the construction adopted in Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081, where it was held, accordingly, that a conveyance made by an heir of his interest in the estate, pending administration, was not affected by a subsequent decree of distribution which ignored such deed, and purported to set over to the heir the interest he had previously conveyed. The same view of the operation of such decrees obtains generally elsewhere. Hall v. Pierson, 63 Conn. 338, 28 Atl. 544; Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. 171; Woerner, Adm'n, §§ 345, 563, and numerous cases cited. "The decree of distribution is conclusive only as to the succession or testamentary rights." In re Burdick's Estate (Cal.) 44 Pac. 735. John Lawler's interest in the land accrued to him neither as successor of the deceased, nor under the will. There was no voluntary submission of his claim to the court. Estate of Vaughn, 92 Cal. 192, 28 Pac. 221. Hence the decree of distribution did not conclude him. Plaintiff argues that the case is without the doctrine of Chever v. Ching Hong Poy, because there the decree set over to the heir the same interest he had already conveyed, so that the decree operated to feed the prior conveyance, while here the property described in the deed from Bridget Lawler to John was not distributed to the grantor, but to other persons. But the attempted distinction does not reach the root of the matter. That lies in the incompetence of the court, proceeding as it did in distributing the estate of Patrick Lawler, to adjudicate upon rights not necessarily involved in accomplishing the purposes of administration.

The court excluded evidence which plaintiff claims might have shown that, at the time it purchased the title of P. H. and James Lawler, the defendant was not claiming the land, but was seeking indemnity from his mother for its loss. We see no error. Defendant's deed was recorded in the proper office, and this was notice of his interest, to plaintiff at least; and there was no offer to show that plaintiff was at all influenced by any act or omission of defendant. The judgment and order denying a new trial should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(113 Cal. 577)

## In re PEARSONS' ESTATE. (S. F. 175.)[1]

(Supreme Court of California. July 29, 1896.)

WILLS—BENEFICIARIES—ORPHAN ASYLUMS.

1. A will providing for equal distribution of property among the different orphan asylums of a city, with a request that they be designated by the judge of the probate court, does not give an arbitrary power of selection; but the action of the court in making the designation is pursuant to powers conferred on it by law.

2. The San Francisco Ladies' Protection and Relief Society, so called because organized and carried on by San Francisco ladies, the articles of which declare that "the objects and purposes of said society are to render protection and assistance to sick and dependent women and children," and which has a home in the city, where is carried on the work of caring for and educating orphans, half orphans, and abandoned children, having therein an average of 20 whole orphans, 115 half orphans, and 42 abandoned children, and from 1 to 3 destitute women, is within a bequest to "orphan asylums" of the city.

3. An orphan asylum whose home is without the city and county, but is managed by an organization within the city, and receives most of its inmates therefrom, but does not confine its benefactions to the inhabitants of the city, or in any way discriminate in their favor, is not within a bequest to "the orphan asylums of the city and county."

4. A society empowered by its charter to maintain an orphan asylum, but which is in fact a reformatory, most of its inmates being committed to it under Code, § 1388, others being sent to it by the Society for the Prevention of Cruelty to Children, and occasionally one being brought to it by a mother who cannot support her child, or who has a child that runs away, is not within a bequest to the "orphan asylums" of a city.

5. Institutions which did not maintain orphan asylums till after the death of testator, who provided that in a certain event specified property should be sold, and the proceeds distributed among the orphan asylums of the city, are not entitled to share in the bequest, though they had such orphan asylums before the distribution.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Hiram A. Pearsons, deceased. From a decree of distribution, certain institutions appeal. Modified.

Joseph Hutchinson, for appellant Ladies' Protection and Relief Society. E. Foulds, for appellant Bishop Armitage Church Orphanage. T. C. Coogan, for appellant Boys' and Girls' Aid Directory. Chas. F. Hanlon, for appellant Girls' Directory Orphan Asylum. A. N. Drown, Geo. W. Haight, A. H. Loughborough, Jos. Naphthaly, Thos. F. Barry, and M. C. Hassett, for respondents.

TEMPLE, J. The decedent died July 7, 1889, leaving an olographic will. In it he provided that in a certain event (which has occurred) specified property should be sold, and that "the proceeds of such sale be equally distributed among the different orphan asylums of the city and county of San Francisco, and said asylums I request to be designated by the judge of the probate court." The property was sold, and a large sum realized. There were 13 different applications for a share of the fund, each applicant claiming to be an orphan asylum of the city and county of San Francisco, and asking that a partial distribution be made. The court found that of the money in the hands of the executor $100,000 could be distributed without danger to creditors, and that such sum did not constitute one-third in value of the estate. The court made a decree distributing that sum, and designated five only of the applicants as orphan asylums of the city and county of San Francisco. These are the Roman Catholic Orphan Asylum, the San Francisco Protestant Orphan Asylum, the Maria Kipp Church Orphanage, the St. Vincent Orphan Asylum, and the Pacific Hebrew Orphan Asylum. Four of the eight institutions whose claims were rejected appealed. They are the San Francisco Ladies' Protection and Relief Society, the Bishop Armitage Church Orphanage, the Boys' and Girls' Aid Society, and the Girls' Directory Orphan Asylum.

Respondents raise a preliminary point that it matters not whether the appellants are orphan asylums of the city and county of San Francisco or not, because, they say, the will gave to the judge of the probate court the power of selection, and that selection, having been made, is conclusive. This must mean that the judge was not acting simply as judge, exercising functions conferred upon him by law, but was acting under a power contained in the will. A mere statement of the proposition disposes of it. The judge could not at the same time act as trustee of a power under the will and as judge. The principle is correctly enunciated in Druid Park Heights Co. v. Oettinger, 53 Md. 46, as follows: "In this state, as in almost all the United States, courts of equity take the supervision of all trusts. 'Relief has been decreed when the original trustees declined to act, or were desirous of being discharged, or had absconded, or were incapable of acting through age or infirmity, or could not discharge the trust through disagreement amongst themselves, or had been guilty of breaches of trust, or had become bankrupt.' Hill, Trustees, 290, 291. The substituted trustee, when so appointed and qualified, sustains to the estate the character of trustee as fully as if he had been originally appointed. Cole v. Wade, 16 Ves. 44. But where the discretionary powers are such as would not belong to the court because of its jurisdiction over the subject-matter of the trust, independent of the authority of the will,—as, for instance, where the power is one of selecting the beneficiaries to enjoy the testator's bounty,—the court will not exercise it, and, under the rules of law, cannot confer such discretion on a trustee." But there is no indication of such intention in the will. The "different orphan asylums" plainly means all the orphan asylums, and these—that is, all the orphan asylums—the court is asked to designate. This clause was unnecessary, but it is not inoperative. The presumption undoubtedly is that no clause is redundant or unnecessary. But this is a presumption easily overcome, and such repetitions and unnecessary expressions are quite common in wills. They are sometimes inserted to remove doubts or make plain some previous clause. It is not inconsistent with the previous clause requiring a division among the asylums, and must be so construed as to harmonize with it.

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[1] For modification of opinion, see 45 Pac. 1062.

Suppose Pearsons had acquired, subsequently to the execution of the will, a residence in the county of Alameda, which residence he retained until his death; would it be held that the probate judge of San Francisco was intended? In what way could the probate judge of San Francisco have made the selection? And who is the probate judge of San Francisco? There is no probate court in the city and county of San Francisco, and no probate judge. The superior court has jurisdiction of probate matters. This court has twelve judges. No one is especially designated for probate jurisdiction, and there is no law authorizing such designation. Any one may exercise probate jurisdiction, and any or all may participate in making a decree of distribution. There is nothing in the record to show that the court acted otherwise than as a court in the exercise of the powers conferred upon it by law, and we must presume it so acted. To determine what institutions are orphan asylums of San Francisco involves the exercise of judicial functions. To choose from these institutions certain ones, exercising the discretion in accordance with no rule laid down in the will, is not the exercise of judicial functions. A judge determines existing rights, but does not create rights by the exercise of an uncontrolled volition. A testator could not impose such a duty upon a court. He may, however, by his will, confer rights upon others who may assert them before a court, and thus require a designation according to a rule indicated. It remains to determine from the record whether any of the appellants are orphan asylums of the city and county of San Francisco, and whether St. Vincent Roman Catholic Orphan Asylum is such.

The most prominent idea of an asylum is that it is a place of safety,—a place of refuge, a retreat, a sanctuary. An orphan asylum, then, is a place of refuge for orphan children,—a home. Children are naturally dependent, and all need a home and protection. Indigent orphans have no home unless it is supplied by charity. To afford such a home, with support and protection, orphan asylums are provided by the humane. The asylum is undoubtedly the home. But these must be maintained by individuals or institutions. The management may be in San Francisco and the home elsewhere, or vice versa. Perhaps an asylum might be called an asylum of the city and county of San Francisco because maintained by the municipality, irrespective of the location of the home. So, too, if it were exclusively or in some special sense devoted to San Francisco orphans. No such San Francisco asylums are shown to exist. San Francisco people or corporations might maintain asylums in any part of the world, but those outside of the city would not be orphan asylums of the city and county of San Francisco in the sense in which those words are used in the will. As there is no asylum peculiarly devoted to the care of San Francisco orphans, this benefaction must be confined to asylums whose home is in San Francisco.

The San Francisco Ladies' Protection and Relief Society, on its appeal, makes two points: (1) The court erred in holding that it is not an orphan asylum of the city and county of San Francisco; (2) in holding that the St. Vincent Roman Catholic Orphan Asylum is an orphan asylum of the city and county of San Francisco. The appellant society was incorporated on the 11th day of August, 1854. As to the purposes of the society, the articles state: "The objects and purposes of said society are to render protection and assistance to sick and dependent women and children." The declared purposes are sufficiently comprehensive to enable the society to maintain a hospital, a school, and an asylum, or either. The work actually done is described by Mrs. Adams, one of the managers, as follows: "We have a home in San Francisco, on Franklin street, running from Post to Geary; and we carry on there the work of an asylum for protecting, caring for, and educating orphans, half orphans, and abandoned children. During the ten years last past, should think we have had at the home, on an average, monthly, twenty whole orphans, one hundred and fifteen half orphans, and forty-two abandoned children. It is called the San Francisco Ladies' Protection and Relief Society, because it was organized and has always been carried on by San Francisco ladies, and not because we have had under our care and protection from time to time one or more destitute women. We have usually had at the home from one to three destitute women. They do a little work for the institution, and are given their living and a home. I do not believe we have had, altogether, a dozen women there during the ten years last past. We take children when they are from three to twelve years old, and keep them until we get homes for them." Respondents admit that appellant maintains an asylum, but deny that it is distinctly an orphan asylum, although it will necessarily have orphans among its inmates. It was not organized, and has not been conducted, they say, to maintain orphans as such, nor because they are orphans, but orphans are admitted because they are among the sick and dependent. What this appellant does in this respect is precisely what all the other applicants to share in the bounty have done. All, with the possible exception of the Protestant Orphan Asylum and the Hebrew Asylum, receive abandoned and destitute children, though not orphans; and no asylum receives orphans merely because they are orphans as a charity. Only the indigent are entitled to be so received. The fact that the phrase "orphan asylum" does not occur in the name of the appellant is of no consequence. In St. Luke's Home for Indigent Females v. Association for Relief of Respectable Aged Indigent Females, 52 N. Y. 191, the bequest was to a specified institution, and a mistake was made in the name. There was no institution bearing the precise name. In determining among different claimants which was entitled, naturally similarity of name was of first importance, and was so because the testator had attempted to name the legatee. Here the bequest is to a class, and we must presume the testator had in his mind only the class. He does not seem to have cared which got his bequest, further than that all of the designated class should share it.

The St. Vincent Roman Catholic Orphan Asylum is maintained by a corporation which, by its articles, appears to have been incorporated for "the administration of said temporalities of the said Roman Catholic Church in the said diocese of San Francisco, and the management of the estate and property of said church." To maintain an orphan asylum was not one of the expressed purposes of this corporation. It is said that the diocese extends from latitude 37 deg. 13 min. N., to 42 deg. N.; and from the Pacific Ocean, on the west, to the Colorado river, on the east. The extent and scope of this corporation is very great, and certainly it was not formed expressly to maintain such asylums, nor is such purpose disclosed in the articles. It is said, however, that it maintains several orphan asylums within the diocese, and its right to do so has never been questioned. The appellant is actually maintaining an orphan asylum of the same precise character in this respect as those mentioned by the applicants. Unless its action were ultra vires, and perhaps even if it were, it must be rated as an orphan asylum of the city and county of San Francisco. The St. Vincent Roman Catholic Orphan Asylum and the Bishop Armitage Church Orphanage stand, with reference to this bequest, in precisely the same position. The home of each is without the city and county, and each is managed by organizations within the city. Each receives most of its inmates from San Francisco, but neither confines its benefactions to the inhabitants of the city, or in any way discriminates in their favor. It is said that there is a difference in favor of St. Vincent, because St. Joseph is an asylum of the city and county of San Francisco for infant orphans, and that, when boys in St. Joseph reach the age of seven, they are sent to St. Vincent. But St. Joseph is separately incorporated, and has asserted a separate claim to a share of the bequest. If it is an asylum, it should have been so recognized, and allowed a share of the bequest. It has not appealed, and the facts in regard to it are not shown. We must presume that the court correctly held that it was not an asylum. If it were such, however, that would not help the claim of St. Vincent. It is said that St. Vincent is the largest asylum, and the only one controlled by the archbishop which could claim the bounty. We recognize the beneficent character of the charity there administered, and its extent. All the claimants are worthy, and all efforts to share in the fund unselfish. But we are not authorized to select the most worthy charities, or to distribute the fund in a way which will be thought fair between different religious denominations. It is not our function to distribute it at all, except by ascertaining, as best we may, who are the beneficiaries indicated in the will. Both of these institutions are most worthy, but neither maintains an orphan asylum in the city and county of San Francisco, and only such are indicated in Pearsons' will.

The claim of the Boys' and Girls' Aid Society was, I think, properly denied. That society is by its charter empowered to maintain an orphan asylum, but it has not done so. It is a reformatory. Most of its inmates were committed to it under the provisions of section 1388, Pen. Code. The superintendent, while on the stand, was asked to account for the others, and replied as follows: "The Society for the Prevention of Cruelty to Children sends them to us. A mother who can't support her child may bring it to us, and sometimes a mother who has a boy who won't stay home, but runs away, brings him to us."

The Girls' Directory Orphan Asylum was incorporated in January, 1894, some four years after Pearsons' death. Before that time a charity had been conducted by some sisters of St. Francis. It was voluntary work, conducted without any special organization or any statement of a formal plan of proceeding. They had a home, and received their first inmate May 22, 1888. She was discharged May 31, 1888. The next inmate was received June 16, 1888, and discharged August 6, 1888. It does not appear from the record that prior to Pearsons' death it was known as an orphan asylum. In the Directory of 1887 it was published thus: "Girls' Directory, established in San Francisco in 1887. Objects: This home is a charitable institution, where poor girls of all denominations can find shelter until work can be obtained, and also for poor abandoned children." It seems that the sisters did not authorize this publication, but it correctly described the charitable work performed by the sisters, so far as disclosed by the record. After Pearsons' death, in 1890, the charitable work increased, and, perhaps, it may be said the sisters were conducting an orphan asylum. At the time of Pearsons' death there were under the care of the sisters 17 orphans and half orphans. Why they were there, except that they were destitute and needy, the record does not show. The presumption is that the judge decided the matter correctly, and I do not think this appellant has shown error.

Counsel for this appellant, while claiming that even at the time of Pearsons' death these sisters were maintaining an orphan asylum, contends that the real question is whether at the time of the distribution the institution is maintaining such asylum. Manifestly, this cannot be so. The rights vested at the time of the testator's death. No new claimants who were not conducting orphan asylums when Pearsons died could come in and share in the fund, the right to which had become vested. Counsel suggests that an institution which was maintaining an asylum when Pearsons died might have ceased to do so before the decree of distribution was entered. What ought to be done in such a case, should it arise, will demand the serious consideration of the court. But the possibility that it may happen is not sufficient to change the rule that such legacies vest at the death of the testator. The cause is remanded, and the probate court is directed to modify the decree in accordance with this opinion.

We concur: McFARLAND, J.; HENSHAW, J.

113 Cal. 607

## THURBER v. THURBER. (S. F. 235.)

(Supreme Court of California. Aug 3, 1896.)

CHANGE OF VENUE—AFFIDAVITS.

Where an action—which should be brought in the county where defendant lives, but which Code Civ. Proc. § 395, provides may be tried in any county which plaintiff may designate, if defendant resides in the state, and the county in which he resides is "unknown to plaintiff"—is brought in a county other than that of defendant's residence, it cannot be retained in such county, against defendant's motion to change the place of trial, supported by his affidavit of residence in another county, on the mere affidavit of plaintiff that at the time of filing the complaint the county in which defendant lived was unknown to plaintiff, but it should be shown that plaintiff used diligence to ascertain such residence.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county.

Action by Isaac L. Thurber against Alfred S. Thurber. Motion to change place of trial was denied, and defendant appeals. Reversed.

E. M. Morgan and I. E. Segur, for appellant. J. H. Skirm, for respondent.

SEARLS, C. This is an appeal from an order of the superior court of the county of Santa Cruz denying a motion of defendant to change the place of trial of the cause from said county of Santa Cruz to the city and county of San Francisco. The action was commenced November 30, 1894, to recover money from the defendant. The summons was served upon the defendant, at the city and county of San Francisco, on the 15th day of April, 1895. Defendant appeared in due time, filed a demurrer, an affidavit of merits and showing that he was a resident of the city and county of San Francisco, a demand for a change of the place of trial from the county of Santa Cruz to the city and county of San Francisco, together with a notice that on the 27th day of May, 1895, he would move the court, upon the affidavit and demand aforesaid, for an order changing the place of trial as aforesaid. The affidavit of defendant, Thurber, stated "that he now is, and for several months last past has been, an actual and bona fide resident of the city and county of San Francisco, state of California," but did not, in terms, state that he was such resident at the date of the commencement of the action. Subsequently, and before the hearing of the motion, the defendant filed sundry affidavits showing his residence to have been in the city and county of San Francisco at and prior to the commencement of the action, and that he was still a resident thereof, etc. Plaintiff thereupon filed a counter affidavit, in which he stated that "at the time of the filing of the complaint in the said action, on the 30th day of November, 1894, the county in which the said defendant above named, the said Alfred S. Thurber, then resided, was unknown to the said plaintiff; that the said defendant was at the time of the commencement of the said action a resident of the state of California." These later affidavits were evidently by leave of the court or by consent of parties, as they were used without objection at the hearing. The court below refused the motion to change the place of trial upon the ground that the action was one for the recovery of money, and the place of trial is governed by section 395 of the Code of Civil Procedure, and upon the ground that it was "an undisputed fact that the defendant, at the commencement of this action, resided in the state, and that the county of his residence was unknown to plaintiff." The propriety of this ruling is drawn in question by the appeal.

This is one of the actions in which the venue should be laid in the county in which the defendants, or some of them, reside. Section 395 of the Code of Civil Procedure provides, however, among other things, that if the defendants reside in the state, "and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate." The question is as to the sufficiency of the affidavit of the plaintiff to retain the cause in the county of Santa Cruz, as against affidavits showing, without conflict, that he resided with his family in San Francisco. The general rule is that, in actions other than those mentioned in sections 392 and 393 of the Code of Civil Procedure, the defendant who is sued without the county of his residence may, upon a proper showing made in due time, have the place of trial changed to the county of his residence. Watkins v. Degener, 63 Cal. 500. To this general rule there is the exception that if the defendant is a nonresident of the state, or if a resident of the state and the county of his residence be unknown, he may be sued in any county of the state designated by plaintiff. In Loehr v. Latham, 15 Cal. 418, which was upon motion to change the place of trial, and which motion was granted by the court upon the ground of the nonresidence of the defendant in the county where the action was commenced, plaintiff had evidently, judging from the opinion of Baldwin, J., filed an affidavit similar to the one here, under a statute containing a clause precisely the same as that of section 395 of our Code of Civil Procedure (St. 1858, p. 82). Baldwin, J., said: "I concur in the judgment of reversal. I think, however, that the statute of 1858 authorizes suit to be brought in any county designated in the complaint, when the residence of the defendant is unknown. But this provision must receive a reasonable construction. A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the state, however remote from his residence; for, if this were so, the effect of the rule would be practically to repeal this provision requiring suit to be brought in the county of the residence of defendant. It would be putting it in the power of the plaintiff, by keeping ignorant of the facts, or feigning ignorance, to sue where he pleased, and thus fraud would be encouraged and oppression practiced. To resist the application of the defendant, the plaintiff should have shown that he used all proper diligence to ascertain the residence of defendant before suit, and failed. He does not show this by his affidavit, or otherwise." Cope, J., said: "I concur in the judgment of reversal, upon the ground that the affidavit of the plaintiff does not show that he used due diligence to ascertain the residence of the defendant." This decision has not been overruled or questioned, so far as we are informed. The reasons for enforcing the rule enunciated by Mr. Justice Baldwin are aptly put, and cogent, and the practice indicated should be upheld and enforced. It follows that the affidavit of plaintiff was insufficient to retain the cause in the county of Santa Cruz. We recommend that the order appealed from be reversed, and the court below be directed to enter an order transferring the cause to the city and county of San Francisco for trial.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the court below directed to enter an order transferring the cause to the city and county of San Francisco for trial.

5 Cal. Unrep. 413

## NEALE v. BARDUE et al. (Sac. 108.)

(Supreme Court of California. Aug. 3, 1896.)

QUIETING TITLE—COMPLAINT—SUFFICIENCY.

In an action to quiet title and for other relief, the complaint is sufficient to support a judgment canceling and setting aside a certificate of redemption issued to defendant where it is alleged that the realty in controversy was never redeemed by anybody from the sale made by the sheriff to plaintiff's grantor, and that defendant was not the successor in interest of the judgment debtor, and not entitled to redeem.

Department 1. Appeal from superior court, Amador county.

Action by Vincent Neale against W. N. Bardue and others to quiet title and for other relief. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Vincent Neale, in pro. per. Wm. J. Magee and H. V. Morehouse, for respondents.

PER CURIAM. In this case the pleader has attempted by his complaint to set out a combination of causes of action. In his prayer for judgment, he asks to have his title to certain realty quieted; that a certificate of redemption issued by the sheriff to the defendant Bardue be set aside and canceled, and the sheriff issue a deed to him as the successor in interest of the purchaser at the sale; that an injunction issue restraining the further commission of waste; and that a money judgment be decreed in the sum of $5,000. Allegations may be found in the complaint bearing upon all these questions. A general demurrer was sustained to the pleading, upon the ground that it failed to state a cause of action, and plaintiff appeals.

It must be borne in mind that no misjoinder of causes of action or parties defendant is here involved; but the single question presents itself, does this complaint state any cause of action, however defective, of which a court of equity should take cognizance? Without passing upon the sufficiency of other causes of action attempted to be set out, we think the complaint sufficient to support a judgment canceling and setting aside the certificate of redemption issued to defendant Bardue. There is an allegation that this realty was never redeemed by anybody from the sale made by the sheriff to plaintiff's grantor, and we find a further allegation that defendant was not the successor in interest of the judgment debtor, and not entitled to redeem. Under such circumstances, the plaintiff, standing in the shoes of the purchaser at the sale, is entitled to have the certificate of redemption issued to defendant canceled and annulled. It is claimed by defendant Bardue that plaintiff ratified the redemption by accepting the redemption money. We find nothing in the complaint showing any ratification or estoppel which could be urged against plaintiff as to any matter of redemption. For the foregoing reasons, the judgment is reversed, and the cause remanded.

113 Cal. 649

## CHETWOOD v. CALIFORNIA NAT. BANK OF SAN FRANCISCO et al. (S. F. 266.)

(Supreme Court of California. Aug. 7, 1896.)

NATIONAL BANKS—AGENT TO SUCCEED RECEIVER—RIGHT TO PROCEEDS OF ACTION BY STOCKHOLDER.

1. 27 Stat. 345, c. 360, § 3, authorizes the election of an agent by the stockholders of a national bank in the hands of a receiver when all indebtedness to outside creditors has been paid, and provides that such agent, after giving bond, shall be vested with the control of the bank's affairs by the controller and receiver, being accountable to the circuit or district court of the United States. *Held*, that such agent takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment cannot be questioned in a collateral proceeding.

2. Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by John Chetwood, Jr., against the California National Bank of San Francisco and others. From an order after judgment, T. K. Stateler, agent in charge of the affairs of defendant bank, appeals. Reversed.

Pierson & Mitchell and R. A. Friederich, for appellant. John Chetwood, Jr., and A. W. Thompson, for respondent.

HENSHAW, J. This is an appeal from an order made in the above-entitled case after the entry of final judgment therein. The following facts are necessary to an understanding of the contention: The California National Bank of San Francisco was insolvent, and its affairs were in the hands of a receiver appointed by the controller of the currency at the time when Chetwood, as a stockholder of the bank, instituted this action on its behalf against certain directors to recover damages for moneys alleged to have been lost to the bank by reason of their mismanagement of its affairs. The receiver continued in charge of the affairs of the bank, and was made a party defendant in the action. Thereafter, at a stockholders' meeting, it was determined that the receiver should not be continued in office to wind up the affairs of the association, and that an agent should be elected for that purpose, and the appellant Stateler was elected such agent. The authority for these proceedings is found in the act of congress which provides as follows (27 Stat. 345, c. 360, § 3): "Whenever any association shall have been placed in the hands of a receiver, and when the controller of the currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved and allowed as therein prescribed, the full amount of such claim and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful moneys of the United States with the treasurer of the United States, the controller of the currency shall call a meeting of the shareholders of such association by giving notice thereof," etc. "At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose. After the election of the agent, and after the execution by the shareholders of a bond to the satisfaction of the controller of the currency, and filed with him, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed, and for the faithful performance of all the duties of the agent's trust, the controller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order or control of said controller and the said receiver, or either of them, and for this purpose the said controller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said controller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association. Upon receiving such deed, assignment, transfer or other instrument, the person elected such agent shall hold, control and dispose of the assets and property of such association which he may receive under the terms thereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts and expenditures as such agent, which court shall upon due notice settle and adjust such accounts and discharge said agent and the sureties upon said bond." The appellant, Stateler, received from the controller of the currency, and from Young, the receiver of the California National Bank, the certificate, deed, assignment, and transfer contemplated by the act, which recited that the shareholders of the bank, called to meeting by the controller, after due notice given as required by law, had elected an agent for the bank as provided by the act, and that Stateler was duly elected such agent, and the required bonds had been executed and filed by the shareholders to the satisfaction of the controller, as required by law. Stateler thereupon entered upon the discharge of the duties of his trust, and, after the entry of judgment in the case of Chetwood v. The California National Bank of San Francisco, petitioned the court for an order requiring Chetwood to turn over to him, as agent of the bank, $27,500 received by Chetwood in that action. The court refusing to make the order, this appeal is taken.

Considerable attention is devoted in the briefs to a discussion of the regularity and validity of the proceedings of the shareholders which terminated in the election of Stateler as agent, and the assignment to him by the controller and the receiver of the assets of the corporation. Into these questions we do not deem it necessary to enter. By the provisions of the act itself, Stateler succeeded the receiver in the performance of the duties which otherwise would have pertained to the receiver. Though chosen by the stockholders, he received his commission as agent from the controller, with whom a bond was filed for the faithful performance of his trust. In the conduct of that trust he is placed under the direction and control of the circuit court, to which he must apply before he can compromise debts or claims of the corporation, and before which he must go to make his report and receive his discharge. The agent therefore stands in loco the receiver, and is in fact the receiver, under a varied form of appointment, and under a different name. It is held that the receiver is an officer of the United States. Platt v. Beach, 1 Thomp. Nat. Bank Cas. 182, Fed. Cas. No. 11,215; Stanton v. Wilkeson, 1 Browne, Nat. Bank Cas. 162, Fed. Cas. No. 13,299; Frelinghuysen v. Baldwin, 12 Fed. 395; Price v. Abbott, 17 Fed. 506. If the agent be not also in strictness a public officer of the United States, he is at least a quasi public officer. In McConville v. Gilmour, 36 Fed. 277, the circuit court enters into a long and elaborate discussion of the functions and status of this officer, and reaches the conclusion that "the agent is an officer of the United States in every sense that the receiver is." Such being the case, and Stateler being de facto the agent, and presenting his commission from the controller, reciting his appointment, and the regularity of the proceedings attending it, the question of the regularity of his appointment is not one to be raised upon collateral attack in this action.

Under this condition of affair, it still remains to be considered whether he is entitled to have paid over to him the moneys that had been collected. The circumstances under which the $27,500 were paid have been fully set forth in the opinion filed in another appeal in this action. Chetwood v. Bank (S. F. 177; filed July 22, 1896) 45 Pac. 704. The shareholder who sues on behalf of the corporation is unquestionably entitled to conduct, manage, and control the litigation until a final determination thereof. Thereafter, in the case of a corporation not under disability, and where no good reason appears to the court why it should not be allowed to take into possession and dispose of the judgment recovered (Fox v. Mining Co., 108 Cal. 475, 41 Pac. 328), it becomes the duty of the shareholder, after reasonable allowance made for costs and expenses of litigation, to restore to the corporation the funds in his possession. In this case, while the corporation, as a corporation, was still in existence, it was not conducting or operating its business, and its assets, under the laws of the United States, had passed into the hands of the receiver, and from his hands to those of his successor,—the agent. The latter was charged with the explicit duty of collecting the assets, and distributing them ratably. If necessary, he could sue or be sued. There can be no doubt but that the receiver or agent would be entitled, where litigation had come to an end with moneys in the hands of the plaintiff stockholder under a judgment rendered in his favor on behalf of the corporation, to invoke the aid of the court, and to receive at its hands an order directing the payment of those moneys to him for the purposes of his trust; and in this case we entertain no doubt but that the appellant would be entitled so to do if it be found that the litigation in question is at an end. If we were to accept the statement of respondent's brief in this regard, no difficulty would here be presented. Respondent states "that Chetwood prosecuted this present action, which resulted in judgments severally against Thompson for $20,000, Wilson for $7,500, and Thomas for $139,738"; but in fact there was no judgment, severally or collectively, entered against Thompson and Wilson, or either of them, for $20,000, or $7,500, or for any other sum whatsoever. As set forth in the opinion upon the former appeal, above referred to, after the court had ordered judgment against the three, and appointed a referee to take an accounting to fix the amount thereof, Thompson and Wilson procured from plaintiff a retraxit, and a judgment of dismissal, by the payment to him of $27,500. The only judgments which were entered in that case were the judgments of dismissal in favor of Thompson and Wilson, and the judgment against Thomas for $139,000; but, as in the former opinion discussed and decided, the payment of $27,500 was a satisfaction of plaintiff's claim against the three defendants, and the defendant Thomas became entitled to a judgment in his favor thereby. That litigation then and there came to an end, as to the defendants Thompson and Wilson, because they had paid $27,500 for a retraxit of the cause of action in tort against them; as to Thomas, because the release and discharge of his alleged joint tort feasors operated in law to release him. An end to that litigation having been thus reached, the agent was entitled to have the proceeds of it, after reasonable deductions, paid over to him. Such was his demand, and it should have been granted. The order is reversed, with directions to the trial court to enter the order prayed for, after making reasonable allowance to plaintiff, Chetwood, for his costs, disbursements, and attorney's fees in the said action as contemplated by law.

We concur: TEMPLE, J.; McFARLAND, J.

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113 Cal. 664

## QUINCHARD v. BOARD OF TRUSTEES OF ALAMEDA et al. (S. F. 80.)

(Supreme Court of California. Aug. 7, 1896.)

CERTIORARI—STATUTORY OFFICE OF WRIT—REVIEWING ACTION OF MUNICIPAL AUTHORITIES—STREET IMPROVEMENTS—PRACTICE.

1. Under Code Civ. Proc. § 1068, a writ of certiorari is to be issued only when the jurisdiction of an inferior tribunal, board, or officer has been exceeded, and there is no appeal, nor any plain and adequate remedy, and under such provisions the action of the authorities of a city or town in ordering and making street improvements cannot be reviewed by certiorari at the suit of a property owner who is liable to assessment therefor, as any want of jurisdiction is available as a defense in proceedings to collect such assessment.

2. The action of the authorities of a municipal corporation in ordering street improvements is legislative in character, and the making of contracts and assessments for such improvements is ministerial, the assessment under the statute being merely an apportionment by the superintendent of the expense on property fronting on the street in accordance with the rule fixed by the legislature, and they cannot, therefore, be reviewed by certiorari.

3. The office of a writ of certiorari being limited to an inquiry into the jurisdiction of an inferior tribunal or officer, it is improper to join in the same proceedings tribunals or officers exercising separate and distinct jurisdictions, or persons having no voice in the proceedings sought to be reviewed.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, F. W. Henshaw, and John Ellsworth, Judges.

Certiorari by Quinchard against the board of trustees of Alameda and others. Judgment for plaintiff, and respondents appeal. Reversed.

R. M. F. Soto, for appellant. Chickering, Thomas & Gregory and E. K. Taylor, for respondent.

HARRISON, J. The plaintiff obtained a writ of review from the superior court for the purpose of annulling an order passed by the board of trustees of Alameda for the improvement of a certain street in that city, and all subsequent proceedings in reference thereto. Upon the return to the writ, and after a hearing thereon, the court rendered its judgment annulling the order for the improvement, "and that all acts or proceedings taken or had, done or performed, by the said board of trustees and by the said superintendent of streets, respondents, subsequent to the said 23d day of March, 1891, appearing in and by the returns herein, be, and the same are hereby, annulled and held for naught." From this judgment the respondents to the writ have appealed.

The plaintiff does not contend that the resolution of intention to order the improvement is insufficient, or that it was not properly passed by the board of trustees, or that the notices and other proceedings required by the street improvement act in order to give to the board of trustees jurisdiction to order the improvement were not properly given; but it is claimed that the proceedings subsequent thereto were of such a character as to vitiate the order, as well as the contract for doing the work, and the assessment issued therefor. Counsel have discussed very fully the sufficiency of these subsequent proceedings, but from the conclusion we have reached upon the proposition of the appellants that the writ was improperly issued, it is unnecessary to pass upon the sufficiency of these proceedings. At common law the writ of certiorari was employed for the purpose of reviewing the proceedings of inferior tribunals in their exercise of judicial powers, and was issued in cases where the final determinations of those tribunals were not subject to review in any other mode. The writ was considered an extraordinary legal remedy, and was issued in the discretion of the court, and only when there was no other mode of review. This discretion, however, was not arbitrary, but was only a legal discretion, controlled by principles of law, and, if improperly exercised, was subject to be corrected on appeal. Board of Sup'rs v. Magoon, 109 Ill. 142. As a street assessment in this state can be collected only by means of foreclosure in a court of record, and as the facts relied upon by the plaintiff herein would be available in defense of such action, and, if deemed sufficient to establish a want of jurisdiction either to order the improvement or to award the contract, would defeat the action, the discretion of the court would have been properly exercised in denying the writ. Spooner v. City of Seattle, 6 Wash. 370, 33 Pac. 963; People v. Myers, 135 N. Y. 465, 32 N. E. 241. The writ should never be employed as a substitute for an action to remove a cloud from a title. The scope of the writ has been limited in this state by the provisions of section 1068, Code Civ. Proc., and it is to be issued only "when an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy"; and by section 1074: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." In Central Pac. R. Co. v. Board of

Equalization of Placer Co., 43 Cal. 365, it was held that the clause in section 1074, "whether the inferior tribunal has regularly pursued the authority of such tribunal," is to be construed as the equivalent of the clause, "has exceeded the jurisdiction of such tribunal," in section 1068. The character of the act or determination sought to be reviewed, rather than of the tribunal or officer by which the act or determination is made, is the test for determining whether the writ should be issued, for it is only a determination which is made "when exercising judicial functions" that can be reviewed. "The officer or tribunal to whom the writ of certiorari is issued must be an inferior officer or tribunal exercising judicial functions, and the proceeding to be brought up for review must be a judicial proceeding." People v. Bush, 40 Cal. 344.

The functions exercised by a municipal corporation may be legislative, administrative, or judicial, but only the acts done by it "when exercising judicial functions" can be reviewed under this procedure. "This writ does not lie under our laws to review the action of any tribunal, board or officer in the exercise of functions which are legislative in their character." People v. Oakland Board of Education, 54 Cal. 375. Whether an existing street shall be improved is a question to be addressed to the governing body of a municipality in its legislative capacity, and its determination upon that question, as well as upon the character of the improvement to be made, is a legislative act. Dill. Mun. Corp. §§ 94, 927; Creighton v. Manson, 27 Cal. 613; De Witt v. Duncan, 46 Cal. 343; Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881. The act does not cease to be legislative because the members of the city council are required to exercise their judgment in determining whether the improvement shall be made. The judgment which they exercise in ordering the improvement is not a determination of the rights of an individual under existing laws, but is the conclusion or opinion which they form in the exercise of the discretionary power that has been intrusted to them, and upon a consideration of the public welfare and demands for which they are to provide. This discretion and opinion is a part of the legislative power that has been conferred upon the city, and is of the same character as that exercised by the legislature itself in providing for the general welfare of the state, and is equally independent of supervision by the judiciary. The adoption by the city council of an order for the improvement of a street is not in the nature of a judgment which is binding upon the city, but is merely the declaration of a purpose, and is only a step taken by it in contemplation of the improvement, from which it may recede at any time before a contract for the improvement has been awarded. The fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action or powers judicial in their character. People v. Walter, 68 N. Y. 403; People v. Board of Commissioners, etc., of New York City, 97 N. Y. 37; In re Wilson, 32 Minn. 145, 19 N. W. 723. The distinction between a judicial and a legislative act was pointed out by Field, J., in the Sinking Fund Cases, 99 U. S. 761, as follows: "The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." In People v. Oakland Board of Education, supra, this rule was adopted by this court as correct, and it was said, with reference to the matter then before the court: "The board acted upon the proposition before it as one of policy or expediency, aiming to adopt that which in its judgment would be best for the constituency which it represented. Its action was then political or legislative, and was in no proper sense judicial in its character. It is conceded that the board exercised its judgment in the action which it took, but this it was called to do in the exercise of its legislative functions. It is apparent that the exercise of judgment is not the criterion by which this proceeding must be viewed to determine its character. To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated." In the opinion given by Mr. Justice McKinstry in Spring Valley Water Works v. Bryant, 52 Cal. 132, this subject received an extended examination, and it was said: "From the foregoing and other cases heretofore decided it sufficiently appears that it has always been considered by this court that the office of certiorari is to bring here for review the proceedings of governmental boards exercising a mixed authority, only when the matter is one in which they have acted judicially." See, also, People v. Supervisors of St. Lawrence Co., 25 Hun, 131; In re Mt. Morris Square, 2 Hill, 14; People v. Board of Health of New York City, 33 Barb. 344; People v. Board of Supervisors of Livingston Co., 43 Barb. 232; Townsend v. Copeland, 56 Cal. 612. Under the provisions of the street-assessment act, the proceedings of the city council for the improvement of a street—the resolution of intention, the order directing the improvement, the invitation for proposals, the award of the contract—are all legislative in character. With the award of the contract, unless there shall afterwards be an appeal from some act of the superintendent of streets, the functions of the council cease, and those of the superintendent begin. His acts—the entering into the contract, the acceptance of the bond, the fixing the time for performing the contract, the acceptance of the work, and the making of the assessment—are ministerial in their character, and do not call for the exercise of judicial functions.

Although the question has not been discussed by counsel, we do not wish to be understood as sanctioning, even by silence, the practice herein adopted by the plaintiff in joining in the writ the superintendent of streets and the contractor with the board of trustees. The statute provides that the writ is to be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified (Code Civ. Proc. § 1070), and, as the review is limited to examining the jurisdiction of the board or officer to whom the writ is issued, there is a manifest impropriety in joining in the same proceeding tribunals or officers who exercise a jurisdiction separate and distinct from each other. Jurisdiction is, in its nature, an entirety, and exclusive in the body or person upon whom it has been conferred; and a writ of certiorari directed to different officers having no joint or common duties, but acting each independently of the other, is unauthorized. People v. Walter, 68 N. Y. 403; Starr v. Rochester, 6 Wend. 564. In the matter sought to be reviewed the functions of the superintendent of streets and of the board of trustees are entirely distinct, and that officer should not have been included in the writ. It is difficult to see upon what grounds the contractor was joined with the others, as no jurisdiction is exercised by him, and he did not even make any return to the writ. The superintendent of streets can exercise no jurisdiction until after the board of trustees have by their acts conferred such jurisdiction upon him, and the jurisdiction which he exercises is distinct from that exercised by the trustees. An appeal may be taken to them from the assessment made by him, and from other acts or determinations of his. Upon such appeal the city council for the first time exercises judicial functions (see Barber v. San Francisco, 42 Cal. 630); but the making of the assessment by the superintendent is but a clerical or ministerial act. Under the system adopted in this state the assessment consists merely in an apportionment of the expenses of the work upon the land fronting thereon. The rule for this apportionment has been fixed by the legislature, and the superintendent of streets, in making the assessment, is not in the exercise of any judgment or discretion, but merely performs the clerical functions of making an arithmetical computation of the amount to be charged against each lot. Bolton v. Gilleran, supra. The cases cited from other states, where the assessment upon each lot is to be made according to the benefits which that lot has received from the improvement, and in which it has been held that the parties to be affected by his acts are entitled to notice, and an opportunity to be heard before a legal charge can be made against their property, are, therefore, inapplicable. The statute, moreover, provides for an appeal to the city council from the act of the superintendent in making the assessment, and thus by express terms takes away the right to invoke the aid of a court to set aside the assessment by means of a writ of review. Wright v. Commissioners, 150 Ill. 138, 36 N. E. 980; People v. Thayer, 88 Hun, 136, 34 N. Y. Supp. 592. In the present case such appeal was taken, and the assessment affirmed. The judgment is reversed, and the superior court is directed to dismiss the writ.

We concur: GAROUTTE, J.; VAN FLEET, J.

113 Cal. 682

## In re BOODY'S ESTATE. (Sac. 199.)

(Supreme Court of California. Aug. 8, 1896.)

HUSBAND AND WIFE—SEPARATE ESTATE—COMMUNITY PROPERTY—PRESUMPTION—DESCENT.

1. The presumption is that lands purchased during marriage are community property; and where parties claiming the property as the separate estate of the husband have not only failed to show that the husband paid for any of the land out of moneys belonging to his separate estate, but have failed to show that at the times of the various purchases he was possessed of any separate property whatsoever, the presumption becomes conclusive.

2. A naked right of partnership possession in lands before marriage is not such a right as to give one of the partners an equity to which the subsequently acquired title to a portion of the land so held could attach, as his separate estate, after marriage.

3. On the death of a husband, intestate and without issue, the widow is entitled to three-fourths of the community property, and her heirs take in like proportion.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

In the matter of the estate of Joseph B. Boody, deceased, the heirs of his deceased wife, Elizabeth Boody, appeal from an order distributing the real estate as the separate property of the decedent. Reversed.

Minor & Ashley and Nicol & Orr, for appellants. Baldwin & Thompson and Woods & Levinsky, for respondents.

VAN FLEET, J. This is an appeal from an order of partial distribution, distributing certain parcels of real estate belonging to said estate; and the only question involved is whether the lands were community property, or the separate property of the deceased. The deceased, Joseph B. Boody, died intestate, in the county of San Joaquin, November 7, 1893, without issue, leaving, him surviving, as his heirs at law, Elizabeth Boody, his wife, a sister, and the children of a deceased brother. Elizabeth Boody, the wife, died intestate November 10, 1893, without issue, leaving, as her next of kin and heirs at law, a sister, one child of a deceased sister, and the children of certain deceased brothers. The heirs of Elizabeth Boody claimed, on the distribution, that the property in controversy was the community property of Joseph B. and Elizabeth Boody, and that they were entitled, of right, to have distributed to them three-fourths thereof. The court below denied this claim. It found that all of the real estate involved was the separate property of Joseph B. Boody, and accordingly distributed to the heirs of Elizabeth but one-half thereof. The latter appeal, contending that the finding as to the separate character of the property is not warranted by the evidence.

It appeared, without conflict, that Joseph B. and Elizabeth Boody were married in 1857, and that the title to all of the real estate in question was acquired long subsequent thereto,—the first parcel in March, 1867, and the various other parcels at different dates thereafter,—and that all of said lands were acquired by purchase. The only evidence, other than that of the record title, bearing upon the circumstances under which any of the land was acquired, relates to two pieces,—one known as the "Locust Shade Place"; and the other, the "Swamp-Land Tract." The evidence tends to show that at and prior to the date of his marriage the deceased, Boody, and one T. P. Heath, were in possession of these two pieces of land, then public, unsurveyed lands, and were farming in partnership, cultivating the land to grain. The extent of their possessory holding does not appear, but they owned some stock and farming implements, and raised sometimes as high as two or three hundred acres of grain. It does not appear what the value of the partnership property was, or whether they were indebted to any extent, or how much, if anything, was realized from their operations, over and above expenses. Some of the witnesses on behalf of respondents testified, in a general way, that Boody & Heath were regarded in the community as successful farmers, and were reputed to have money to loan; but none of the witnesses knew anything of their affairs, except through general current rumor in the neighborhood. The testimony of Albert Drouillard, a witness on behalf of respondents, very fairly illustrates the character of the evidence relied upon to establish the separate character of the property. He testified: "I knew T. P. Heath and J. B. Boody. First met them in 1856. They were living together at that time on what is called the 'Locust Shade Place,' on the road from Stockton to Lockford. Heath and Boody were living together. I know the lands afterwards obtained by Mr. Heath as swamp and overflowed lands. Mr. Heath was farming that land in 1856; that is, the swamp and overflowed lands. * * * I knew the firm of Heath & Boody in 1854. They were farmers,—farming together in common. I couldn't tell you how much land they did farm; quite extensive farmers. I threshed there in 1856. I suppose there must have been three hundred acres of grain. I could not tell how many cattle or farming implements they had, or how much grain they raised that year. * * * They were considered successful farmers, and were, I think, in stock-raising also." On cross-examination the witness testified: "In the summer of 1856 I assisted Heath & Boody in threshing. I do not know how much grain was raised, or what it sold for. I don't know whether they were indebted at that time, or not. I don't know what became of the money realized from the sale of crops. I don't know anything personally about their affairs, or if they had a dollar over and above their debts at that time. I don't know whether any profit was realized from this crop of wheat. I know nothing about their financial or business affairs, except that people said they were successful farmers. I knew they farmed well. I know something about it, for I saw their farming. It is a fact, though, that men farm well, and get poor, and the raising of good crops is no evidence that a man is getting ahead." The evidence on behalf of appellants, on the other hand, tended to show that the partners did not have any considerable means at or about the time of the marriage of Boody. Mrs. Heath, who was a sister of Mrs. Boody, and who was married to Heath about a year after the marriage of the Boodys, testified that she loaned Boody & Heath four or five hundred dollars shortly prior to her marriage, which they used in their business, and that she never knew, at or prior to her marriage, of either Heath or Boody being possessed of considerable means. The evidence is wholly silent as to any means or property owned by Boody, other than his interest in the partnership property, at the time of his marriage. The partnership seems to have been continued after the marriage, but how long does not appear. In 1866, the land having been theretofore surveyed and the township plat filed in the local office, Boody filed a declaratory statement on the legal subdivisions covering the "Locust Shade Place," and thereafter made proof of his pre-emption right to said land, and paid for the same, and in June, 1868, received a patent therefor from the government. About the same time, Heath made application for, and purchased from the state, as swamp and overflowed land, the legal subdivisions embracing the "Swamp-Land Tract," theretofore occupied by them. Thereafter, in 1872, Heath, for an expressed consideration of one dollar, conveyed to Boody an undivided one-half of the swamp land; and Boody, for a like consideration, conveyed to Heath an undivided half of the land pre-empted by him. The other parcels in controversy were all purchased from private parties. This is substantially the evidence upon which the finding as to the separate character of the property is based, and we regard it as wholly insufficient to sustain that finding.

The purchase of the lands having been made during marriage, the presumption is that it was community property, and this presumption could be overthrown only by evidence, of a clear, certain, and convincing character, establishing the contrary; and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof, the presumption as to the community character of the property was absolute and conclusive. Meyer v. Kinzer, 12 Cal. 247; Morgan v. Lones, 78 Cal. 62, 20 Pac. 248; Dimmick v. Dimmick, 95 Cal. 327, 30 Pac. 547. This requirement of the law is not satisfied by the evidence before us, nor is the evidence sufficient to raise a substantial conflict when opposed by the presumption. It would be only by the aid of the vaguest conjecture or surmise that it could be said that any of the lands owned by Boody at his death were acquired by his separate means. The evidence not only fails to show that he paid for any of the land out of moneys belonging to his separate estate, but it fails to show that he was possessed, at the times of the various purchases, of any separate property whatsoever. It does not even follow, necessarily, that, because he may have had some separate property at his marriage, he had any such 10 years later, when he bought the first piece of land. The vicissitudes of life are such that he may have lost all such means, and have possessed, at the time of these various purchases, nothing but property earned by the community. It was incumbent upon the parties claiming the land as separate estate to trace clearly the sources of the particular funds with which the lands were purchased to the separate property of Boody, "not by way of surmises and probabilities, but by plain and connected channels." Dimmick v. Dimmick, supra. This the evidence wholly fails to do, and does not constitute a sufficient basis for the finding rested upon it.

The doctrine of Harris v. Harris, 71 Cal. 314, 12 Pac. 274, and In re Lamb, 95 Cal. 397, 30 Pac. 568, has no application to the circumstances of this case. In both those cases legal steps had been initiated by the filing of application, prior to the marriage, to procure title to the land from the government. This fact was held to create an equity to which the legal title, when acquired, would relate back, and constitute the land separate estate, although the title was not actually acquired until after marriage. Here no such fact exists. Nothing but the naked right of possession, and that a joint one in the partnership of Boody & Heath, existed in any of the lands here involved. This certainly was not such a right as to give one of the partners an equity to which the subsequently acquired title to a portion of the land so held could attach.

Respondents' contention that, whether the lands were community property or separate property, in either event appellants received all they were entitled to take, is untenable. If the lands were community property, Elizabeth Boody was entitled, at the death of the husband, without descendants, to three-fourths of such property; and the appellants, standing in her shoes, take in like proportion. Civ. Code, § 1402; Jewell v. Jewell, 28 Cal. 232. The order is reversed.

We concur: GAROUTTE, J.; HARRISON, J.

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113 Cal. 618

## PEOPLE v. MAYES. (Cr. 154.)

(Supreme Court of California. Aug. 7, 1896.)

CRIMINAL LAW—TRIAL—CONDUCT OF COUNSEL—IMPEACHING EVIDENCE—JUDICIAL NOTICE—ORDER OF PROOF.

1. A verdict of conviction, sustained by the trial court, will not be set aside on appeal on account of the conduct of the prosecuting attorney, unless it was such as clearly would result in injustice to the prisoner.

2. It cannot be assumed that a jury were influenced by statements in regard to the evidence made by the court in ruling upon objections, when they were instructed to disregard such statements.

3. A defendant who testifies as a witness is subject to the same rules as to impeachment as other witnesses, and it is not error to permit other witnesses to testify as to his general reputation; such testimony being properly limited, by an instruction, to the question of his credibility.

4. On cross-examination of a witness who has given testimony either sustaining or impeaching the credibility of another witness, it is permissible to question him with reference to his knowledge of specific acts, or as to the acts themselves.

5. Under Code Civ. Proc. § 1875, subd. 8, declaring that a court takes judicial notice of the laws of nature and the measure of time, and may resort for its aid to appropriate books of reference, and section 2102, providing that whenever the knowledge of the court is, by the Code, made evidence of a fact, it is to declare such knowledge to the jury, who are bound to accept it, a court may properly state to a jury the time when the moon rose on a given date, though no evidence on the subject was introduced.

6. The accuracy of a statement made to a jury by the court, in an instruction, of a fact of which courts take judicial notice, cannot be questioned by an affidavit filed on motion for a new trial, which does not affirmatively show error.

7. The order of proof is a matter within the discretion of the court, and the admission of testimony which, though not proper when admitted, was made so by evidence subsequently introduced, is not error.

8. It was not error to recall a jury and give an additional instruction in the absence of a defendant's counsel, where defendant was himself present, and his counsel could not be found; an exception being given defendant.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Mayes was convicted of a felony, and appeals. Affirmed.

R. A. Ling and W. A. Ryan, for appellant. Atty. Gen. Fitzgerald, for respondent.

HARRISON, J. The appellant was convicted of felony, in stealing a blue steer, and has appealed from the judgment thereon, and from an order denying a new trial. The evidence connecting him with the taking of the animal was sharply conflicting, and testimony impeaching nearly all of the witnesses who testified on either side of the case was presented to the jury. Under these circumstances, the sufficiency of the evidence to sustain the verdict is not open for examination.

Appellant contends that the conduct of the district attorney was such as to prejudice his case before the jury, and to prevent him from having a fair and impartial trial. While it may be conceded that the language of this officer was not at all times characterized by the urbanity of a Chesterfield, and that his manner, so far as it can be gathered from the record, was somewhat brusque, we cannot say that it was of such a character as to have interfered with the judgment of the jury upon the evidence before them. Although it is desirable that the amenities of social and professional intercourse should be observed in the court room, it must also be borne in mind that the temperament and mental peculiarities of individual attorneys are so diverse that all are unable to try a cause by the same rules of conduct. Much must be left to the discretion of the trial judge, in determining whether an attorney oversteps the bounds of legal propriety in his conduct of the trial; and, unless it clearly appears to the contrary, the judgment of the trial court that his conduct has wrought no prejudice to the defendant will not be set aside. Counsel's conduct must reach a course of proceeding militating against justice, and the fair and orderly conduct which should characterize judicial proceedings in criminal cases, before error can be predicated of it. There must be willful error, persisted in for an illegitimate purpose, followed by injustice to the prisoner. People v. Ward, 105 Cal. 340, 38 Pac. 945.

Exceptions were taken to statements made by the court during the trial, concerning the testimony of witnesses, as being an invasion of the province of the jury. These statements were made in answer to objections by counsel to the admission of certain testimony, or in ruling upon such objections, and were in no respect instructions to the jury with reference to the evidence. It very frequently occurs, at a trial, that the sufficiency of an objection to a question depends upon the presence of other evidence in the case,—such as whether it is proper cross-examination, or relevant to what was stated on direct examination; whether a proper foundation has been laid; whether the form of the question properly meets the statement of a witness already given; whether the testimony offered is merely cumulative. Such objections are directed to the court, and, for the purpose of sustaining its ruling, it is frequently necessary for it to state to counsel evidence that has already been given, in order that the correctness of its ruling may be apparent. While the jury may hear what is said by the court, its remarks, or its statement of the evidence, are not in the nature of an instruction to them, and it is not to be assumed that they will be influenced by them. The court instructed the jury, when the cause was submitted to them for their verdict, to disregard any such statement, or any intimation that might have been made of its view upon any question of fact, and to determine all questions of fact upon the evidence alone. The observations of the court in People v. Northey, 77 Cal. 618, 19 Pac. 870, and 20 Pac. 129, may with propriety be here repeated: "We think that these observations to the jury, made to them by the court when giving them directions by which to guide their conduct in the consideration of the case, were sufficient to remove all apprehension that the remarks of the court above referred to would have any effect on their minds prejudicial to the defendant. To hold otherwise would be to attribute to the jurors a lack of ordinary intelligence, and this we are bound to presume, from their selection to try the cause, they possessed."

The defendant was a witness in his own behalf, and the prosecution, in rebuttal, asked certain witnesses, who were called for the purpose of impeaching his testimony, concerning his general reputation for truth, honesty, and integrity. Defendant's counsel objected to these questions upon the ground that his character could not be put in question, and that the presumption that he has a good character could not be thus impeached. The court overruled the objection, and stated to his counsel that they could submit an instruction, which would be given, that the impeaching testimony would be considered only as bearing upon his credibility, and not as affecting his character as a defendant. The jury were subsequently instructed by the court that "the character of the defendant in this case is presumed to be good, in the traits involved in the crime with which he is charged, and any proof offered in regard to his general reputation only goes to his credibility as a witness, and not otherwise." There was no error in this. When the defendant offered himself as a witness in the case, his testimony was subject to the same rules as the testimony of any other witness, and he could be impeached in the same mode as could any other witness. See People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Hickman (Cal.) 45 Pac. 175. The impeaching questions were authorized by section 2051, Code Civ. Proc. Neither did the court err in permitting the prosecution, upon cross-examination of the witnesses called in behalf of the defendant to sustain his credibility as a witness, to question them in reference to his reputation for honesty and integrity. They had testified in their direct examination, presumably in response to questions put to them in his behalf, that his reputation for these traits was good, and their testimony in that respect was open to a full cross-examination.

Witnesses were also called on behalf of the defendant for the purpose of sustaining the testimony of other witnesses that the prosecution had attempted to impeach, and upon the cross-examination of these witnesses the prosecution was allowed to question them with reference to specific acts. While it is not permissible to give evidence of wrongful acts for the purpose of impeaching a witness, it is proper, upon cross-examination of a witness who has given testimony, either for sustaining or impeaching the credibility of another witness, to question him with reference to his knowledge of specific acts, and with reference to the specific acts themselves, for the purpose of overcoming the effect of his testimony upon the direct examination.

A witness on behalf of the defendant testified that on the night when the animal was taken he met Ruiz, one of the witnesses for the prosecution, driving a dark-colored animal; that the moon was up and shining, and the night was pretty light. On being asked what time of the night it was, he said that he was unable to tell, but thought that it was "along about ten o'clock, somewheres about there, I suppose," and at another time he said that it was "betwixt nine and ten, I suppose." The court instructed the jury, as a matter of judicial knowledge, that the moon on that night rose at 10:57 p. m. It does not appear that any evidence upon that point had been offered at the trial, nor was such evidence necessary. People v. Chee Kee, 61 Cal. 404. Section 1875, subd. 8, Code Civ. Proc., declares that courts take judicial knowledge of "the laws of nature, the measure of time, and the geographical conditions and political history of the world," and that "the court may resort for its aid to appropriate books or documents of reference"; and section 2102, Code Civ. Proc., declares, "Whenever the knowledge of the court is by this Code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to adopt it." "Judicial notice will be taken of the time the moon rises and sets on the several days of the year, as well as of the succession of the seasons, the difference of time in different longitudes, and the constant and invariable course of nature." Case v. Perew, 46 Hun, 57. See, also, State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11. Upon his motion for a new trial the appellant assigned the above instruction as error, and, in support thereof, presented an affidavit by Lewis Swift that on that night the moon rose at 10:35 p. m. No precedent in support of the practice of showing by affidavits that the court erred in instructing a jury upon matters within its judicial knowledge has been cited to our attention, and we are of the opinion such practice ought not to prevail. The judicial notice which courts take of matters of fact embraces those facts which are within the common knowledge of all, or are of such general notoriety as to need no evidence in their support, and also those matters which do not depend upon the weight of conflicting evidence, but are in their nature fixed and uniform, and may be determined by mere inspection, as of a public document, or by demonstration, as in the calculations of an exact science. These matters may not be within the personal knowledge of the judge who presides over the court, but, if a knowledge of them is necessary for a proper determination of the issues in the case, he is authorized to avail himself of any source of information which he may deem authentic, either by inquiring of others, or by the examination of books, or by receiving the testimony of witnesses. Rogers v. Cady, 104 Cal. 290, 38 Pac. 81. As this knowledge of the court does not depend upon the weight of evidence, and is not to be determined upon a consideration of the credibility of witnesses, it is evident that, when the court has stated to the jury a fact of which it takes judicial knowledge, the correctness of such statement is not to be controverted or set aside on an appeal by affidavits which are merely contradictory of the correctness of such statement. The appellate court takes judicial notice of the fact, in the same manner as does the trial court; but, in the absence of any personal knowledge of the fact by the individual members of the court, the fact as stated by the court below will be assumed to be correct, and the appellant will be required to show affirmatively that the court erred in its statement of it. The record does not show the means or sources from which the court obtained its knowledge of this fact,—whether from information derived from others, or from books, or by means of an individual calculation; and, although it appears from an affidavit on behalf of the appellant that the times of the rising of the moon, in the Family Christian Almanac, are correct, and that the ordinary almanacs found in drug stores, and sometimes called "patent-medicine almanacs," are not reliable, the time stated in either of these almanacs at which the moon rose on that night is not given, nor does it appear that the court below referred to either of them. While it is said in the affidavit of Swift that his statement is "made from accurate, correct, and reliable astronomical observations, calculations, and data," he does not state that he made the calculations, or the person by whom they were made; so that his affidavit is in reality of no higher grade than hearsay, and is insufficient to overcome the presumption of the correctness of the court's statement to the jury.

Numerous exceptions were made on behalf of the defendant to the rulings of the court on the admission of evidence, but none of them are of a nature to require particular consideration. There was no error in permitting answers to the questions, in the early part of the trial, relating to George Vandekarr. Ruiz subsequently testified that Vandekarr and the defendant were driving the steer together on the night it was taken, and these questions relating to Vandekarr would have been proper after the testimony of Ruiz had been given. That they were admitted out of the proper order of developing the case does not constitute error. The order of proof is a matter within the discretion of the court. The statement by Ruiz that Vandekarr told him that the defendant had lost a hat while they were chasing the steer was not hearsay, as Ruiz testified that it was told in the presence of the defendant, and also that the defendant at the same time gave the reason why he lost it.

The court did not err in refusing to give the instructions asked by the defendant. No error was committed by recalling the jury, and giving an additional instruction, in the absence of the defendant's counsel. The defendant was himself present, and the court directed that an exception be entered in his behalf to the instruction thus given. It is stated in the bill of exceptions that before giving the instruction the court caused his attorneys to be called, and searched for in the courthouse, and also sent officers to look for them, but that they were not found. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(113 Cal. 628)

## SANTA CRUZ ROCK-PAVEMENT CO v. BRODERICK, Auditor. (S. F. 380.)[1]

(Supreme Court of California. Aug. 7, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—AUTHORIZED CONTRACT—EQUITABLE CONSIDERATION—RECOVERY.

1. The requirement of Street Improvement Act (St. 1885, p. 149) § 5, that, before the awarding of any contract by the city council for any work authorized by the act, the city council shall invite sealed proposals, and shall award the contract to the lowest bidder, applies to every contract authorized by the act, irrespective of the character of the street on which the work is to be done, or of the mode in which the expense is to be paid.

2. St. 1885, p. 160, § 20, which provides for the acceptance of a street by the city council, and that it shall thereafter "be kept in repair and improved by the said municipality, the expense thereof to be paid out of a fund to be provided by said council, for that purpose," merely fixes the obligation upon the city to bear the entire expense of such improvement, and does not take such accepted street out of the jurisdiction conferred on the city council by section 1, to order its improvement, which must in all instances be done under the proceedings described in the act.

3. Under provisions authorizing the repair of streets under certain conditions, the term "repair" does not include an original improvement of the street, or work of a character different from that previously done.

4. A municipality cannot disregard the restrictions which its charter places upon its power of contracting, and, after a contract entered into in disregard of such restrictions has been performed, a subsequent promise to pay for such performance cannot be enforced.

5. Where one has performed a contract for a city, which he knowingly entered into in disregard of statutory requirements, he cannot claim an equitable consideration by reason of its performance.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Proceedings in mandamus by the Santa Cruz Rock-Pavement Company against William Broderick, auditor, to compel him to audit and allow a claim for street paving. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. C. Bates, Denson & De Haven, and Garler, Boalt & Bishop, for appellant. Garret W. McEnerney and Charles F. Hanlon, for respondent.

HARRISON, J. The board of supervisors of the city and county of San Francisco passed a resolution, July 8, 1895, directing the superintendent of streets to enter into a contract with the appellant to pave Van Ness avenue from Pacific avenue to Jackson street with bituminous rock, at the rate of seven cents per square foot. Under the contract entered into by virtue of said resolution, the appellant completed the work therein named, and thereafter presented its demand, duly verified, to be paid out of the street department fund, for the sum of $1,447.99; and on October 28, 1895, the board of supervisors passed an authorization for the payment of said demand. Upon its presentation to the respondent, who is the auditor of said city and county, that officer refused to indorse his allowance thereon, or in any way to approve or allow the same, whereupon the appellant instituted the present proceeding to compel him to audit and allow said claim. The respondent set up, as an answer to the application, that, in passing the resolution authorizing the contract with the appellant, the board of supervisors acted in excess of its jurisdiction and authority, and that the contract itself was invalid, for the reason that no proposals or bidding therefor were invited by the board of supervisors, and that the contract was let without any opportunity for competition. It was shown at the hearing in the superior court that the roadway of Van Ness avenue from Pacific avenue to Jackson street was accepted by the board of supervisors, February 24, 1880, under the provisions of the act amendatory of the street law, passed April 4, 1870. It was admitted on behalf of the petitioner that none of the acts or steps provided for by section 3 or by section 5 of the street improvement act of March 18, 1885, had been taken or done; that no invitations for sealed proposals or bids for doing the work had been given; and that the contract for the work was made solely by virtue of the resolution of July 8, 1895. The court granted a nonsuit, and denied the petitioner's application for the writ of mandate. Judgment was thereupon entered in favor of the defendant, from which the plaintiff has appealed.

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[1] Rehearing denied.

Section 5 of the street improvement act (St. 1889, p. 160) declares that, "before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall cause notice with specifications to be posted conspicuously for five days, on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered," and that the notice of this posting shall be published in the official paper. The section then provides the mode of making proposals for doing the work, and that they shall be examined and declared by the city council in open session, and that "the city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent and unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder, at the prices named in his bid, which award shall be approved by the mayor or a three-fourths vote of the city council." The requirement that the city council shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder is equivalent to a declaration that it shall not accept any other proposal, although it is not required to accept the lowest bid, since it may, in its consideration for the public good, reject all the bids. The requirement that it shall invite sealed proposals before awarding a contract, as well as its obligation to award the contract to the lowest responsible bidder, is, however, universal, and applies to "any" contract for doing "any" work authorized by the act, irrespective of the character of the street upon which the work is to be done, or of the mode in which the expense is to be paid. Section 20 of the act provides for the acceptance of a street by the city council after it has been once fully constructed, and certain improvements laid therein, and that it shall thereafter "be kept in repair and improved by the said municipality, the expense thereof to be paid out of a fund to be provided by said council for that purpose"; and in subdivision 2 of section 7 it is provided that "after such acceptance the expense of all work thereafter done thereon shall be paid by said city out of the street department fund." There is, however, no provision in the act which authorizes any different procedure for a contract to do work upon an accepted street from that which is required for work to be done upon an unaccepted street; and the reason for requiring competition, and awarding the contract to the lowest bidder, would seem to be as great when the compensation is to be paid out of the city treasury as when it is to be collected from the owners of the abutting land. The advertising for bids is made by the act a condition precedent to the exercise of the power to award "any" contract, and is a limitation upon the mode in which the previous order for the improvement of the street is to be made effective. Until proposals have been received in accordance with such notice, the city council has no jurisdiction to enter into a contract for the improvement. In Raisch v. San Francisco, 80 Cal. 1, 22 Pac. 22, the same question was under consideration; and it was held that the provisions of the act were equally applicable to a contract for work done upon an accepted street, for which payment is to be made directly from the city treasury, as when the expense of the work is to be collected through an assessment upon the adjacent land. In that case the supervisors had extended the time for the completion of a contract after the time fixed therefor by the contract had expired, and it was urged that as the city alone was interested in the contract, and the extension had been made by its own representatives,—the board of supervisors,—the objection was not available to defeat its liability; but the court held that the question was not one of estoppel, but of the construction of a statute and of the power to be exercised thereunder, saying: "The provision which forbids extensions of time after the expiration of the contract time is general and comprehensive, and applies to all contracts made under the act. There is nothing in the language used to limit it to any particular class of contracts, or to any particular class of streets; and we could not, without ingrafting an exception upon the statute, sustain the contention of the appellant in this regard." The same principles require us to hold that the board of supervisors had no power to direct the superintendent to enter into a contract for doing the work in the present case, unless it had been awarded to the lowest responsible bidder, after proposals to do the work had been invited under the provisions of section 5.

The board of supervisors has no plenary authority to improve its streets, either by virtue of the consolidation act, or under the provisions of the street improvement act. Its power upon this subject, which was originally included in the consolidation act, was expressly repealed by subsequent acts of the legislature, and these, in turn, have been superseded by the statute commonly called the "Vrooman Act." To the latter act alone must it look for all authority in the matter, and, under the familiar rule that the mode is the measure of the power, this authority is limited by the requirements therein provided for its exercise. The power to order the improvement of an accepted street is not conferred by section 20. That section merely fixes the obligation upon the city to bear the entire expense of such improvement.

The power to order the work is conferred by the first section of the act, and the character of the work which may be ordered is defined in the second section. Section 1 of the act gives to the city council jurisdiction to order any of the work mentioned in section 2 to be done upon the streets of the city; and the jurisdiction or power with which the council is thus invested extends to "all streets, lanes, alleys, places or courts" in the city, and is in all cases to be exercised "under the provisions hereinafter described." The subsequent provision in section 20 for accepting a street after certain work has been done therein does not take such accepted street from the jurisdiction thus conferred upon the city council. The accepted street still remains subject to the power of the city council to order its improvement, and the provision in section 20 requiring the municipality to improve such street at its own expense is subordinate to the provision in section 2 that the city council shall order such improvement "whenever the public interest or convenience may require"; but whenever such order is made the provision of section 1 requires that the work must be done "under the proceedings" described in the act.

The facts shown by the record herein do not present for determination the power of the city to "repair" an accepted street under the provisions of section 25 of the act. The contract in question does not purport to be for repairing the street, its terms being "to pave the following streets with bituminous rock laid on a macadam foundation"; and it is not alleged, nor was it shown at the trial, that the street in question had ever been paved with bituminous rock. It would be in violation of a proper construction of the term "repair" to hold that it included an original improvement of the street, or work of a different character from that previously done thereon. The provisions of the first part of section 25 do not, by their terms, apply to accepted streets, but merely authorize the city council to "repair" streets upon which certain work has been done; and the provisions of the latter part of the section, requiring advertising and assessment when the work to be done upon an unaccepted street is new work of the same character as had been previously done, cannot be construed as importing into the first part of the section a condition that the repairs therein authorized are to be made upon an accepted street. We must assume that if the legislature had intended that the express provision which it made in section 20 for the improvement and repair of accepted streets, and for a fund out of which the expense should be paid, should be superseded by the provisions of section 25, it would have so declared in some direct or unequivocal language.

We do not hold that, before the city council can order the improvement of an accepted street, it is requisite to observe all the steps prescribed in section 3 of the act. By their very terms, it is seen that they are intended solely for the benefit and protection of the owners of the property which may be assessed for the expense of the work; but, if no part of this expense is to be charged against the property, many, if not all, of these steps would be vain and purposeless, and without the scope of the statute. The purpose and scope of these requirements is indicated by the provision that after they have been observed "the city council shall be deemed to have acquired jurisdiction to order any of the work to be done." The term "jurisdiction" implies that the person or tribunal which has "acquired" it is thereby empowered to declare or establish an enforceable charge or liability against the person or subject over which it has been acquired; but, in the matter under consideration, if no charge or lien is to be established against the adjacent property, the necessity of thus acquiring jurisdiction therefor does not arise.

The proposition that because the board of supervisors have passed an authorization for payment for the work after its completion, entitles the plaintiff to recover, cannot be maintained. This proposition is independent of the proceedings under the street improvement act, and concedes the invalidity of this proceeding, but rests upon the estoppel against the city by virtue of its promise to pay for the benefits received by it by reason of the performance of the contract. The invalidity of the plaintiff's contract under the street improvement act places it in the same position as any other person dealing with the city under the authority conferred upon its board of supervisors. If the board of supervisors did not have authority to enter into the contract, they could not bind the city by a subsequent authorization for the payment of the contract price. The provision of section 67 of the consolidation act, "The powers of the board of supervisors are those granted in this act, and they are prohibited to exercise any others," and the provisions of section 98 of the same act, "If any expenditures not authorized by this act be incurred, they can never be paid out of the treasury, nor shall they be deemed to constitute or lay the foundation of any claim, demand or liability, legal, equitable or otherwise, against the said city and county," preclude any right of recovery by reason of such resolution. In entering into the contract, the plaintiff was charged with knowledge of all the limitations upon the powers of the board of supervisors. He knew that the board had no power to authorize the contract for doing the work unless it had invited sealed proposals therefor, and he entered into the contract with the knowledge that he had not made any proposal for doing the work. Having thus performed a contract which he knowingly entered into in disregard of statutory requirements, he is not in a position to claim any equitable consideration by reason of its performance. To hold that a municipality may disregard the restrictions which its charter places upon its power of contracting, and that, after a contract entered into in disregard of such restrictions has been performed, its subsequent promise to pay for such performance may be enforced, would set at naught all limitations upon municipal powers, and, as was said in Sutro v. Pettit, 74 Cal. 337, 16 Pac. 9, "put the people in the complete power of careless or unscrupulous officers." The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

113 Cal. 467

## MURPHY v. WATERHOUSE (PACIFIC BANK, Intervener. S. F. 199).

(Supreme Court of California. July 23, 1896.)

ATTORNEY AND CLIENT — NEGOTIATIONS — PRIVILEGED COMMUNICATIONS—WITNESS—EVIDENCE—SUFFICIENCY.

1. Where two persons are negotiating with each other in the presence of the attorney of one of them, their communications, as between themselves, are not privileged, and either can compel the attorney to testify against the other as to their negotiations. In re Bauer's Estate, 21 Pac. 759, 79 Cal. 304, followed.

2. Where a witness has been erroneously held incompetent, and it appears that, if his testimony had corroborated that of the appellant, the verdict might have been different, the judgment will be reversed.

3. In a civil case, it is error to charge that there must be evidence sufficient "to convince their minds" of any fact necessary to be shown by either party, since the weight of evidence, or preponderance of probability, is sufficient.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Samuel G. Murphy against Columbus Waterhouse on a promissory note. The Pacific Bank intervened. From a judgment in favor of the intervener, defendant appeals. Reversed.

Denson & De Haven and Dorn & Dorn, for appellant. Sawyer & Burnett, for intervener. Lindley & Eickhoff, for plaintiff.

McFARLAND, J. This action was brought upon a promissory note for $10,000 made by the defendant, Waterhouse, to the Pacific Bank, and alleged to have been assigned by said bank to the plaintiff, Murphy. Afterwards, however, the plaintiff, Murphy, withdrew his claims to the note; and the contest was thereafter between the Pacific Bank, intervener, and the defendant, Waterhouse. The case was tried with a jury, who returned a verdict in favor of the intervener for the amount of the face of the note. Defendant, Waterhouse, appeals from the judgment.

The defense set up by the appellant, Waterhouse, was that there was no consideration for the note. The facts alleged by him were that the Pacific Bank requested appellant to place the apparent or record title of 300 shares of the stock of the People's Home Savings Bank in his name, for the benefit of the said Pacific Bank; that appellant was to hold said stock in trust for said Pacific Bank; that the promissory note sued on in this action was given by appellant to said Pacific Bank for the purpose of protecting said bank in case of the death of defendant, or any other contingency, and as collateral security for the performance by appellant of his agreement to hold said stock of the People's Home Savings Bank in trust for the said Pacific Bank; that the real ownership of the stock was to remain in the Pacific Bank; and that appellant had the right at any time to transfer the stock to the said Pacific Bank, and receive back the said note. At the trial of the cause the appellant testified substantially to the matters of defense above stated. He then called as a witness D. S. Dorn, who is an attorney at law, and proposed to prove by him, in substance, that he was present when the said contract testified to by appellant was made between him and one McDonald, who was acting for said Pacific Bank, and witnessed the contract. The intervener objected to any testimony of said Dorn as to anything that passed on said occasion between the appellant and said McDonald, upon the ground that said Dorn was at that time the attorney and counselor for said Pacific Bank, and that anything that occurred upon said occasion should be excluded, because privileged as a communication between client and attorney. The objection was sustained, and the appellant excepted. This ruling of the court excluding the offered testimony of Dorn was clearly erroneous. It appears, we think, very plainly, from the testimony of Dorn, that at the time of the transaction referred to he was also the attorney for the appellant, Waterhouse. Assuming that to be the fact, then the point was expressly decided in favor of the contention of appellant by this court in Re Bauer's Estate, 79 Cal. 304, 21 Pac. 762. In that case this court said: "When two persons address a lawyer as their common agent, their communications to the lawyer, so far as concerns strangers, will be privileged; but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations;" citing numerous authorities. The rule, however, is the same where the witness is attorney for only one of the contracting parties. Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction, and the circumstances surrounding it, are inconsistent with the notion of a confidential communication between one of the parties and his attorney, who happens to be present. "The rule deducible from the authorities is that all communications made by a client to his counsel for the purpose of professional advice or assistance are privileged, whether such advice relates to a suit pending, one contemplated, or any matter proper for such advice or aid; that, where the communications are made in the presence of all the parties to the controversy, they are not privileged, but the evidence is competent between such parties." Britton v. Lorenz, 45 N. Y. 51. In Coveney v. Tannahill, 1 Hill, 33, the court say: "It is not necessary that a man should have an attorney to hear his dealings with third persons, and, if one is called in, I see no reason why he, like any other person, should not be sworn to prove what was done. * * * What was done and said between the plaintiff and Tannahill in the way of business cannot be turned into a confidential communication between attorney and client merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to the attorney, and he might have been required to answer, not only when and where the account was signed, but as to everything that was done and said between the plaintiff and Tannahill on that occasion, so far as the matter would be pertinent if proved by any other witness. If any communications passed between the attorney and client apart from Tannahill, these may be privileged, but nothing else." In Hughes v. Boone, 9 S. E. 286, the supreme court of North Carolina say: "So, too, it has been held by numerous adjudications, the rule does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or when made by one party, to his counsel, in the presence of the other party, or where made by one party to the attorney of the other party." In 1 Greenl. Ev. § 245, it is said, among other things, that an attorney may be compelled to disclose "a statement made by him [the client] to the adverse party." In Griffith v. Davies, 5 Barn. & Adol. 502, it was held that "the fact of the witness having been present as attorney on one side does not prevent his giving evidence of a conversation between the parties." See, also, Hurlburt v. Hurlburt, 128 N. Y. 420, 28 N. E. 651; Michael v. Foil, 100 N. C. 178, 6 S. E. 264; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Greenl. Ev. §§ 244, 245, and notes; Gallagher v. Williamson, 23 Cal. 331. The provision contained in subdivision 2 of section 1881 of our Code of Civil Procedure is merely a declaration, without any substantial modification, of a principle that has always obtained. Hurlburt v. Hurlburt, supra. It was therefore perfectly competent for appellant to prove by Dorn what occurred between the appellant and McDonald, acting for the bank, at the time when, as appellant claims, the transaction took place between McDonald and himself, out of which the trust relation which he claims arose.

But respondent contends that the ruling of the court in excluding the testimony of Dorn, although erroneous, did no material injury to appellant. This position cannot be maintained. If Dorn had testified, and his testimony had corroborated that of appellant, the verdict of the jury might have been different. At least, this court would not be justified in saying that it might not have been different. For this reason, therefore, the judgment must be reversed.

The appellant contends also that the court erred in asking, of its own motion, a certain question of the appellant, while he was on the witness stand. It is contended that said question prejudiced the appellant before the jury, and was an unwarrantable interference by the court with a matter that belonged to the jury. We think that said question—which it is not necessary here for us to state in full—was improper, but it is not necessary for us to determine whether the matter was serious enough to warrant a reversal of the judgment. It probably will not be repeated upon another trial.

We do not think that the court erred in admitting in evidence a part of a statement made by the appellant to the bank commissioners.

We see no error in the instructions given by the court to the jury, or in the ruling upon instructions offered, except that part thereof which relates to the amount or quantity of evidence necessary to sustain the burden of proof. The court, after having told the jury that the burden of proof was upon appellant to show that there was no value or consideration for the note, said, "It is for him to satisfy you, by such evidence as convinces your mind, that no value was paid for that note." In a civil case it is error to tell the jury that there must be evidence sufficient to convince their minds of any fact necessary to be shown by either party. The weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case. The judgment appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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113 Cal. 490

## RUIZ v. DOW et al. (L. A. 97.)

(Supreme Court of California. July 24, 1896.)

DEED—DELIVERY—GIFT INTER VIVOS—DECLARATIONS OF DONOR—PAROL EVIDENCE—CONFIDENTIAL COMMUNICATIONS BY CLIENT.

1. The execution of a deed conveying the grantor's land to his wife, and the delivery of such instrument to a third person, with directions to hold the same till the grantor's decease and then record it, is sufficient to vest in the grantee a present title to the fee. Bury v. Young, 33 Pac. 338, 98 Cal. 446, followed.

2. The delivery to a third person of an instrument conveying all the donor's personal estate

to his wife, with directions to hold the paper till the donor's decease and then record it, divests the latter of all control over the property, and operates as a valid gift inter vivos, the intention to make the gift being shown.

3. The intention to execute a gift inter vivos may be shown by the declarations of the donor, made either before or after the transaction.

4. Where a husband executed a deed conveying all his real and personal estate to his wife, with directions therein that it be deposited with a third person to hold till the grantor's decease, and then be recorded, the fact that the grantor subsequently, and before delivery, changed or modified the intentions so expressed, as to the disposition of the instrument, may be shown by parol.

5. Testimony of an attorney to prove the delivery of a deed to him by a deceased grantor, with instructions to deliver the same to a third person to hold for the grantee until the grantor's decease, is not within the prohibition of the statute forbidding an attorney to disclose confidential communications by a client.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cops, Judge.

Action by A. M. Ruiz, administrator of the estate of James Dow, deceased, against Rebecca Dow and another, for the recovery of money. Judgment for defendants, and plaintiff appeals. Affirmed.

Richards & Carrier and E. J. Squier, for appellant. B. F. Thomas, for respondents.

GAROUTTE, J. This is an action by the administrator of the estate of James Dow, deceased, to recover the sum of $4,000 from Rebecca Dow, wife of said deceased. Plaintiff claims the money to be the property of the estate of the deceased, and the wife claims the money to be her own by gift from the husband. The material facts may be briefly stated as follows: James Dow, a man of considerable property, consisting of lands and money, feeling that he was not long for this world, and desiring that his wife, Rebecca, should possess his estate without the expense attendant upon an administration in the usual course by the courts, consulted his attorney for advice; and as a result a deed was executed and acknowledged by Dow, parts of which are as follows: "Know all men by these presents that I, the undersigned, James Dow, * * * the party of the first part, in consideration of my love and affection for my wife, Rebecca Dow, * * * the party of the second part, do by these presents grant, give, and convey unto the said party of the second part, her executors, administrators, and assigns, the following properties: First [certain lands, describing them]; * * * third, all personal property belonging to me, of every description whatsoever, including chattels, stocks, moneys, notes, bonds, mortgages, and any other evidence of indebtedness to me, wherever situated, held, or deposited. And this conveyance shall be held and shall be a good and sufficient assignment from me to said grantee of each, all, and every said evidence of debt and ownership by me of every interest belonging to me in all said personalty whatsoever, and an absolute transfer thereof to the grantee therein. This deed is to be inclosed in an envelope, and deposited for safe-keeping in the First National Bank of Santa Barbara, with an indorsement on said envelope directing that at my decease the then cashier or president of said bank shall, at the request of my said wife, immediately file this deed for record with the recorder of said county of Santa Barbara. And I do hereby further declare, as a part of this conveyance, and as my act and deed, that the filing of this deed for record, as above recited, at my decease, shall constitute and be a good, valid, and sufficient delivery of this deed to the grantee therein, as of the date of the execution thereof, as to all properties, both real and personal, belonging to me at the date of my decease." The aforesaid deed was then inclosed in an envelope, and the indorsement made thereon called for in the body of the instrument. Thereupon Dow handed the deed to his wife, Rebecca, who retained it for the period of two years. The deed was then examined by another attorney, at the request of Mr. Dow, which attorney advised him that a delivery of the instrument was necessary to its validity. It was then given to this attorney, with instructions to hand it to the cashier of the bank, Mr. Sheffield, with directions to him that it be recorded upon his (Dow's) demise. The deed was so delivered, and thereafter, at Dow's death, it was recorded as directed. At the time of the making of the deed, Dow was the owner of a certain promissory note in the sum of $12,000, and after the deed came to the hands of the bank cashier, and prior to Dow's death, payment of $4,000 was made upon this note, which sum was deposited by Dow in his own name in the bank. This is the money the title to which is involved in the present litigation. This money was the property of the wife, if the title to the $12,000 note passed to her under the deed made by the husband; and in the consideration of this question, the verdict of the jury upon the facts being favorable to defendant, we shall more particularly address ourselves to the law of the case, for the evidence appears to be entirely sufficient to justify the verdict and judgment based thereon. While the intention which moved and controlled the husband, Dow, in making this writing, is all-important in arriving at a proper conclusion upon the validity of the instrument as one carrying title either to real or personal property, still that intention was a pure question of fact for the jury under the law, and upon the record before us we are foreclosed from setting aside the jury's finding of fact upon that issue.

It is immaterial to the merits of the present litigation whether or not the first delivery of the instrument to the wife, Rebecca, was a sufficient delivery; for a subsequent delivery of the paper to the cashier of the bank by Dow's attorney, and under specific instructions, constituted a valid delivery of the instrument. A delivery sufficient in law to pass title to realty, and sufficient in this case to pass title to the land described in the deed now being considered, is sufficiently proven by the evidence in this case. This principle of law has been fully discussed in the recent case of Bury v. Young, 98 Cal. 446, 33 Pac. 338, and upon that decision, with the authorities there cited, we leave the question; for if the title to the land described in this deed passed to the grantee, Rebecca Dow, it would seem somewhat strange that the instrument should prove too weak to pass title to personal property, viz. a promissory note, and no such results can follow. If there was a valid transfer of this note to the wife, it constituted a gift; yet it is contended by appellant that there was neither a gift causa mortis, nor inter vivos. It must be conceded that the transaction possesses no elements of a gift causa mortis. Was the gift one inter vivos? Appellant declares to the contrary, claiming there was no immediate transfer of title, and no immediate right of possession passing to the donee. It is said in Zeller v. Jordan, 105 Cal. 148, 38 Pac. 640, that, in order to constitute such a gift, "there must be an immediate transfer of the title, and the donor must relinquish all present right to or control over the thing given." Those conditions are presented by the facts of this case. The donor relinquished all present right and control over the note when he made the deed and delivered it to the cashier of the bank, and by the same act he also placed the right of possession of the note beyond himself. The delivery of the deed to the third party operated to accomplish both of these results. It may be conceded, for present purposes, that the right of possession to the note did not vest immediately in the donee. At the same time, it was lost to the donor, and that is the essential and vital element looking towards the validity of the gift. It may be further suggested that section 1147 of the Civil Code contemplates that it is only necessary to the validity of verbal gifts that there should be an actual or symbolical delivery to the donee.

It is insisted that parol evidence was not admissible for the purpose of proving the declarations of Dow as to his intentions in making the deed to his wife. By the introduction of this class of evidence it was not intended to vary or contradict the terms of a written instrument, and the evidence had no such effect. The question under investigation was, did Dow, by the deed, intend to make a gift of this note to his wife? His intention was the all-important and controlling question. That such intention may be proved by his own declarations, made either before or after the transaction, is elementary. See Thornt. Gifts, §§ 222, 224.

It is further contended by appellant that the written directions of Dow, inserted in the body of the deed, and also indorsed upon the envelope inclosing it, were conclusive evidence as to his intentions in the disposition of the deed, and that parol evidence was inadmissible to show that his intentions were otherwise. Without conceding that his intention bearing upon the delivery of the deed, as expressed in the writing, was at all different from his intention as subsequently expressed in parol, still he had the right at all times, up to the date of the actual delivery of the instrument, to modify, enlarge, or even annul his intentions in this regard; and as to these things he was in no way bound by any writing made by himself, for the document was in his possession, and subject in all respects to his control. He not only had the right to change the character of the delivery originally contemplated, but he had the right to destroy and nullify the instrument itself.

The objection to the evidence of the witness Thomas upon the ground of privilege was properly overruled. While it may be said that Thomas was the attorney of the donor, still the conversation between them was not confidential, in the sense contemplated by the statute. The donee, Mrs. Dow, was present during the greater portion of the time, and, aside from this, the conversation was largely directed towards the delivery of the deed by the cashier of the bank; and, as to any instructions to the attorney by Dow pertaining to this delivery, evidence to that point has always been recognized as admissible. Rosseau v. Bleau, 131 N. Y. 183, 30 N. E. 52. As supporting the principle generally that this conversation did not come within the class of privileged communications, we cite In re Bauer's Estate, 79 Cal. 312, 21 Pac. 759; Michael v. Foil, 100 N. C. 189, 6 S. E. 264; Hurlburt v. Hurlburt, 128 N. Y. 424, 28 N. E. 651; Hanlon v. Doherty, 109 Ind. 43, 9 N. E. 782; Murphy v. Waterhouse (S. F. 199, decided July 23, 1896) 45 Pac. 866. There is nothing in the exception upon this point demanding a reversal of the judgment. For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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113 Cal. 455

## DOWNING v. MURRAY et al. (S. F. 5.)[1]

(Supreme Court of California. July 23, 1896.)

ACCOUNT STATED—SETTLEMENT—WHEN CANNOT BE IMPEACHED—NONSUIT.

1. Where one interested with others in a joint property which had been sold made a settlement with one of the parties, who acted as trustee of the fund for all, and received and receipted for his share of the proceeds, with full knowledge of the basis on which the settlement was made, and of the matters which entered into it, he cannot reopen and impeach such settlement after the trustee has made settlement with the other parties on the same basis, and distributed the money.

2. A trial judge should grant a nonsuit when, if the case is being tried to a jury, a verdict for plaintiff should be set aside for want of evidence to support it, or when, if without a jury, the evidence is insufficient to support a judgment in favor of plaintiff.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Rehearing denied.

Action by F. O. Downing against M. W. Murray and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lewis & Keenan, Mastick, Belcher & Mastick, C. L. Tilden, and W. H. Payson, for appellant. Lloyd & Wood, for respondents.

McFARLAND, J. After the plaintiff had introduced all his evidence in the court below, the defendants moved for a nonsuit. The motion was granted, and judgment ordered for defendants. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial. The record is quite voluminous, and the arguments of counsel are elaborate; but, under our views of the case, it is not necessary for the length of our opinion to be proportionate to that of the transcript or the briefs.

It is averred in the complaint that the relation existing between the parties to the action with respect to the moneys and property involved was that of a co-partnership. This averment is denied in the answer, and a great deal of the arguments of counsel is directed to that question. In our opinion, the relation between the parties, as shown by the evidence, was not that of a co-partnership; but we do not attach as much importance to that fact as is claimed for it by defendants, who contend that, if there was no co-partnership, then, no matter what the other facts were, the action must fail. The main purpose of the action was to set aside and annul a certain settlement made on December 2, 1891, upon an account stated, and to open up said account; and the facts stated in the complaint are not sufficient, leaving out of view the averment of co-partnership, to warrant the relief asked as to said settlement. The plaintiff, Downing, and the defendants, Murray, Treadwell, Fuller, and Carroll, were the co-owners of certain mining claims and lands situated in the territory of Alaska, the titles thereto standing in the name of Murray. The first of these claims was acquired about the year 1882, and is known as the "Bear's Nest." Not long afterwards another claim was acquired, called the "Douglas Island." From time to time certain other claims in the vicinity of the two above named were acquired by at least some of said persons. Each of these latter claims had a name, but it is sufficient here to call them the "Outside Claims." The record title to all the claims stood in Murray. He made a conveyance of one-fifth of the Bear's Nest and the Douglas Island to the plaintiff, Downing, and to each of the others; but plaintiff has no paper title to any of the outside claims. About the year 1886, efforts were commenced to effect a sale of these claims, or parts of them. It is not necessary here to trace the various negotiations which resulted in such sale. It is sufficient to say that in the year 1888 a sale was effected, through the agency of a corporation called the Alaska Gold Company, of the Bear's Nest, and of certain described parts of said outside claims. The Douglas Island was not included in the sale. Conveyances were made to the Alaska Gold Company of the property sold by the said defendant Murray. The purchase price was $750,000 in cash, and about $500,000 in stock and bonds of said corporation. However, $100,000 of the $750,000 was to remain in escrow pending the hoped-for repeal of an act of congress known as the "Alien Act"; the real purchasers being mostly Englishmen. This $100,000 is still in escrow, and need not be further considered. Neither is it necessary to consider the matter of the stock and bonds. Of the $750,000, $650,000 was paid in cash, or its equivalent, to the defendant Treadwell; and it was the understanding of all the parties that Treadwell was to take charge of the money, pay off all expenses incurred in handling and selling the property, and, after settling all such expenses, to divide the balance between the parties according to their respective shares and rights. This money was paid to Treadwell some time in the spring of 1889; and plaintiff's share of the $650,000, and a settlement which he made with Treadwell about said share, are the matters here involved.

Plaintiff contends that he and the four defendants were each the owner of one-fifth of all the Alaska mining claims, including all of the outside claims, as well as the Bear's Nest and the Douglas Island; and that, therefore, he was entitled to one-fifth of the balance of said $650,000. Defendants contend that he had no ownership in the outside claims, and therefore is only entitled to such part of the $650,000 as is justly his proportion thereof as an owner of one-fifth of the Bear's Nest, and that his claim of ownership to the outside claims is of comparatively recent date. On August 17, 1889, while the money was in the hands of Treadwell, and before any settlement, the plaintiff and the four defendants executed a written instrument in which it was stipulated and agreed that the Bear's Nest should receive two-thirds of the said purchase money, and the other locations should receive one-third of said money, and the expenses should be borne in like proportion. This instrument was left with Treadwell, and afterwards, but before any final settlement, he paid to plaintiff and also the several defendants large sums of money out of said fund of $650,000, upon the basis that plaintiff was only entitled to one-fifth of two-thirds of said fund; and defendants contend that plaintiff was thus estopped from denying the validity of said instrument, and from claiming more than the said one-fifth of said two-thirds. We do not deem it necessary to pass upon this question of estoppel; but the instrument and the testimony given by plaintiff as a witness clearly show that, at the date of the instrument, he had knowledge of the claim made by defendants that the owners of the Bear's Nest and of the other locations were not the same, and that he had no interest in the latter, and that with such knowledge he afterwards made his final settlement with Treadwell. There was great difficulty among the parties in arriving at a settlement and final distribution of the balance of the fund in the hands of Treadwell. The latter had from time to time allowed each of them to draw out a large proportion of his share, plaintiff having thus been paid over $42,000; but there was still a considerable amount awaiting final settlement. The business transactions of the parties in connection with said mines had been carried on in an exceedingly loose and irregular manner, and without any system or explicit understanding between them. Large expenses had been incurred in assessment work, surveying, buying additional land, and for other purposes connected with the mines, and in negotiating and completing the sale. For the latter purpose, several trips were made by some of the parties to New York and England and other points. Each of the parties had personally paid certain of these expenses, and each presented accounts against the fund for allowance, and many items of these accounts were disputed. Some of the parties were so hostile to each other that they would not confer together. This was especially the case with plaintiff and Murray, and their views could, at last, only be communicated to each other through Treadwell, who was friendly with both. But on December 2, 1891, a final settlement was at last made between plaintiff and Treadwell. An account was stated, showing the final balance due the plaintiff to be $35,374. On that day, Treadwell paid said last-mentioned sum of money to plaintiff, who received it as full payment of his share of said fund of $650,000, and signed said account as "settled." Treadwell afterwards, and before the commencement of this action, settled with all the other persons interested, upon the same basis as that upon which he had settled with plaintiff. He thus settled with Murray, December 28, 1891; with Carroll, February 5, 1892; with Fuller, February 24, 1892; and on said February 24th he balanced his books. During this time, plaintiff acquiesced in his own final settlement, and made no attempt to rescind it; but nearly four months afterwards, and a month after Treadwell had thus closed up the entire business and paid out the entire fund, the plaintiff commenced this present action.

We are satisfied that the court below was fully warranted in holding that the appellant made no showing to justify the cancellation of his deliberate and solemn act of settlement. It is clear that at the time of the settlement the appellant knew all of the substantial and important points of difference between his associates and himself; that he made the settlement with his eyes open; and that whatever concessions he made for the purpose of effecting a final settlement were made deliberately and intentionally. Of course, he knew that the others claimed that his interest in the fund was only that of a one-fifth owner of the Bear's Nest, and that the owners of the Bear's Nest were entitled to only two-thirds of the fund; and he knew that he was yielding that point and settling on that basis. There is no plausible reason why that question should be reopened. The other matters to which appellant now objects are items in the "expense account"; that is, the part of the account which shows the amounts claimed by and allowed to each of the parties for moneys paid out for expenses incurred in connection with the mines, and for services, etc. But it appears that, at the time of the settlement, appellant and Treadwell had before them an account of these expenses, and went over them together item by item; and appellant admitted in his testimony that there were only two items to which he then made any serious objections. These were an item of $10,000 claimed by Murray as money paid by him to a man named Benn; and $7,000 claimed by Murray, and called the "Portland expense account." He, for a while, objected somewhat strenuously to these two items; but he concluded to yield these objections, and settled with full knowledge that these items formed part of the account. In his complaint, and at the trial, he also objected to other items of the expense account; but it appears that, long before the settlement, he had reason to know or expect that the aggregate of said account would be in amount about the same as that stated in the account by which he settled. On September 12, 1889, he executed to Treadwell a power of attorney authorizing the latter to act for him in making a settlement in accordance with the written agreement of August 17, 1889, hereinbefore referred to, and providing that "the expenses mentioned in said agreement are not to exceed the sum of $100,000"; and in the stated account which he signed, and by which he settled the amount of said expenses, was put at a figure only slightly greater than the one named in the power of attorney. It was $102,920.58. It abundantly appears that he did not make the settlement ignorantly. On the other hand, it appears that he knew, and for a long time before the settlement had known, what the other parties claimed, and substantially the extent and amounts of their claims; that he was a man of good business capacity; and that, looking over the whole field and considering the advantages and disadvantages of any particular line of action, he concluded to accept the account as stated, settle in accordance with it, and take the money which he could not then have otherwise received. Such an act cannot be set aside at the will of either party. It could be legally set aside only upon a showing of fraud, undue influence, etc., which showing was not made. There were averments of such things and of a conspiracy against him, but there was no evidence making a prima facie case of their existence. To grant the prayer of the complaint in the case at bar would be to do a gross wrong to Treadwell, who, upon the faith of appellant's deliberate act, has settled with all the other parties, and exhausted this fund, in accordance with the conditions and upon the basis solemnly assented to and adopted by appellant. As, under our views, no showing was made for setting aside the settlement, it is not necessary for us to inquire into the correctness of some of the items of the account which appellant now attacks.

There are some discussions in the briefs of the general subject of granting nonsuits. With respect to this matter it is sufficient to say that, with a jury present, the judge should grant a nonsuit where a verdict in favor of plaintiff should be set aside for want of evidence to support it, and, in the absence of a jury, where the evidence is insufficient to support a judgment for plaintiff. The judge of the court below is presumed to have acted on this principle, and to have concluded that the evidence was thus insufficient, and there is no reason for holding that he abused his discretion in coming to that conclusion.

There are several exceptions to rulings upon the admissibility of evidence which we do not deem it necessary to discuss; for, even if well taken, they would not be of importance enough to work a reversal of the judgment. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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113 Cal. 656

## HAILE v. SMITH. (S. F. 174.)

(Supreme Court of California. Aug. 7, 1896.)

SALE OF LAND—FAILURE TO PAY PURCHASE MONEY—RECOVERY OF LAND—PLEADING.

1. A complaint to recover land on the ground of defendant's failure to pay therefor at stipulated times, which, by the terms of the contract of sale, worked a forfeiture of defendant's rights, need not set out the deed tendered by plaintiff to defendant. It is enough to allege that he tendered "a good and sufficient deed of grant, bargain, and sale to the property," which was what the contract called for.

2. Under a contract of sale of land, declaring time the essence thereof, and providing that failure to make payment at a stipulated time shall release the seller from obligation to convey, and shall forfeit all right of the buyer to the property, the seller, by failure to tender deed on the day when the last payment falls due, does not lose his right to recover the land because of the nonpayment.

3. Under a contract of sale of land providing that the purchaser shall forfeit all right thereto by failure to make payment at a stipulated time, refusal by the seller of a seasonable tender releases the land from any further claim by him, and remits him to his personal claim for the money; and this is not changed by a subsequent tender of deed and demand of payment, and a refusal by the purchaser.

4. The averment in an answer that a tender was made "on or about" a certain day is sufficiently certain as against a general demurrer.

5. Under a contract of sale of land, declaring time the essence thereof, and providing that failure of the purchaser to make payment for more than 60 days after the purchase money is due shall release the seller from all obligation to convey the land, and forfeit all right of the buyer thereto, the buyer may, after such time, make payment without losing his rights, so long as the seller treats the contract as in force; and his tendering a deed shows that up to that time he has so treated the contract.

6. A complaint to recover land for nonpayment of purchase money, under a forfeiture clause in the contract of sale, sufficiently alleges plaintiff's title by an averment that, at the date of the contract, plaintiff was the owner in fee simple, and, after maturity of the contract, tendered to defendant a good and sufficient deed.

7. In an action to recover land of the purchaser for nonpayment of the purchase money, under a clause of the contract forfeiting his rights if payment is not made at a specified time, he cannot defend on the ground that the contract is still in force, entitling him to possession, and at the same time seek to recover the partial payment made by him.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by Haile against Smith. Judgment for plaintiff. Defendant appeals. Reversed.

W. J. Manson, for appellant. Snook & Church, for respondent.

HARRISON, J. Ejectment. The plaintiff alleges that on the 24th of September, 1891, he was the owner in fee of a certain lot of land in Alameda, and that on that day he entered into an agreement with the defendant for the conveyance of the land to him upon certain terms therein expressed. By the terms of the agreement, which is set forth at length in the complaint, the defendant agreed to pay for the land $350,—$100 at its execution; $100 before January 1, 1892; and the balance, $150, on or before January 1, 1893. The time for this last payment was subsequently extended for another year. The agreement also contains the following clause: "Time is the essence of this agreement, and a failure to comply with the terms hereof, or to make the payments for said premises as herein provided, for a period exceeding sixty days from the date when any payment shall become due and payable by the said party of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, together with the improvements at the time thereon, and all payments theretofore made." Immediately after the execution of the agreement, the defendant entered into possession of the property, and has continued to remain in such possession. It is also alleged in the complaint that the defendant has not made the last payment required by the agreement; and that on or about the 15th day of March, 1894, the plaintiff tendered to the defendant a good and sufficient deed of grant, bargain, and sale to the property above described, and demanded said payment, which the defendant refused and still refuses to pay; and that the same has not been paid; and that thereafter, April 11, 1894, he demanded possession of the premises, but the defendant unlawfully withholds the same, to his damage in the sum of $75. Plaintiff thereupon asks judgment for the restitution of the land. To this complaint the defendant filed a general demurrer, which was overruled, and thereafter he filed an answer admitting the execution of the agreement, and alleging that he has faithfully performed all the agreements therein to be performed by him. He also alleges that on or about the 1st day of March, and before the alleged tender of a deed by the plaintiff, he tendered to the plaintiff the balance of said purchase money, and demanded a conveyance of said land, which was refused by the plaintiff. The defendant also filed a cross complaint, setting forth the agreement with the plaintiff, and substantially the same matters as are alleged in his answer, and that by reason of the premises he has an equitable title to the land, which he asks to have protected. The plaintiff demurred to the answer, and also to the cross complaint, and his demurrers were sustained by the court. The defendant declining to amend, judgment was entered against him as upon his default, and in favor of the plaintiff according to the prayer of his complaint. From this judgment, the defendant has appealed.

1. The demurrer to the complaint was properly overruled. It was not necessary for the plaintiff to set out the deed which he tendered to the defendant. The averment that he tendered "a good and sufficient deed of grant, bargain, and sale to the property" showed a compliance with his part of the agreement. This averment is in the precise language of his agreement, and was the fact to be averred. A copy of the deed would have been only evidence of this fact. The plaintiff did not lose his right of action for the recovery of the land by not tendering the deed upon the day when the last payment fell due. The provision by which time is made the essence of the agreement did not authorize the defendant, by failing to make the payments agreed upon, to treat the contract as rescinded. Newton v. Hull, 90 Cal. 487, 27 Pac. 429; Scott v. Glenn, 98 Cal. 168, 32 Pac. 983.

2. The demurrer to the answer and to the cross complaint should have been overruled. The plaintiff could not maintain an action to recover the possession of the land held by the defendant by virtue of the agreement, so long as the defendant continued to recognize the validity of the agreement and to perform its terms. The particular in which the plaintiff alleges that the defendant failed to observe his agreement is in not making the last payment for the land; and, for the purpose of showing that the defendant had repudiated the agreement, the plaintiff alleged that, subsequent to the time for making said payment, he tendered a conveyance to the defendant, and demanded the payment from him, which the defendant refused. In his answer, the defendant alleges that he has performed all the covenants of the agreement to be performed by him; and that, before the date of the alleged tender of a deed by the plaintiff, he had tendered to the plaintiff the full amount of the last payment, and demanded a conveyance of the land according to the agreement, but that the plaintiff had refused to comply therewith; and that he had ever since been able, ready, and willing to make said payment upon the receipt from the plaintiff of the deed according to his covenant in the agreement. He also denied that the plaintiff had ever tendered to him his good and sufficient deed of grant, bargain, and sale for the land. These allegations presented a defense to the plaintiff's complaint, and raised issues of fact which should have been tried before a judgment could be rendered in the action. If the defendant tendered to the plaintiff the full amount of the purchase money before the plaintiff tendered to him the deed, and the plaintiff refused to accept such tender, and to make the conveyance which he had agreed to make, a subsequent tender of conveyance and demand of payment by the plaintiff, and a refusal of the defendant, did not give to the plaintiff the right to recover the possession of the land. While the unaccepted tender did not release the defendant from his obligation to pay the money, it had the effect to release the land from any further claim thereto by the plaintiff, and to remit the plaintiff to his personal claim for the money. "An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." Civ. Code, § 1504. The plaintiff's right to recover the land is one of the incidents to the defendant's obligation, which would have been extinguished by the payment of the purchase money; and, by the terms of this section, the tender of such payment had the same effect. A tender of the amount of a debt, though refused, extinguishes the lien of a pledgee, and will defeat an action to recover the property pledged. Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773. "The principle governing the subject is that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or right of distress." Tiffany v. St. John, 65 N. Y. 318. The averment in the answer that the tender of the money was made "on or about the first day of March" was sufficient as against a general demurrer. If the plaintiff would have objected to the averment on the ground of its uncertainty, he should have demurred upon

that ground. By the terms of the agreement, there could be no forfeiture unless the defendant failed to make the payment "for a period exceeding sixty days" from January 1, 1894. This authorized a payment at any time prior to March 3d; and the defendant could also make the payment after that date, so long as the plaintiff treated the agreement as in force. The tender of the deed by the plaintiff "on or about March 15th" shows that, up to that date, he recognized the agreement as in force, and the allegation in the answer is that the payment was tendered "before the alleged tender of a deed by plaintiff."

Counsel have discussed the validity of the title held by the plaintiff, and also the character of the conveyance tendered or to be tendered by him; but these questions do not arise upon this appeal, and it would not be proper to anticipate them before the parties have offered the evidence thereof at the trial. The rule that "a good and sufficient conveyance" means a conveyance which will transfer the title, as well as the rule that the parties to a contract of sale may agree upon the character of the conveyance to be made by the vendor, are equally to be considered in the construction of such contract. The allegation in the complaint that, at the date of the agreement, the plaintiff was the owner in fee simple of the land, and that, after the maturity of the agreement, he tendered to the defendant a good and sufficient deed of the lots, was a sufficient averment of the plaintiff's title.

Neither is the right of the defendant to a lien upon the land, as security for the payments made by him, involved in this appeal. Such lien exists only when the vendee is entitled to recover back the payment in case of failure of consideration, and is "independent of possession." Civ. Code, § 3050. In the present case the defendant relies upon the agreement as being in force, and as entitling him to remain in possession of the land, and pleads a full performance on his part; and, so long as he treats the contract of the plaintiff as in force, he is not entitled to recover the amount paid by him. He cannot retain the possession, and at the same time recover the amount paid under the contract. Hannan v. McNickle, 82 Cal. 122, 23 Pac. 271. The judgment is reversed, and the superior court is directed to overrule the demurrer to the answer and the demurrer to the cross complaint, and to allow the plaintiff a reasonable time within which to answer the cross complaint.

We concur: GAROUTTE, J.; VAN FLEET, J.

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113 Cal. 636

## HOPPER et al. v. BARNES. (S. F. 12.)

(Supreme Court of California. Aug. 7, 1896.)

EASEMENTS—RIGHT OF WAY—CONSTRUCTION OF GRANT—PARTIES—PLEADING—WAIVER OF MISJOINDER.

1. A right of way granted to one and "his heirs and assigns forever" will be held to be appurtenant to land of the grantee, though not so expressed in the deed, and not a grant in gross to the person of the grantee, when it leads to such land, and, except for use in connection with it, would be a useless cul de sac, and where it has, both before and since the grant, been used solely for access to such land.

2. A conveyance of land to the daughter of the grantor, to be held by her in trust during her life for the use of herself and her three children and any other children thereafter born to her, with remainder in fee to her children in case any survived her, otherwise with remainder to the grantor or his heirs, leaves the grantor only the bare possibility of a reversion, insufficient to sustain an action by him for an injury to the property, and he cannot join as plaintiff in such an action.

3. Where a misjoinder of plaintiffs does not appear from the complaint, it cannot be reached by demurrer, and must be pleaded by answer, or it will be waived.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Thomas Hopper and others against Jehu Barnes. Judgment for plaintiffs, and defendant appeals. Modified.

Rutledge & Pressley, for appellant. D. R. Gale and Albert C. Burnett, for respondents.

VANCLIEF, C. Thomas Hopper is the father, and F. Roberts is the husband, of Mary E. Roberts; and William Roberts, Edward Roberts, and Hubert Roberts are the minor children of F. Roberts and Mary E. Roberts. This action was brought to recover damages alleged to have been suffered by plaintiffs in consequence of an obstruction by defendant of their alleged private right of way over the land of the defendant, and to enjoin the defendant perpetually from obstructing such way. The court found that plaintiffs had the alleged right of way, and that defendant had obstructed it, and awarded the perpetual injunction prayed for, but no damages. The defendant has appealed from the judgment and from an order denying his motion for a new trial.

It is alleged by plaintiffs in their complaint that they own the right of way, and that they have had and enjoyed the continuous, peaceable, uninterrupted, open, notorious, undisputed, adverse use and occupation thereof during the term of 20 years immediately prior to February 15, 1893, when defendant obstructed their use thereof by building a stone wall across their entrance thereto; and further allege that said way is appurtenant to the land which adjoins the land of the defendant over which said way lies. But whether the right of way was acquired by grant or prescription is not expressly alleged, though facts are alleged which perhaps warrant the conclusion that the right was acquired by prescription. In his answer the defendant admits that on December 6, 1875, he granted to the plaintiff Thomas Hopper a private right of way, in common with himself, over the strip of land though which plaintiffs claim the right of way as described in their complaint; but alleges, and contends here as matter of law, that such grant was merely of an easement in gross to Thomas Hopper, individually, and not an easement appurtenant to his adjoining land, into which the way led. Whether or not defendant's construction of the grant, in this respect, is correct, is the principal question for decision. The grant describes the way as claimed by plaintiffs in their complaint, the following being a copy of it: "This indenture, made the 6th day of December, 1875, between Jehu Barnes and Thomas Hopper, both of the county of Sonoma, and state of California, witnesseth: That the said Barnes, in consideration of the sum of fifty dollars, sells to the said Thomas Hopper, his heirs and assigns, forever, the right of way over and along the following described tract of land, situated in the county and state aforesaid, and bounded and described as follows, to wit: Beginning at a point in the line running east and west between the lands of the parties hereto, and east of the gate in the fence on said line, where a stone fence intersects said line; thence south along said stone fence sixty feet; thence west ninety-seven feet; thence north thirty feet; thence west and parallel with said line between the lands of the parties hereto, and thirty feet south of the same, to a point in the road leading from the city of Petaluma to the city of Santa Rosa, and thirty feet south of said first-named line; thence north to said first-named line; thence easterly along the said line between the lands of the parties hereto, to the place of beginning. The said Barnes agrees to build and keep in repair a lawful fence on the south line of the land above described, and the said Hopper agrees to keep in repair the fence on the north line of said land. The understanding between the parties hereto is that the land above described is to be used as a roadway by the parties hereto and their heirs and assigns forever, for all lawful purposes whatever. Given under our hands and seals the day and year first above written." "Though an easement, like a right of way, may be created by grant in gross, as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate." Washb. Easem. (4th Ed.) p. 45, citing Kramer v. Knauff, 12 Ill. App. 115; Boatman v. Lasley, 23 Ohio St. 614; Spensley v. Valentine, 34 Wis. 154. That the way granted may be deemed appurtenant to the adjoining land of the grantee, it is not necessary that it should have been so expressed in the grant. The grant in question is to be construed in the light of the circumstances under which it was made and the acts of the parties under and in relation thereto during a period of 15 years immediately after it was made. Dennis v. Wilson, 107 Mass. 591; Smith v. Worn, 93 Cal. 206, 28 Pac. 944. At the date of the grant the defendant owned the southwest quarter of section 32, and Thomas Hopper owned the northwest quarter of that section and about 300 acres of other land adjoining it. Section 32 is bounded on the west by the county road from Petaluma to Santa Rosa. The way in question is 30 feet wide and about 800 feet in length, connecting with said road on the west, and extending east therefrom along the quarter-section line to a gate opening into said northwest quarter section, on which plaintiffs, other than Hopper, have resided more than 10 years, and upon which is a stone quarry convenient to said gate, the product of which quarry has been hauled to market through said gate and way by plaintiffs and their lessees ever since said grant, to the knowledge of defendant, and without objection, until he erected the obstruction complained of. The way, including the gateway, was used by plaintiffs and their visitors for all purposes of traffic and travel, without objection, from the date of the grant until February 15, 1893, when defendant built the stone wall across the gateway. The gate existed and had been used in connection with the way by Hopper and his tenants before the grant. In the case of Dennis v. Wilson, supra, there was no declaration of the intention of the parties in regard to the nature of the way, and the court said: "When there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relation. * * * In partition of land a right of way set to one over the land of the other would certainly be presumed to be appurtenant, unless the contrary should clearly appear. A partition by deed, with provision for a way over one of the lots for the use of the owner of the other, would be taken as making the way appurtenant as matter of course." In that case, as in this, the right of way extended from the highway along the line of division for a specified distance, less than the whole length of the dividing line. In construing the grant the court said: "As the grantor [who reserved it] could have no occasion, apparently, to use such a way for any other purpose than for access to and egress from his remaining land, the inference would seem to be inevitable that it was for that use that both parties must have understood and intended the way to be held. * * * Unless appurtenant to the land, his way was a useless cul de sac." So in the case at bar. If Hopper could not gain access to and egress from his adjoining land through the way, it was a useless cul de sac, so far as he was concerned. That the grant was intended to be of a right of way appurtenant to Hopper's adjoining land, and not of a mere personal right in gross limited to Hopper, is sufficiently expressed, it being a grant to him, "his heirs and assigns forever," without any qualification; and when the intent thus expressed is in accord with all the circumstances, and corroborated by the practical construction given by the acts of the parties, as above shown, there remains no plausible ground of controversy; and therefore I think the court below did not err in construing the grant to be of a right of way appurtenant to Hopper's adjoining land. On June 4, 1891, Thomas Hopper granted and conveyed said northwest quarter of section 32, together with said right of way, and his other land adjoining said quarter section, to his daughter, Mary E. Roberts, who is one of the plaintiffs, in consideration of love and affection, in trust for the uses and purposes expressed in the deed as follows: "That is to say, to occupy and possess by herself or her tenants, to care for and preserve the same, to collect all the rents and profits arising from the rents and products of said lands, to apply and pay out all said rents and profits—First, in payment of taxes on said property; second, to the support of said Mary E. Roberts, and to the support and education of her said minor children, William Roberts, Edward Roberts, and Hubert Roberts, as well as any and all other children that may be born unto her in the future; and any surplus of said profits shall be retained by said Mary E. Roberts in her own right. And at the death of the said Mary E. Roberts the said hereinbefore granted and described property and premises shall immediately be conveyed in fee unto the said William Roberts, Edward Roberts, and Hubert Roberts, as well as to any other children that may have been born unto the said Mary E. Roberts, provided that any of them are then living; but, in case none of them survive their said mother, the said property and premises, upon the death of all the said children and their mother, the said Mary E. Roberts, be immediately conveyed and transferred in fee to Thomas Hopper, the party of the first part, or, in case he is not then living, it shall be then conveyed in fee to the heirs at law then surviving of the said Thomas Hopper in the proportions they would be entitled to inherit under the laws of the state of California at that time in force."

The complaint was demurred to on the ground that Hopper was improperly joined as a party plaintiff, and appellant contends that the court erred in overruling the demurrer. But it does not appear on the face of the complaint that Hopper was improperly joined. Nothing of Hopper's conveyance to his daughter appears in the complaint. Therefore the demurrer was properly overruled, and, since such misjoinder was not pleaded in the answer, it was waived.

A more serious objection, however, founded upon the conveyance of Hopper to his daughter, is that the finding of the court that all the plaintiffs are owners of the right of way is not justified by the evidence, for the alleged reason that the express grant of the right of way and the dominant estate by Hopper to his daughter in trust for the use of herself and children during her life, and remainder in fee to her children should they or any of them survive her, exhausted the entire estate, leaving no interest to the grantor (Hopper) in the land or right of way, which would entitle him to maintain an action for obstruction of the way. The question presented is whether the reversion to Hopper, if such it may be called, gives him such an interest in the way in question as entitles him to maintain this action. If not, the finding of the court below that he had such an interest is not justified by the evidence. If the alleged reversion depended only upon a contingency that in its nature must happen, there would be no question that he would be entitled to an action for any wrongful act injurious thereto. 2 Washb. Real Prop. (5th Ed.) p. 804; Add. Torts (6th Ed.) *409, *424; Gould v. Stafford, 91 Cal. 146, 27 Pac. 543. But it is manifest that the contingency in this case may never happen, and probably never will happen, namely, that Mary E. Roberts will survive all her children. Therefore Hopper has no substantial estate in the easement in question which may be properly called a reversion. To him pertains only a bare possibility of reverter. He has no present estate in the property conveyed by him to his daughter for life with remainder in fee to her children which entitles him to maintain an action for any injury to that property. In Keene's Appeal, 60 Pa. St. 504, it was held that "a bare possibility," under a will dependent upon the death of the first taker without issue, is not such an interest as will authorize a citation to the executor to account; and that the interest for such purpose must be such as will certainly fall into possession sometime. See, also, 1 Washb. Real Prop. (5th Ed.) pp. 65, 95; 2 Washb. Real Prop. (5th Ed.) p. 802. It follows, I think, that the finding that all the "plaintiffs are, and were at the time that the said way was obstructed, * * * the owners of said private way," is not justified by the evidence, though all except Hopper were such owners in common with defendant. But, since no damage was found or awarded, and the plaintiffs, other than Hopper, appear to be entitled to all the relief granted by the decree, a new trial will not be necessary; and, since the name of Hopper is not mentioned in the findings or judgment, and only in the title of the complaint, the error in the finding may be corrected by striking Hopper's name from the title of the complaint, the misjoinder having been waived by failure of defendant to plead it. De Celis v. Porter, 65 Cal. 3, 2 Pac. 257, and 3 Pac. 120. With this amendment of the complaint the findings on file and the judgment as entered will be correct.

Defendant's objection to evidence that the way, including the gateway, was used by

Hopper and his tenants before and up to the date of the grant of the way, was properly overruled. Such evidence was competent and relevant in aid of the construction of the grant, as tending to prove that the way was intended to be appurtenant to Hopper's adjoining land.

In view of the construction above given to the grant of the right of way, all other points made by appellant become immaterial, since they are grounded on the assumption that the grant was in gross, and the right granted not transferable. I think the court below should be instructed to amend the complaint by striking therefrom the name of Thomas Hopper, and that, with this amendment, the order and judgment should stand affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the cause is remanded, and the court below is instructed to strike from the complaint the name of Thomas Hopper. In all other respects the order and judgment appealed from are affirmed, the costs of the appeal to be borne by the appellant.

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113 Cal. 644

## MILLER et al. v. CURRY. (S. F. 394.)

(Supreme Court of California. Aug. 7, 1896.)

COUNTY OFFICERS — FEES — CONSOLIDATED CITY AND COUNTY.

Local or special laws prescribing the duties of officers in counties or cities, or affecting the compensation of any officers, being prohibited by Const. art. 4, § 25, and officers of a consolidated city and county being either county or city officers, Act March 28, 1895, establishing the fees of county and other officers, applies to the city and county of San Francisco, and repeals Act Feb. 9, 1866, which contained the fee bill for such city and county.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Henry Miller and others against Charles F. Curry. Judgment for defendant. Plaintiffs appeal. Affirmed.

E. B. & Geo. H. Mastick, for appellants. Delmas & Shortridge, for respondent.

HENSHAW, J. The action is mandate to compel defendant to file an answer in a civil case without the payment of the fees required by the act of March 28, 1895, establishing the fees of county, township, and other officers, and of jurors and witnesses, in this state. St. 1895, p. 267. The sole question presented on this appeal, and therefore the only question to be decided, is the applicability of the said act of 1895 to the city and county of San Francisco. At the time of the adoption of the present constitution, the fee bill for the city and county of San Francisco was found in an act passed February 9, 1866. St. 1865-66, p. 66. If that act was repealed by the act of 1895, then the judgment of the trial court is correct. If, upon the other hand, the act of 1866 is still in force, appellants' contention must prevail. Appellants argue that the act of March 28, 1895, though a general act, does not in terms repeal the act of 1866; that there is no necessary repeal by implication; that it does not in terms apply to the officers of a city and county; and that, therefore, the general statute is to be read as silently excluding from its operation the special statute of 1866. By article 11, § 5, of the constitution, the legislature is enjoined to provide a uniform system of county government for the various cities, to regulate the compensation of county officers in proportion to their duties, and to provide for the strict accountability of all such officers for the fees and moneys collected by them in their official capacity. By section 7 of the same article, the provisions of the constitution affecting cities and affecting counties are, so far as may be, made applicable to consolidated city and county governments; while by article 4, § 25, of the constitution, the legislature is prohibited from passing special or local laws affecting the fees or salary of any officer (subdivision 29), or prescribing the powers and duties of officers in counties, cities, cities and counties (subdivision 28), or regulating county and township business (subdivision 9). The law under consideration is general in its terms, and, while it makes no distinct mention of officers in consolidated governments, it undertakes to establish the fees, not alone of county and township officers, but of other officers in this state. In the somewhat anomalous municipal corporations recognized by the constitution, and known to the law as consolidated cities and counties, the officers do not lose their distinctive characters as county officers or city officers merely because they hold within the corporate limits of such government. The county clerk of the city and county of San Francisco, the sheriff of the city and county of San Francisco, the recorder of the city and county of San Francisco, are each and all county officers. They have no place properly as officers of a city. Upon the other hand, the mayor of the city and county is distinctly and separately a city officer, as distinguished from a county. A law, therefore, which, under the constitutional mandate, undertook to regulate the duties or the compensation of county officers, would fail of the basic requisite of the constitution that all laws of a general nature shall have a uniform operation (Const. art. 1, § 11), if it should be held that its terms did not apply, and were not meant to apply, to county officers in consolidated governments; and it must therefore be concluded, without room for question, that the act under consideration is in its terms applicable to the city and county of San Francisco.

But, when this point has been reached, appellants contend that they may invoke the rule and principle expressed in Home for Inebriates v. Reis, 95 Cal. 142, 30 Pac. 205; and that, under the authority of this case, the city and county of San Francisco must be excepted from the operation of the law. All that this court did in the Reis Case was to recognize and give effect to certain well-settled principles governing the interpretation of statutes. It founded the decision in that particular case upon the maxims that repeals by implication are not favored, and that, where permissible, an earlier special statute will be construed to harmonize with a general later one. It was, in short, but the application of the maxim, "Generalia specialibus non derogant." But this rule has its limits, and means no more than that in arriving at the intent of the legislature, which is always to govern, and in endeavoring to deduce that intent from the acts themselves, unless there be plain and explicit terms of repeal in the later act, or unless the provisions of the two acts be so inconsistent as that both may not stand, it will be assumed that the legislature, in making general provision for all cases, did not mean to destroy the effect of a rule laid down with explicit care and directness, and applicable to a particular class of cases. But this, after all, is but a method of arriving at the legislative intent when other and better means are not available. So it was held in the Reis Case that there was no such repugnancy in the later act as made plain the intent of the legislature that the moneys provided for in the earlier act were no longer to be paid over to the Home of the Inebriates.

There are other rules of construction, however, of equal dignity and potency. The rules that we have been considering apply only in a case where a repugnancy between the two acts is not manifest. If such a repugnancy exist, then it is well settled that the earlier act must fall. End. Interp. St. § 206. Only so far as the two acts are not in their terms incompatible with each other is the earlier act allowed to stand. It is a fundamental rule for the interpretation of statutes that where the instrument is susceptible of two permissible constructions, by one of which it is valid, by the other of which it is void, the one in favor of its validity and of natural right will prevail, for courts will only upon the clearest showing of invalidity overthrow the enactments of a co-ordinate department of government. The legislature is presumed to know the constitution and the limitations upon its powers therein set forth. In the case at bar, as has been said, the legislature had only the power to pass a general law upon the subject in question, applicable to all county officers. If it was the legislative intent (and the legislative intent is always the ultimate fact to be determined) to except the county officers of the city and county of San Francisco from the operation of the law, this might as well have been done by an exception expressed in the terms of the act itself. No one would for a moment question but that such an exception would impair the general operation of the law, and thus violate the provisions of article 1, § 11, of the constitution. In that event, either the exception would be void, or, if inseparable from the other parts of the law, the whole act would fall. But that constitutional provision would be no less violated if the legislature did not mean and intend that the statute of 1866 should be repealed by the act of 1895. The latter would still be a law purporting to be general in its terms, yet not having a uniform operation, by reason of the exception indicated. There is thus a plain repugnancy between the act of 1866 and that of 1895, which cannot be disposed of except upon the conclusion that the legislature intended in the act of 1895 to pass a valid law, and that, to do so, the repeal of the act of 1866 necessarily resulted. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

113 Cal. 688

## ROWE v. SIMMONS et al. (S. F. 196.)[1]

(Supreme Court of California. Aug. 8, 1896.)

PARTNERSHIP—EVIDENCE OF DISSOLUTION — DISMISSAL AS TO ONE DEFENDANT.

1. A chattel mortgage given on the personalty of a firm, to one who had been a member thereof, by the other members, is admissible in support of the contention of the mortgagee that the firm was dissolved by his selling out to the other members; such mortgage being given to secure payment of the purchase money.

2. In an action to dissolve a partnership, the court, finding that one of the defendants was not a member of the firm, may dismiss him from the action, giving him judgment for costs against plaintiff, though the action is to proceed between plaintiff and the other defendants.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by William B. Rowe against Joseph S. Simmons and others. Judgment for defendant Philip Simmons. Plaintiff and one of the defendants appeal. Affirmed.

C. F. Hanlon, for appellant Rowe. E. C. Harrison, for appellant Simmons. A. C. Searle, for respondents.

McFARLAND, J. Judgment was rendered by the court below in favor of defendant Philip Simmons against the plaintiff. The action is to dissolve an alleged partnership.

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[1] Rehearing denied. Beatty, C. J., dissenting.

In the original complaint, which was filed May 30, 1877, it was alleged that a partnership existed between the plaintiff and the defendants Joseph S. Simmons and Alonzo R. Simmons; that Philip Simmons was taken into the partnership in January, 1863, and remained a partner until about the 18th of May, 1872, "when the same was dissolved by the retirement therefrom of said Philip Simmons." Sixteen years afterwards, to wit, August 25, 1893, the plaintiff filed a supplemental complaint, in which he made the said Philip Simmons a defendant, and charged that he (Philip) was a member of the partnership. Philip filed an answer in which he denied that he was a partner, or had been since the —— day of May, 1872: and he also pleaded the statute of limitations, and that the alleged cause of action of the plaintiff had become stale, and therefore not enforceable in a court of equity. The court found that the partnership was dissolved by the consent and agreement of all the co-partners in May, 1872. It also found that the cause of action set forth in the amended complaint against Philip Simmons was barred by the provisions of section 343 of the Code of Civil Procedure, and by laches; that the action as to said Philip should be dismissed, and judgment entered in his favor against plaintiff. And judgment was accordingly entered in favor of said Philip against the plaintiff, to the effect that plaintiff take nothing by the action against said Philip, and that the latter have judgment for his costs and disbursements. The plaintiff moved for a new trial, and his motion was denied. He appeals from the judgment, and from the order denying a new trial. The defendant Alonzo Simmons also joins in said appeal.

It is unnecessary to consider the findings of the court as to the statute of limitations and laches, because the finding of the court that the partnership was dissolved in May, 1872, and that since then the said Philip has not been a member of said partnership, is amply supported by the evidence. In May, 1872, the other partners bought out the said Philip, and all his interest in said partnership and the property owned by the partnership, for $15,000, and gave said Philip two mortgages,—one upon certain real property held by the partnership, for $9,000, and a chattel mortgage for $6,000 upon the personal property held by said partnership. The said Philip then went to the Eastern states, and remained several years; and it was clearly proven by witnesses that all the remaining members of the firm declared that they had bought out the said Philip, and that the partnership was dissolved. Afterwards the said Philip, respondent herein, brought two actions to foreclose said mortgages. To these actions the other partners set up that they had been deceived as to the value of respondent's interest in said partnership; that they had not had an opportunity to examine the books, and erroneously believed that the firm, at the time of "Philip's retirement," was owing him $15,000, but that, instead of that being the fact, he, the said respondent, was really in debt, to the firm and to the other partners. They described themselves as his "remaining partners," and made no pretense that the partnership had not been dissolved. It is quite apparent from their answers that their defense simply was that respondent had fraudulently induced them to pay more for his interest than it was worth, and the whole theory of their defense to these actions was that the partnership had really been dissolved. Neither the plaintiff herein, nor either of the other partners, ever sought to set aside the dissolution of the partnership. The plaintiff himself introduced the judgment rolls in these two actions to foreclose said two mortgages. Afterwards defendant introduced in evidence the said chattel mortgage, to which the appellant objected, and, his objection being overruled, the plaintiff excepted; and this exception is one of the grounds upon which plaintiff asks for a new trial. The objection, however, we think, was properly overruled. Appellant seems to argue that these two suits and the mortgages are relied upon by respondent as estoppels. But, assuming that they were not estoppels, they were still evidence tending to show the fact of a dissolution of the partnership. They were transactions which would not likely have occurred if there had not been a dissolution of the partnership by the sale of the interest of respondent to the other partners. The object of the introduction of the chattel mortgage by the respondent was said by his attorney at the time to be for the purpose of showing a dissolution,—"transactions that would not be likely to take place in case there was not a dissolution." When the respondent returned from the Eastern states, several years after the time of the alleged dissolution of the partnership, it seems that he collected some rents on certain real property which had been owned by the partners, and this fact is urged by the appellants as showing that the partnership had not been dissolved. But the title to the real property was in the individual partners, and one of them had sold his interest in the real property to the respondent Philip, and he claimed that he had the right, as such owner, to collect the rents. He took no part whatever in the general business of the partnership. At the time of the dissolution, when he took the mortgages, he made a deed of his interest in the real estate to the other partners; but he had not delivered said deed, because he claimed that he had a right to retain it until they had paid him the $15,000. It may be said that these facts, and some others not necessary to mention, had some tendency to support the contention of appellants that the partnership had not been dissolved, but the most that can be said is that these facts made some conflict of evidence. All the evidence, however, taken together, not only justified the finding of the court upon the ground of a conflict, but strongly preponderates in favor of the conclusion reached by the court.

We see no good foundation for the technical point made by appellants, in their final brief, that the judgment is invalid because it is not a final determination of the rights of all the parties. The court, having found that the plaintiff had made no case against the defendant Philip, had clearly the power to dismiss the action as to him, and to give him judgment against plaintiff for his costs, notwithstanding the action was to proceed as between the plaintiff and the other defendants. The respondent, not being a partner, and therefore not being in any way liable to plaintiff upon the matters alleged in the complaint, was entitled to be dismissed from the action. Code Civ. Proc. § 581. Judgment and order affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.

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113 Cal. 692

## EQUITABLE NAT. BANK v. GRIFFIN & SKELLEY CO. (S. F. 47.)

(Supreme Court of California. Aug. 11, 1896.)

BILL OF EXCHANGE—PAYMENT BY CHECK.

A bill of exchange drawn on defendant by C., payable to plaintiff, was presented by plaintiff's agent to defendant. Defendant's manager thereupon called on the agent, and gave its check for the amount, with direction that the draft, which was in the possession of the agent's clerk, then out of the office, should be marked "Paid," and be sent to it. It was so marked and sent that evening. *Held*, that the giving of the check constituted payment, and not a mere acceptance; so that defendant, on learning of the insolvency of C. before payment of the check, could not demand the return of the check in exchange for the draft.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Equitable National Bank against the Griffin & Skelley Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lloyd & Wood, for appellant. E. S. Pillsbury, for respondent.

TEMPLE, J. This appeal is by the defendant, a corporation, from the judgment, and from an order denying a new trial. It is conceded that the facts are fairly stated in the findings. From the findings it appears that the appellants had dealings with A. R. Clark & Co., of Cincinnati, Ohio. They bought and sold goods to and from each other. It was the understanding and agreement between them that each firm should draw upon the other as shipments were made. Bills drawn by defendant upon A. R. Clark & Co. were drawn payable 60 days after acceptance, but those drawn by A. R. Clark & Co. upon defendant were payable at sight, less 1½ per cent. for cash. December 8, 1892, A. R. Clark & Co. sold and shipped to defendant goods to the amount of $617.50, and thereupon mailed the bill to the defendant, and also, in pursuance of the previous agreement, drew a bill of exchange on the defendant, payable at sight to plaintiff, for the amount of the goods shipped. The bill of exchange was delivered to plaintiff, which thereupon paid the amount to A. R. Clark & Co. The bill was then sent to plaintiff's agent in San Francisco for collection, being received there December 13, 1892, and on the same day was presented to defendant for payment. Defendant's manager on the same day called at the office of Wells, Fargo & Co., which was plaintiff's agent, and gave its check on the Crocker-Woolworth Bank for the amount. The clerk having the bill of exchange not then being at the office, the bill was sent by Wells, Fargo & Co. to defendant that evening by mail, as requested by defendant. Pursuant to that request, the bill of exchange was marked "Paid." It was received by the defendant on the following morning. Some time after its reception, but on the same day, defendant learned that A. R. Clark & Co. had become insolvent. Then defendant sent to plaintiff's agent, offered to restore the bill of exchange, and demanded the return to it of the check on the Crocker-Woolworth Bank, which had not then been paid. This Wells, Fargo & Co. refused to do, and then defendant requested the bank to refuse payment of the check, which it did. Plaintiff then demanded payment from defendant, and, payment having been refused, this action was commenced upon the check.

Appellant contends that at the time the return of the check was demanded the check given by it may be regarded as an acceptance, and that as the plaintiff still held it, and its position had been in no way changed by reason of the act of defendant, it was entitled to recall the acceptance, under the rule laid down in section 3198, Civ. Code. But the position of plaintiff had been changed by the transaction. The check given by defendant would not have constituted payment unless it had been so understood. Defendant delivered the check with express direction that the draft of A. R. Clark & Co. should be marked "Paid," and sent to it; and these terms were acceded to, and the draft was so marked and surrendered to defendant. This shows a distinct understanding by both parties that the bill of exchange had been paid. Suppose afterwards, but before the check was paid, defendant had become insolvent; could not A. R. Clark & Co. have contended that the bill of exchange had been paid? The authorities seem to be uniform that under such circumstances the money paid cannot be recovered by the drawee. Bank v. Burkham, 32 Mich. 328; Hoffman v. Bank, 12 Wall. 181; Ft. Dearborn Nat. Bank v. Carter, Rice & Co., 152 Mass. 34, 25 N. E. 27. It follows, I think, that the judgment must be affirmed, and it is so ordered.

We concur: HENSHAW, J.; McFARLAND, J.

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(114 Cal. 10)

## PEOPLE v. MILLER. (Cr. 87.)

(Supreme Court of California. Aug. 12, 1896.)

HOMICIDE — PLEADING GUILTY — WITHDRAWING PLEA—EVIDENCE IN MITIGATION OF PENALTY.

1. Evidence of intoxication of defendant at the time of the murder is inadmissible in mitigation of the penalty; he having pleaded guilty, and it appearing from his confession and other testimony that the crime was deliberate and premeditated, and in accomplishment of a pre-existing plot, and that he at the time knew, and afterwards confessed in detail, the part he took in it.

2. Nor is evidence of good character admissible for such purpose, under such circumstances.

3. Where one makes a confession of a murder, and more than six weeks thereafter, when he had had aid of counsel for a month, withdraws his plea of not guilty, on their advice, after repeated consultations, and after being fully informed of his rights and the consequences of his act, there is no abuse of discretion in refusing to allow the withdrawal of his plea of guilty, on the ground that it was made in fear of and to avoid mob violence; the request to withdraw not having been made till after it was apparent that the court would impose the death penalty, and there being nothing in the evidence which would call for a lesser punishment.

In bank. Appeal from superior court, Yuba county; E. A. Dairs, Judge.

Marshall J. Miller, indicted for murder, appeals from the denial of a motion that he be allowed to withdraw his plea of guilty. Affirmed.

C. A. Webb and Richard Belcher, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. Upon the 8th day of May, 1895, this defendant was charged by information with the crime of murder. Upon the 11th day of the same month, he was brought before the superior court for arraignment. At his request the court appointed two attorneys to represent him, and granted him until May 13th to consider his plea. Upon the last-named date the defendant came before the court with his counsel and pleaded not guilty to the charge. The plea was accepted and entered, and the cause set for trial upon the 17th day of June following. Upon that day, the court being actually engaged in the trial of another cause, the case of defendant was continued until June 19th. Upon June 19th defendant appeared in court with his two counsel, and the case was called for trial. Thereupon Mr. Belcher, counsel of and speaking for defendant, stated to the court, in open court, that defendant desired to withdraw his plea of not guilty, theretofore entered, and to plead guilty to the charge in the information set out. The court then asked the defendant if that was his desire, and he answered "Yes." The court then asked him if he understood that upon a plea of "Guilty" the court would be obliged to hear testimony and receive evidence for the purpose of determining the degree of the crime of which he stood charged, and to which he asked leave to plead guilty; and he said he did, and that he had been fully advised by his said attorneys as to all of said matters. Thereupon the court made its order that the defendant be permitted to withdraw his said plea of "Not guilty," and the same was by him (said defendant) then withdrawn. The court asked the defendant whether he was guilty of the charge of murder contained in said information. Whereupon the defendant personally pleaded that he was guilty thereof. The court thereupon stated that it would then proceed to hear testimony and receive evidence in the case for the purpose of determining the degree of said crime; and, no objection being made, the court then proceeded to hear and receive the same. At the conclusion of the taking of the evidence offered by the people, the court asked defendant if he had any testimony or evidence to offer; and he answered, by his counsel, that he had none. The hearing of evidence took until 11:30 a. m., at which hour the court continued further proceedings until 4 o'clock p. m. of the same day. At this last hour,—all the parties, with their attorneys and counsel, being present,—the court announced that, from the evidence, it was satisfied that the murder of Julius Pier was committed by defendant in the perpetration of robbery and burglary, and "that there are no facts or circumstances in the case which ought to mitigate the extreme penalty of the law." The defendant was thereupon adjudged guilty of murder in the first degree, and ordered to appear for sentence upon the 29th day of June. Upon the 29th day of June, defendant, with his counsel, came into court, and moved for a postponement of the time of pronouncing judgment upon defendant, to the end that defendant might be enabled to introduce evidence in mitigation of punishment. Thereupon further proceedings were postponed until July 3d. Upon this last-named day the defense asked a further postponement to procure evidence of the previous good character of the defendant, and of the fact that at the time of the murder he was intoxicated so that "he was unable at the time to thoroughly appreciate his position, or to thoroughly distinguish right from wrong, or to form an intent to commit the crime." The court denied this motion, properly holding that under the circumstances the evidence was valueless,—as to intoxication, because the defendant's confession admitted in evidence, with the other testimony which was taken, showed that the crime was deliberate and premeditated, and was perpetrated in accomplishment of a pre-existing plot; that the defendant knew at the time, and afterwards confessed in detail, the part he took in it; and finally because, if incapable of forming a criminal design, defendant was innocent of any crime, which consideration was removed by his plea of guilty. As to the evidence of previous good character, the ruling was based upon the sound principle that evidence of this character may be introduced where the question of a defendant's guilt is in doubt, but not where it is admitted. After this ruling, and the consequent failure to secure further postponement, and when the court was upon the point of pronouncing judgment of sentence upon defendant, his counsel moved that defendant be allowed to withdraw his plea of guilty and plead not guilty, and, with the motion offered, read and filed defendant's affidavit, made upon July 3d (the day of the hearing), which set forth that defendant, while in jail, feared mob violence, and summary death at the hands of lynchers, and that when he pleaded guilty he did so "without due deliberation, and without fully realizing his position, and in the hope that by so doing the punishment to which he would be exposed, were he tried before a jury, would thereby be mitigated." No other showing than that of the affidavit was made. The court denied the motion, from which order defendant appeals.

In immediate connection with the quotation from defendant's affidavit, it is proper to set forth exactly what the record shows: "The Court: Are you ready in the case of People v. Miller? Mr. McDaniel: The prosecution is ready. Mr. Belcher: In this case the defendant, Miller, wishes, with the permission of the court, to withdraw his former plea of not guilty, and to plead again to the information by changing that plea. The Court: That means but one thing. He wishes to withdraw the plea of not guilty, and— Mr. Belcher: To plead guilty. That is the only interpretation to be put on it. The Court: Have you fully informed the defendant with regard to this matter? Mr. Belcher: I have. I have talked with him several times upon the proposition. I have submitted to him all that could be, in my judgment, urged for and against, and have asked him what to do, and he has told me that he wishes to plead guilty. I think he understands it fully. The Court (to defendant, Miller): Have you discussed this matter fully with your attorney? A. Yes. Q. And do you understand the situation thoroughly? A. Yes. Q. Do you understand that if you withdraw your plea of not guilty, and plead guilty, the court will have to take testimony and determine the degree? Do you understand that? A. Yes. Q. And, under those circumstances, do you wish to withdraw your plea of not guilty? A. Yes." The clerk was thereupon directed by the court to enter the withdrawal of the plea of not guilty formerly made by the defendant, Marshall J. Miller. "The Court (to defendant Miller): Now stand up. Do you understand what the information against you is? That it charges you with the crime of murder? A. Yes. Q. What is your plea,—guilty or not guilty? A. Guilty."

Upon May 2d, more than two weeks before he pleaded guilty, defendant had made a voluntary confession, which was introduced in evidence. In that confession he minutely related the circumstances of the murder, which was brutal and atrocious to the last degree. Defendant and his confederate had been plotting for several weeks to rob Julius Pier, a neighboring storekeeper. In the nighttime they went to his store, in the rear of which he slept. They carried with them pistols and a bludgeon, and ropes and straps with which to bind their victim. They were unmasked. Masks were unnecessary, for they appear to have fully contemplated his murder if he should discover them. He was absent. They forced an entrance, and were rifling the place when he returned. They struck him blow after blow with the bludgeon. They held him down, tied him hand and foot, and gagged him. The gag was so placed that it would and did produce suffocation. The murderers were smeared with his blood. With the staring, tortured, dying man upon the floor before them, they carried off their plunder, and left him to his death.

Appellant's contention is that the court abused its discretion in not allowing him to withdraw his plea, interpose a plea of not guilty for the second time, and go before a jury for trial. Before judgment the court may at any time permit this to be done (Pen. Code, § 1018), and the discretion thus vested is one to be liberally exercised. The law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considerate in viewing the motives which may influence him to take one or another course. Therefore it will permit a plea of guilty to be withdrawn, if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was unduly and improperly influenced, either by hope or fear, in the making of it. But the mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion. People v. Lennox, 67 Cal. 113, 7 Pac. 260. To hold that it did would be equivalent to saying that a defendant might speculate upon the supposed clemency of a judge, with the right to retract if at any time before sentence he began to think that his expectation would not be realized.

And this we are constrained to believe is exactly what this defendant attempted to do. He had made free and voluntary confession of his atrocious crime, in all its details. Upon June 19th, more than six weeks after making his confession, when he has had the aid of counsel for nearly a month, under their advice, and under their statement and his own that after repeated consultations he is fully advised of his rights, and of the consequences of his act, he withdraws his plea of not guilty. After his confession had been made known for more than six weeks, all of which time he had passed in the security of his jail, his fear of mob violence could not have been very keen, and as the court, of its own knowledge, says, was not justified by the facts. Upon June 19th the court makes plain intimation to the defendant that it will be compelled to impose the death penalty upon him, and continues the case 10 days longer for that purpose. At the next hearing, on June 29th, no suggestion is made by defendant that he desires to withdraw his plea, or that he has been improperly induced by fear or hope to the making of it. He simply asks time to procure evidence in mitigation of punishment. This time is granted him, though at the former hearing he declared that he had no evidence to offer. Again he comes before the court, upon July 3d, and again a motion is made for postponement, still with no suggestion that defendant desires to withdraw his plea. Only after it is made manifest that defendant is to suffer the extreme penalty, and that no further delay will be permitted, do counsel produce the affidavit, itself made upon the day of the hearing, but not offered until that moment, and ask to be allowed to retrace all the steps thus advisedly taken. What conclusion can be reached, except the one that, because the court was about to pronounce sentence of death, defendant and his counsel, knowing that he could not fare worse at the hands of a jury, and might fare better, sought an opportunity to essay the other chance. If we could perceive anything in the evidence which would have called for a lesser punishment than that which the trial court was about to impose, some reason might appear why defendant should have been permitted to withdraw his plea and put his fate before a jury. No showing of this kind is made. The record not only fails to show an abuse of discretion, but, on the contrary, from first to last, makes manifest that the trial judge, placed in an unusual and most trying position, conducted all of the proceedings with a just and even solicitous regard for the defendant's rights, and ruled as alone it was permissible for him to rule under the facts before him. The order appealed from is affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND. J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

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113 Cal. 612

## ELLIS v. MASSACHUSETTS MUT. LIFE INS. CO. (S. F. 144.)

(Supreme Court of California. Aug. 4, 1896.)

LIFE INSURANCE—PROOF OF DEATH.

A life policy provided that, if any premium was not paid when due, the policy should cease, except as provided in Act Mass. April 10, 1861, "subject to which this contract is made." It also provided that no claim should exist under it unless notice and proof of death were given within two years from death of insured. Act Mass. April 10, 1861, provides that in case of failure to pay premiums the policy shall not be forfeited because thereof, but the net value of the policy at the time of the default shall be treated as a premium to uphold the policy so long as its amount will serve the purpose, "provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease." *Held*, that the policy waived the 90-days provision of the statute, and allowed notice and proof of death within 2 years, even where there had been default in payment of premiums.

Commissioners' decision. Department 2. Appeal from superior court, San Francisco county.

Action by Leila Ellis against the Massachusetts Mutual Life Insurance Company. Judgment for defendant. Plaintiff appeals. Reversed.

Freeman & Bates, for appellant. Morrison, Stratton & Foerster, for respondent.

SEARLS, C. This is an action to recover upon an insurance policy issued by the defendant, a corporation, organized and existing under and by virtue of the laws of the state of Massachusetts, on the 17th day of December, 1878, to William H. Ellis, of New Orleans, in the state of Louisiana, insuring the life of him, the said William H. Ellis, for $2,000; loss payable to Leila Ellis, wife of the insured, and plaintiff herein. A demurrer was interposed to plaintiff's amended complaint, based upon the ground that said complaint does not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and judgment rendered in favor of defendant. Plaintiff appeals.

The amended complaint shows that the annual premium was payable in quarterly installments, and was paid to and including the quarterly installment which fell due September 17, 1885. Thereafter no premiums were paid. The insured died at New Orleans in October, 1892. In July, 1894, plaintiff presented due notice and satisfactory proof of death to defendant, and defendant refused payment. Two of the provisions of the policy are as follows: "Second. That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured, and that, if any subsequent premium or installment of premium on this policy shall not be paid on or before the day when due, then this policy shall cease and determine, except as provided in chapter 186, Laws of the Commonwealth of Massachusetts, approved April 10, 1861, under the provisions of which law this contract is made. (A copy of this law is printed on the third page of this policy.)" "Thirteenth. That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company, at the home office, in Springfield, Massachusetts, within two years after the death of the person whose life is hereby insured, and that, in accordance with the provisions of the General Statutes of the Commonwealth of Massachusetts (chapter 58, section 16), the time within which any suit shall be brought against the said company on any claim under this policy is hereby limited to two years from the time when the right of action accrues."

The statute of Massachusetts, approved April 10, 1861, is set forth in the complaint. Without quoting the statute at length, it is sufficient to say that the policy issued and was payable in the state of Massachusetts, and that by the statute referred to in the policy, and set out in the complaint (chapter 186), it is provided that no policy of insurance on life hereafter issued (after 1861) shall be forfeited or become void by the nonpayment of premium thereon, but in such cases the net value of the policy when the premium becomes due and is not paid shall be determined according to the "combined experience" or "actuaries" rate of mortality, with interest at 4 per cent. per annum. Four-fifths of such net value, after deducting all indebtedness to the company, if any, shall be considered a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium. If the death of the insured occurs during the term of the insurance covered by the value of the policy as aforesaid, and if no other condition of the policy has been broken, except the nonpayment of premiums, the company shall be bound to pay the amount of the policy, the same as if there had been no lapse of premium, "provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease." It is further provided that the company may deduct from the amount due on the policy the premiums forborne, and 6 per cent. interest thereon. The complaint shows that the net value of the policy at the date when the payment of premiums ceased constituted a sum which kept the policy alive up to December, 1895, and that the insured died in 1892. Plaintiff further shows, in apt words, that she was not aware of the death of the insured until June, 1894, and that she gave notice, etc., and in July, 1894, presented proofs, etc., to defendant. The court below held, in sustaining the demurrer, that under section 2 of chapter 186 of the Laws of the Commonwealth of Massachusetts, approved April 10, 1861, it was incumbent upon the beneficiary under the policy to give notice of the claim and proof of the death to the company within 90 days after the decease of the insured. The propriety of this ruling is the only question involved on the appeal. Appellant's contention is that "the defendant, in its policy, waived presentation of proof of death within the ninety days required by the statute of 1861." We proceed to the consideration of the question of waiver by the defendant.

The statute of 1861 simply provides that, in case of failure to pay the annual premiums, no forfeiture shall occur by reason thereof, but treats the sums already paid, after making the deductions therein provided for, as a premium to uphold the policy so long as its amount will serve such purpose. Broadly stated, it treats the net value of the policy at the date of default as a cash payment of that date on account of premiums, and the policy will not be forfeited until such payment is exhausted. This is, by the statute, termed "temporary insurance." If the death of the insured occur within this period of temporary insurance, and no other condition of the policy than the nonpayment of premium has been violated by the insured, "the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding, provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days," together with another proviso not important here. This requirement in reference to the time of notice and proof of death is imperative, and binding upon the insured and his beneficiaries. But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law or in a contract intended for the benefit of a party may be waived by the party to be benefited thereby. Did the insurers waive this clause in the Massachusetts statute? We think this question should be answered in the affirmative. It inserted in its policy the following condition: "That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company, at the home office, in Springfield, Massachusetts, within two years after the death of the person whose life is hereby insured." By every rule of construction in such cases, the effect of this clause was to give two years after the death within which to give notice and furnish the proof of death. If it was not intended to abrogate the proviso of the Massachusetts statute requiring such notice and proofs to be made within 90 days, then it is a snare and a delusion, well calculated to entrap the unwary, and lull them into fancied security until, all too late, they find themselves deceived, and beyond the pale of redress. It cannot properly be said that the term of two years is given to impart notice and make proofs of death in case premiums are all paid upon the policy, and that this is a case of special insurance, to which the two-year clause is not applicable, for the reasons: (1) The two-year clause is general, and not limited to any particular exigency; (2) the insurance, in case of nonpayment of premiums, is only special in the sense that the policy is kept alive only so long as the net value of the policy will continue to extinguish the premiums. The right to recover in such a case, if any, is upon the policy, and is "the same as if there had been no lapse of premium." To say that in such a case no recovery can be had without showing that notice and proofs of death were given within 90 days is to beg the very question in issue,—to assume there is no waiver, which is the question to be determined. The waiver of notice and proofs within 90 days, by fixing the period at 2 years, stands in lieu of the 90-day requirement, and, when consummated within 2 years, is as complete as it would have been, without the waiver, if performed within the 90 days. The defendant loses nothing by such waiver. Under the statute, when it pays the policy it is authorized to deduct the premiums which fell due during the time the net value of such policy stood as security therefor, and extending the time to make the proofs of death will frequently have the effect of deferring the day of payment to the advantage of the insurer. We recommend that the judgment be reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions of the court below to overrule the demurrer to the complaint.

114 Cal. 1

## BADDELEY v. SHEA. (S. F. 85.)

(Supreme Court of California. Aug. 12, 1896.)

NEGLIGENCE—DEFECT IN STEPS TO PRIVATE HOUSE —INSTRUCTIONS.

1. Where a board in the platform to the steps leading from a private house broke as one hired to take a trunk from the house was passing over it with the trunk, the owner of the house is not liable for negligence, if he exercised such care in and about keeping the platform in good condition as housekeepers of common prudence are accustomed to exercise; and the platform having been properly constructed, and one which would ordinarily wear many years without repair, and the defect being latent (dry rot on the underside) and unknown to the owner, and no indication being given by the platform that it was unsafe, and the owner not having any knowledge or notice of any deficiency of ventilation under it, he cannot be held negligent for not having examined the platform for any such defect.

2. An instruction, in an action against the owner of a private house for injury from the breaking of a board in a platform to the steps leading from the house, that "those latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the platform was constructed in a good and substantial manner, and gave no indication of being unsafe, up to the accident, * * * then I instruct you the defendant was under no legal obligations to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform was secret, and unknown to defendant, and was incident to the ordinary wear and tear of said platform, then you will find a verdict for defendant,"—is not a charge as to fact.

Commissioners' decision. Department 2 Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by William Baddeley against James Shea. Judgment for plaintiff. Defendant appeals. Reversed.

Sawyer & Burnett, for appellant. Estee, Miller & Shurtleff, for respondent.

VANCLIEF, C. Action for recovery of damages for personal injuries. Plaintiff, being a servant of the City Transfer Company, of the city of San Francisco, called at the private dwelling house of defendant, at the latter's request, for the purpose of carrying two trunks from there to the railroad depot. After having taken the smaller trunk to his wagon, he returned for the larger trunk, which was very heavy. Defendant then told him he would not be able to carry that heavy trunk downstairs, and offered to assist him; but plaintiff declined the proffered assistance, and placed the trunk upon his back, saying to defendant, "You put that young lady on top of this trunk, and I can take her down." He then went down the inside stairs, passed out at the front door and down the front steps to a platform about three steps above the sidewalk. When he stepped down upon the platform the plank upon which he stepped broke, letting his leg through the opening made by the break, and fracturing one of the bones (fibula) at the juncture of the ankle. The issues of fact were tried by a jury, whose verdict was in favor of the plaintiff, and the judgment of the court was in accordance with the verdict. The defendant has appealed from the judgment, and from an order denying his motion for a new trial.

The evidence, without conflict, shows that the front steps, including the platform which broke, was built for defendant, about 7 or 8 years before the accident, by a carpenter and builder whose competency and skill were in no degree impeached; that it was well constructed, of first-rate material, which would ordinarily wear 16 to 20 years without repair; that it had been repainted every year; that it appeared to defendant and those who had passed over it to be perfectly sound and safe, up to the time of the accident; and that the defendant had no knowledge that it was unsound, unsafe, or at all defective, until after the accident. But an examination after the accident disclosed a partial decay (dry rot) of the underside of the plank that broke, and of a stringer on which it rested, which was not apparent from the outside, and which could not have been discovered without making an opening through or under the vertical side of the steps sufficient to admit a person under the platform, which was only about one foot above the ground. It is not pretended by respondent that there was any defect in the construction of the steps or platform, except that he contends there was not sufficient ventilation under them, and upon this question the evidence was conflicting. On the part of defendant it was shown that the open space under the platform extended back to, and connected with, the open space under the house, and that the open space under the house was ventilated in the ordinary way; but on the part of plaintiff it was contended that there should have been ventilating holes immediately connected with the open space under the platform and steps. But there was no evidence that defendant had any knowledge or notice of the alleged deficiency of ventilation, nor that any other ventilation than that under the house was necessary.

At the request of defendant's counsel the court properly, I think, gave to the jury the following instruction: "The defendant is only bound to exercise the care which housekeepers, or owners of houses, of common prudence are accustomed to exercise; and, if you find from the evidence that the defendant did exercise such care in and about keeping the platform in good condition, then your verdict will be in favor of the defendant." Counsel for plaintiff contended that under the rule expressed in this instruction the defendant must be found guilty of negligence, in that he had not examined the underside of the platform for the purpose of ascertaining whether it was sound and safe, "this being the only negligence claimed to have been proved." In answer to this, defendant's counsel contended that to have made any examination of the underside of his steps or platform within eight years after they were built, under the circumstances proved, and without any notice or indication that they were unsound or unsafe, would have been extraordinary care and vigilance on the part of the defendant, which the law does not require, and to this effect asked the following instruction, which was refused on the express ground that it was a "charge as to fact": "Those latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the platform through which the plaintiff broke was constructed in a good and substantial manner, and gave no indication of being unsafe, up to the accident testified to, then I instruct you the defendant was under no legal obligations to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform was secret, and unknown to defendant, and was incident to the ordinary wear and tear of said platform, then you will find a verdict for the defendant." I think this instruction is substantially correct, and should have been given. In speaking of the liability of owners of private houses for the consequences of defects therein dangerous to invited visitors on lawful business, Mr. Wharton, in his book on Negligence (section 825), says: "For the question, when such liability is mooted in reference to such a visitor, is whether the proprietor exercised in his house the care which good housekeepers are accustomed to exercise. What is such care? Certainly, when we recollect the great varieties of habit and taste in this respect, all we can ask is that the house, to those visiting it, should be free from those obvious defects of which an occupant, not an expert in mechanics, would be cognizant. Those latent defects which are either concealed in defective workmanship, or are incidental to the ordinary wear and tear of houses, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose;" citing English cases. There can be no question that in such cases the law imposes the duty of only ordinary care, which is properly defined to be such as good housekeepers ordinarily exercise to avoid danger of personal injuries in their own private dwelling houses. Nor do I think it questionable that an examination by the defendant of his stairs and platform, at any time before the accident, for the purpose of detecting latent defects, from which, under the circumstances and facts assumed and hypothetically stated in the requested instruction, would have been extraordinary care.

The only ground upon which the instruction was refused is that it instructs as to questions of fact which should have been submitted to the jury. But I do not so understand it. It merely applies the law to hypothetical facts, and submits to the jury the question whether the facts hypothetically stated are true. The questions of fact thus submitted were: (1) Whether the platform which broke had been constructed in a good and substantial manner; (2) whether the defects therein, if any, were latent, and were unknown to defendant before the accident; (3) whether the platform gave any indication of being unsafe before the accident. And, in case the jury should find the affirmative of the first two of these questions, and the negative of the third, instructed, as legal conclusions, that it had not been the duty of the defendant, before the accident, to examine the platform for the purpose of discovering latent defects, either in the workmanship, or caused by ordinary wear, and that the verdict of the jury should be for the defendant. That these were simple conclusions of law is unquestionable. Shear. & R. Neg. §§ 52, 53. And that such conclusions were correct appears, not only from the above extract from Wharton on Negligence, supported by English cases, but from the following American cases: Lunney v. Concord, 58 Fed. 913; Hobbs v. Stauer, 62 Wis. 108, 22 N. W. 153; De Graff v. Railroad Co., 76 N. Y. 125; Provision Co. v. Hightower, 92 Ill. 139; Hoffman v. Dickinson, 31 W. Va. 152, 6 S. E. 53; Warner v. Railway Co., 39 N. Y. 468; Sjogren v. Hall, 53 Mich. 275, 18 N. W. 812 (per Cooley, J.); Mars v. Canal Co., 54 Hun, 625, 8 N. Y. Supp. 107; Railway Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949; Loftus v. Ferry Co., 22 Hun, 33; Id., 84 N. Y. 455. It should be borne in mind, however, that the ultimate question of law to be decided is whether it was the duty of the defendant, under the circumstances proved, to examine his platform for the purpose of ascertaining whether there were latent defects in it; for, if such was not his duty, his omission to make such examination was not negligence, in any degree, and the defendant was entitled to a verdict. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. And whether or not such was his duty depends entirely upon whether or not he had notice of facts which would induce a man of ordinary prudence to suspect the existence of a latent defect, in consequence of which danger of injury to person or property might be reasonably apprehended; and when, in such a case, the facts of which one charged with negligence had notice, are known and undisputed, the question of duty to examine for latent defects is a pure question of law, though it may involve a question as to the degree of care required, which is also a question of law when the facts are given. Stratton v. Railway Co., 95 Ill. 25; Sack. Instruct. Juries, p. 15. In accordance with these principles, courts grant nonsuits and direct verdicts in actions for negligence, whether the negligence in question be that of the defendant, or contributory negligence of the plaintiff. Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. 518; Orcutt v. Railway Co., 85 Cal. 291, 24 Pac. 661; Smith v. Steamship Co., 99 Cal. 462, 34 Pac. 84.

Counsel for respondent have cited many cases, none of which seems to be relevant. Only those of them, however, from which counsel have copied extracts, without stating the facts bearing on the point decided, need special notice. In Carleton v. Steel Co., 99 Mass. 216, cited for respondent, the unsafe condition by which plaintiff was injured, and of which he was not warned, was known to the defendant. In Currier v. Association, 135 Mass. 414, in which it was held that if defendant neglected his duty to keep the hall in a safe condition, so that in fact it was unsafe when plaintiff entered it, "defendant's knowledge or ignorance of the defect was immaterial," the only defects complained of were a depression in the floor, and that the hall was not sufficiently lighted. These defects, if they existed, must have been patent to all who entered the hall, and it was not questioned that they were so. Had the hall been properly lighted, the depression in the floor would have been apparent, so that the negligence which was the immediate cause of the injury was the omission of the duty to light the hall, which duty was not questioned. In Looney v. McLean, 129 Mass. 33, "it was admitted that the defendant knew that the stairs [by the breaking of which plaintiff was injured] were greatly decayed and unsafe, and there was no evidence that he cautioned or notified the plaintiff that they were so." In Holmes v. Drew, 151 Mass. 578, 25 N. E. 22, the only question was whether the public had been invited to use a sidewalk on defendant's private land. In Gill v. Middleton, 105 Mass. 477, it was assumed to have been the duty of defendant, arising from contract, to use ordinary skill in repairing a privy so as to make it safe. He failed to use such skill, in consequence of which the plaintiff was injured. The defendant asked the trial court to instruct the jury "that the defendant is not liable unless he knew or believed that the repairs which he made were insufficient, and that the premises were still unsafe and dangerous." The appellate court overruled an exception to the refusal of this instruction, saying, "His undertaking required at least the skill of an ordinary mechanic, and his failure to furnish it, either because he did not possess or neglected to use it, would be gross negligence." While this implies that the knowledge or belief of the defendant in that case was immaterial, it is obvious that it does not touch the question involved in the case at bar. In Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901, the plaintiff was injured by a defect in a platform at the head of stairs which the defendant was in duty bound to repair and keep in safe condition. The defect was that a board in the platform had become loose. The defendant asked the court to instruct the jury "if the jury find that there was such defect, but that it was not known to the defendant at or previous to the accident, then they must find for the defendant." The instruction was refused, and the appellate court overruled an exception to the refusal of it. There was no evidence that the defect was latent, nor that defendant had no knowledge of it. The plaintiff had made a prima facie case by proving the defect and consequent injury; and unless there was rebutting evidence tending to show that the defect was latent, and that the defendant was ignorant of it, the instruction was properly denied, because not applicable to the evidence.

For like reasons, the case of Camp v. Wood, 76 N. Y. 92, is not in point. As considerable importance has been attributed to the fact that plaintiff was invited to remove the trunks from defendant's house, it should be observed that he was not invited to carry the heavy trunk downstairs, but that defendant protested against his doing so, and also that plaintiff did not accept defendant's invitation gratuitously. It was the business of plaintiff's employer to carry trunks for hire. The parties were equally interested in the transaction. I think the order and judgment appealed from should be reversed, and a new trial granted.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment appealed from are reversed, and a new trial granted.

114 Cal. 24

## In re TREADWELL. (No. 9,761.)

(Supreme Court of California. Aug. 13, 1896.)

REINSTATING DISBARRED ATTORNEY.

Disbarment of an attorney does not preclude his reinstatement on good cause shown.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Application for reinstatement of W. B. Treadwell, a disbarred attorney. Granted.

Ben Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for respondent.

PER CURIAM. On the 2d day of April, 1885, on proceedings had therefor, an order was made and entered by this court striking the name of said W. B. Treadwell, then an attorney of this court, from the roll of attorneys and counselors, and prohibiting him from practicing as such attorney, upon the ground that said Treadwell had, in his capacity as such attorney, been guilty of misappropriating moneys intrusted to his keeping. An application is now made in behalf of said Treadwell by E. B. and George H. Mastick, attorneys of this court in good standing, asking that he be restored to said roll of attorneys. The sworn petition shows that continuously since the 1st day of January, 1887, the said Treadwell has been in the employment, as general assistant and confidential managing clerk, of the law firm composed of these petitioners and the late W. C. Belcher, down to the death of Mr. Belcher in September, 1895, and that since said date said Treadwell has continued in the employment of petitioners in a like capacity; "that, during the nine years which have elapsed since said Treadwell entered their employment as aforesaid, petitioners have reposed in him the most implicit confidence, and have given to him the management of matters of great importance, requiring the utmost care, secrecy, and good faith, and have intrusted to him large sums of money and property belonging to themselves and others; that their confidence in him has never been betrayed, and that they have always found him to be careful and trustworthy in the highest degree; that, during all of said time, petitioners have had frequent social intercourse with said Treadwell and members of his family, and can and do truly certify to his good character as a husband and parent, and as a moral and upright citizen of this community; that the conduct of said Treadwell since the said 1st day of January, 1887, has ever been such as to inspire confidence in his character, honor, and integrity, and to warrant this application to the court in his behalf, and it is their firm belief and opinion that he can be safely admitted to practice again, and intrusted with the affairs of clients." It is further shown that the money, the appropriation of which caused the disbarment of said Treadwell, has been by him fully refunded and repaid to those entitled thereto. This petition is accompanied by personal letters and recommendations addressed to the court from a large number of the prominent attorneys and law firms practicing before this court, all of the highest professional standing, many of the judges and ex-judges of our superior court, and others; all uniting in the request of said petition, and urgently asking the granting of the same, and stating, in substance, that, from their personal knowledge and observation of the life and character of said Treadwell since his disbarment, they sincerely believe him to have fully atoned the wrong committed by him, that his whole course of conduct since said disbarment has been above reproach, and that they regard him, notwithstanding his one misstep, as a man of high moral character, of great industry and ability, and one whose reinstatement at the bar will in no way bring discredit upon the profession of the law. This showing is a very strong one, and presents a case which, we think, should justly move us to grant the application. An order or judgment of disbarment is not necessarily final or conclusive for all time, and does not preclude the court, for good cause, from setting it aside and restoring the delinquent attorney. This has been established from an early date. In Rex v. Greenwood, (A. D. 1760) 1 W. Bl. 221, the report of the case is as follows: "Greenwood was an attorney of this court, and about two years ago was struck off the rolls for malpractice, and was now, upon humble petition and motion, readmitted; the court declaring that the striking off the roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the court sees cause." In an anonymous case (A. D. 1852) 17 Beav. 475, a solicitor had been disbarred for fraudulent misappropriation of moneys. Ten years afterwards, on the memorial of a number of solicitors, he was reinstated, the master of the rolls (Sir John Romilly) saying: "I have considered this case, and I have determined to restore this gentleman to the roll. Though he was very properly struck off, yet, considering the great length of time that has elapsed, and the great suffering that he has endured by reason of the order, considering the testimonials to his good behavior and conduct, and that the application is supported by so many solicitors of Birmingham who have certified to that effect, and the absence of any opposition on behalf of that most useful and intelligent body in London, the Law Institution, I have come to the conclusion that I shall best act by restoring this gentleman to the roll of solicitors." In Ex parte Pyke (A. D. 1865) 6 Best & S. 703, the court restored a disbarred attorney on the ground of good conduct for a long period after disbarment, saying, "Both on principle and precedent, sentences of exclusion from either branch of the profession need not necessarily be exclusions forever." No cases holding to the contrary view have come to our attention, nor do we find anything in the statute of this state to alter this rule. That statute merely regulates the procedure, and in no wise defines the effect of the order upon the powers of the court. That effect must be determined by the ordinary rules of law, which, as we have shown, authorize the court to mitigate the sentence upon a showing of good cause arising subsequently. We think, therefore, that upon the showing made, and the authorities above cited, the application should be granted. It is therefore ordered that the said W. B. Treadwell be, and he is hereby, restored as an attorney and counselor of this court, and that his name be reinstated upon the roll of attorneys thereof, and that he be entitled henceforth to practice in all the courts of this state.

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114 Cal. 18

## PEOPLE v. KENNETT. (Cr. 161.)

(Supreme Court of California. Aug. 13, 1896.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

An instruction that "no man by his own lawless acts can create a necessity for acting in self-defense, and thereupon, killing the person with whom he seeks the difficulty, interpose the plea of self-defense. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it,"—is not erroneous, when immediately followed by the statement; "Undoubtedly the defendant can show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. But, in the absence of such circumstances, when the defendant seeks and brings upon himself a difficulty with the deceased, in which he willingly continues until he involves himself in the necessity to kill, the law will not hold him guiltless. The right of self-defense which justifies a homicide does not include the right of attack." Garoutte, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

F. B. Kennett was convicted of manslaughter, and appeals. Affirmed.

Ben Goodrich, W. A. Harris, T. E. Gibbon, and W. H. Shinn, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant, charged with murder and convicted of manslaughter, rests his appeal upon a single specification of error. He contends that the court erred in giving the following instruction: "In order to justify the homicide, the danger menacing the defendant must have been present, apparent, and imminent, and the killing must have been done under a well-founded belief that it was absolutely necessary for the defendant to kill the deceased, at that time, to save himself from great bodily harm. The apprehension of danger to life or limb which justifies a man for taking the life of another must be an honest one,—one that is well grounded,—and must arise out of a reasonable cause. But a cause which originates in the fault of the person himself—in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself by his own misconduct—cannot be considered reasonable, or sufficient in law to support a well-grounded apprehension of imminent danger to his person. Error of apprehension the law overlooks when a man is called upon to act on appearances, but it does not overlook dishonesty of apprehension. Hence a real or apparent necessity, brought about by the design, contrivance or fault of the defendant, cannot be availed of as a defense for the commission of a crime. *And no man by his own lawless acts can create a necessity for acting in self-defense, and thereupon, killing the person with whom he seeks the difficulty, interpose the plea of self-defense. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it.* Undoubtedly the defendant can show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. But, in the absence of such circumstances, when the defendant seeks and brings upon himself a difficulty with the deceased, in which he willingly continues until he involves himself in the necessity to kill, the law will not hold him guiltless. The right of self-defense which justifies a homicide does not include the right of attack." It is insisted that this instruction is, in legal intent, identical with that condemned in People v. Button, 106 Cal. 628, 39 Pac. 1073. In the Button Case the instruction under review was the following: "And no man by his own lawless acts can create a necessity for acting in self-defense, and then, upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense, subject to the qualification next hereinafter set out. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. The court instructs the jury that if you are satisfied that there was a quarrel between the defendant and deceased, in which the defendant was the aggressor, and first assaulted the deceased by means or force likely to produce, and actually producing, great bodily injury to the deceased, and that the defendant thereafter, in the same quarrel, fatally shot the deceased, then you must find the defendant guilty, subject to this qualification." The vice of this, as the opinion clearly demonstrates, lies in its failure to recognize that circumstances might arise whereunder one who was the first aggressor might slay his opponent, and still avail himself of the plea of self-defense, as after an honest withdrawal from the combat, which withdrawal was fairly made known to his adversary, who thereafter forced a new strife upon him. The qualification which the trial court gave to the instruction in the Button Case, as the opinion declares, was not made evident by the record. Counsel for the state nowhere directed the attention of the court to the matter. The statement in the opinion that no explanation or qualification could validate it had reference to any explanation not embracing the principle expounded. This is too plain to need amplification. Any other interpretation would result in the merest stultification of language. It would be equivalent to saying that this court had held that no qualification could cure the incomplete instruction, while in the next sentence it proceeds to set forth the very modification which, if read into the original instruction, would have made it a sound enunciation of the law. It is not to be supposed, in other words, that if the explanation which the court sets forth had been given with, and as a part of, the instruction in the Button Case, it would still have been held to be erroneous. But, as has been said, this court did not there have the qualification before it, and whether or not any particular qualification would have been sufficient to cure the imperfection could not have been, and was not, decided. In the instruction here under consideration, the part italicized is, in language, identical with that of the Button Case, but with this all-important difference: The court, in the next sentence, and in immediate connection with what it has said, proceeds to give the circumstances under which one who is the first aggressor may kill, and still be justified If a judge should say to a jury: "All contracts may rest in and be proved by parol. But there is this important qualification: Those required by the statute of frauds and perjuries to be in writing must be evidenced by a writing," etc.,—it would not be held permissible to consider the language piecemeal, and to say that the first sentence contains an incorrectible error. So, here, the general doctrine announced in the italicized portion is defective merely by reason of its incompleteness; but, when read with what immediately follows, the whole is a fair declaration of the principle. We do not mean by this to commend the instruction as a full exposition of the law, nor to invite its continued use by trial judges, but merely declare that in and of itself it contains no error. It may be open to some criticism for lack of clearness, and for a failure fully to expound the principles governing the right of self-defense, which will be found set forth at length in People v. Hecker, 109 Cal. 451, 42 Pac. 307; but, while it may thus fail in completeness, in so far as it goes it lays down no erroneous doctrine. The judgment and order are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; VAN FLEET, J.; TEMPLE, J.; McFARLAND, J.

GAROUTTE, J. I am compelled to dissent from the views of the majority of the court. No substantial difference is found, when this instruction is compared with the respective instructions given in People v. Button, 106 Cal. 628, 39 Pac. 1073, and People v. Conkling, 44 Pac. 314; and a new trial was ordered in those cases, after a thorough consideration and discussion, for the reason that the law therein contained was bad. As was said in People v. Button, the principle of law there declared was radically wrong,—so wrong that qualification and explanation could not validate it; and the instruction here under consideration is so wrong and so unsound in so many ways as to place it beyond all help by qualification. There can be no qualification of it, and what is here termed by the court a qualification in no way qualifies, but is a contradiction, pure and simple. Contradictory instructions being given to the jury, one containing good law and the other bad law, the cause must be reversed; for it is not for this court to say that the jury, in making up its verdict, acted upon one rather than the other. This principle is well settled and elementary. Let us dwell for a moment upon this instruction. Among other things, the judge said to the jury: "The apprehension of danger to life and limb, which justifies a man for taking the life of another, must arise from a cause which does not originate in the fault of the person himself, as in a quarrel which he has provoked." This statement is not a sound expression of the law. The judge further said: "Hence a real or apparent necessity, brought about by the design, contrivance, or fault of the defendant, cannot be availed of as a defense for the commission of a crime." As to the word "fault," as here used, the law is unsound. Again, the judge says: "And no man by his own lawless acts can create a necessity for acting in self-defense, and thereupon, killing the person with whom he seeks the difficulty, interpose a plea of self-defense." This statement is wrong in law, as the cases I have previously cited fully show. Again the judge says: "The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it." This statement is but a repetition of what goes before, and is legally unsound, from any angle at which it may be viewed. The material part of the qualification which it is held validates the entire instruction is as follows: "Undoubtedly the defendant can show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow." It is apparent that the word "necessity" should be read "danger." This instruction is no qualification of the other one. It is absolutely contradictory of it. No single statement of the first instruction can be true, if the so-called qualification be true. It is impossible for both to stand. One must go down. A qualification is not a contradiction, but a limitation or modification. And here, if the second statement made by the judge be true as a sound principle of law, the first must be untrue. With equal consistency and definiteness the judge could have said to the jury: "All men are white, undoubtedly some men are black." These instructions are diametrically opposed to each other at all points, and it would be a guess upon the part of this court for it to say that the jury were guided in their deliberations by the law as embodied in the "qualification," rather than by the law given looking in the opposite direction. Indeed, it may be said that the instruction, including the "qualification," could only serve the single purpose of confusing the minds of the jurors, and, instead of affording them light as to the law, left them groping in absolute and confusing darkness.

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114 Cal. 28

## FINKELDEY v. OMNIBUS CABLE CO.

(S. F. 170.)

(Supreme Court of California. Aug. 14, 1896.)

Boarding Moving Street Car—Negligence—Contributory Negligence.

1. For one to attempt to board a street car, the speed of which has merely been slackened in response to his signal that he wished to get on, cannot, in the absence of exceptional circumstances, be declared negligence, as matter of law; and that though the attempt is to get on the front platform, especially where there is a rule of the road that persons smoking should ride thereon, and the person attempting to get on is smoking at the time.

2. Nor can it be declared negligence, as matter of law, for the driver of a street car to merely slacken its speed for one to get on, especially where the person, without indicating any desire that it be stopped, attempts to board it while it is in motion.

3. Whether failure to put guards in front of the wheels of a street car, as required by an ordinance, is negligence, and, if so, whether the absence thereof was the cause of injury to one who, trying to get on the front platform while the car was moving, missed his footing, and got his foot under the wheel, while holding with both hands on the railings, are questions for the jury.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Finkeldey against the Omnibus Cable Company. Judgment for defendant. Plaintiff appeals. Reversed.

A. Morganthal, for appellant. Lloyd & Wood, for respondent.

HARRISON, J. The plaintiff was injured in attempting to board a car of the defendant at the corner of San Bruno road and Army street, in San Francisco, and brought this action to recover damages therefor, alleging that the injury was caused through the negligence of the defendant "in failing to bring said car to a full and sufficient stop at the time plaintiff was boarding said car for the purpose aforesaid, and in failing to provide said car with guards as required by law." The circumstances connected with the injury are detailed in his testimony as follows: "When the car came along, and was about thirty feet away from me, I held up my hand for the driver to stop. He came along at a trot. I was facing east. The car was coming from the north, going south. I was smoking a cigar at the time. It is the rule to ride on the front platform when you are smoking. The driver did not stop. He slackened up somewhat for me to step on. I went up to the car, trying to get on the front platform. I took hold of the rails, one hand on each, and tried to step on the platform. I missed my footing, but kept hold with both hands on the railing. My left foot got under the wheel. I kept holding on to the rails till the car stopped, when I stepped on the platform. I rode as far as to the next switch, where we met the car coming back, and I stepped off this car on to the car coming back, and went home. When I stepped off the first car I wondered how my foot got under the wheel, and I noticed that the car had no guards around the wheels." At the close of the plaintiff's case the defendant moved for a nonsuit, upon the grounds (1) "that no evidence had been introduced showing, or tending to show, that the defendant was negligent in any way; (2) that the evidence introduced conclusively showed that the plaintiff was negligent himself, by attempting to get upon a moving car." The motion was granted, and from the judgment thereon, and an order denying a new trial, the plaintiff has appealed.

It cannot be said, as a proposition of law, that the act of attempting to board a street car while it is in motion is of itself negligence. Whether such act is negligent must depend upon the particular circumstances under which it is done. It is a matter of common observation that persons do every day get on and off from street cars while they are in motion, under circumstances that would not, in the estimation of any reasonable man, be considered negligent. The question depends greatly upon the situation of the street at which the act is attempted, as well as upon the speed with which the car is moving. While it might be negligent to attempt to get upon a car moving rapidly down a street of heavy grade, it would not be so regarded if the car was moving slowly up the grade. Beach, Contrib. Neg. § 146; Booth, St. Ry. Law, § 336; Eppendorf v. Railroad Co., 69 N. Y. 195; Morrison v. Railroad Co., 130 N. Y. 166, 29 N. E. 105; McDonough v. Railroad Co., 137 Mass. 210; Briggs v. Railway Co., 148 Mass. 72, 19 N. E. 19; Schepérs v. Railroad Co., 126 Mo. 665, 29 S. W. 712; Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213; Sahlgaard v. Railway Co., 48 Minn. 232, 51 N. W. 111; Railway Co. v. Williams, 140 Ill. 275, 29 N. E. 672. There may be cases in which other facts or circumstances render the act of the person negligent,—as, for instance, if he is lame or infirm, or is burdened with packages, or impeded by others so as to be deprived of the use of his limbs,—and the court might be justified in determining his negligence upon his own statement of these circumstances; but if the person is in the possession of physical vigor, and free from any hindrance, the question of negligence is one of fact, to be determined by a jury. In the present case, however, there were no exceptional circumstances which would authorize the court to say, as a matter of law, that the plaintiff was negligent. He had signaled the driver that he wished to board the car, and in response thereto the driver had slackened the speed of his horses. The speed at which the car was moving when he attempted to get on is not shown, but the slackening of the speed in response to his signal was an invitation from the driver for him to board the car. Ganiard v. Railroad Co., 50 Hun, 22, 2 N. Y. Supp. 470. The attempt to get upon the front platform was a circumstance to be considered in determining whether he was negligent, but it was not conclusive of the fact. He was at the time smoking a cigar, and it was shown that it was a rule of the defendant that a person smoking should ride upon the front platform. This might be regarded as a reason why the plaintiff attempted to get upon that platform, and was also a circumstance to be considered in determining the question of negligence.

Neither could the court say, as matter of law, whether the defendant was guilty of negligence by reason of not bringing the car to a full stop before the plaintiff attempted to board it. The same considerations by which the attempt of the plaintiff to get upon the car while it was in motion is held not to be in itself negligent show that the failure of the defendant to stop the car was not in itself an act of negligence. This is clearly indicated by the daily custom of drivers upon street cars to merely slacken the speed of their cars in order to take on passengers, without any injury resulting therefrom. Especially would the driver be freed from the charge of negligence in not stopping the car if the passenger, without indicating any desire that the car should stop, attempts to board it while it is in motion. Moylan v. Railroad Co., 128 N. Y. 583, 27 N. E. 977. There was no evidence that the defendant was negligent in the running of its car after the plaintiff made this attempt, or that the injury to the plaintiff was caused by any change in the speed of the car. On the contrary, it was shown that before the plaintiff got upon the platform the car came to a full stop.

It is alleged in the complaint that there was an ordinance of the city requiring railroad companies operating street cars to have guards upon their cars, by which persons may be protected from getting under the wheels of the car; and it was shown at the trial that the car in question had no protecting guards, as required by the ordinance. Whether the defendant was negligent in not having guards upon the car, as well as whether the absence of guards was the cause of injury to the plaintiff, was to be determined upon a consideration of all the facts connected with the injury, and the inferences that might be drawn therefrom. The court could not determine either of these propositions as a matter of law, and should not have withdrawn their consideration from the jury. If the neglect of the defendant to provide its car with guards was the direct cause of the injury to the plaintiff, without which he would not have been injured, the plaintiff's failure to step upon the platform did not of itself relieve the defendant from liability. While he might not have been injured if he had once firmly stepped upon the platform, yet the court should have left to the jury to determine whether his failure to do so contributed to his injury. The jury might have found that, although the plaintiff had failed to step upon the platform, he would not have received the injury if there had been guards in front of the wheels. The relative positions of the step and the wheel were an element to be considered by the jury in determining this issue. If the step was directly in front of the wheel, so that a failure to reach it would bring the plaintiff's foot directly under the wheel, the necessity for guards would be greater than if the wheel was remote from the step. If the jury should find that the plaintiff was not guilty of contributory negligence in attempting to board the car while it was in motion, and that the injury would not have resulted had the car been provided with suitable guards, and should also find that the defendant was negligent in failing to provide such guards, it would follow that his failure to get upon the step was disconnected with the cause of the injury. While it may be conceded that, if the plaintiff, at the time of attempting to board the car, was fully aware that there were no guards to the wheels, he assumed the risk from any injury resulting therefrom, it was nevertheless for the jury to determine the extent of his knowledge upon this point, and whether, in view thereof, he was guilty of negligence. Smith v. Steamship Co., 99 Cal. 462, 34 Pac. 84. Whether negligence existed in either party, or whether any negligence of the plaintiff contributed to his injury, as well as whether the injury he received was owing to any negligence of the defendant, irrespective of his own negligence, were questions that should have been submitted to the jury. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

114 Cal. 41

## ROBINSON v. TEMPLAR LODGE NO. 17, I. O. O. F., OF CALIFORNIA.

(S. F. 488.)

(Supreme Court of California. Aug. 14, 1896.)

Appeal — Dismissal — Filing Undertaking and Notice of Appeal.

1. Appeal will be dismissed, the undertaking thereon not having been filed within five days after service of notice of appeal, as required by Code Civ. Proc. § 940.

2. The undertaking on appeal, required by Code Civ. Proc. § 940, to be filed within five days after service of notice of appeal, may be filed on the sixth day, the fifth day being Sunday.

3. Code Civ. Proc. § 940, requiring the undertaking on appeal to be filed within five days after service of notice of appeal, does not require the notice of appeal to be filed within that time.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Thomas B. Robinson against the Templar Lodge No. 17, I. O. O. F., of California. Motions by defendant to dismiss appeals by plaintiff. Granted as to one appeal. Denied as to the other.

Geo. D. Collins, for appellant. Davis Louderback, for respondent.

McFARLAND, J. The motion of respondent to dismiss the appeal, notice of which was served and filed in the superior court on the 5th day of November, 1895, upon the ground that no undertaking on said appeal was ever filed, is granted; and said appeal is dismissed, without prejudice to another appeal.

Respondent has also made a motion to dismiss the appeal, the notice of which appears on page 127 of the printed transcript, upon the grounds that the notice was served on December 31, 1895, and that neither the motion nor the undertaking was filed until January 6, 1896. These grounds are not tenable. The notice of appeal may be served before filing, and the Code does not prescribe any particular time after service within which it must be filed (Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98; Galloway v. Rouse, 63 Cal. 280; Boyd v. Burrel, 60 Cal. 280; Code Civ. Proc. § 940); but the undertaking must be filed within five days after the service of the notice of appeal. In this case the service was on December 31, 1895. The 5th day of January, 1896, was Sunday, and thus appellant had until the 6th of January to file his undertaking. The said motion to dismiss said second appeal, the notice of which appears on page 127 of the transcript, is denied.

We concur: HENSHAW, J.; TEMPLE, J.

114 Cal. 34

## PLEASANT v. SAMUELS. (S. F. 284.)

(Supreme Court of California. Aug. 14, 1896.)

Pleading—Common Count—Allegation of Time—Limitations—Demurrer.

1. The common counts may be used to state a cause of action, notwithstanding the Code provision that a complaint must state the facts constituting the cause of action in ordinary and concise language.

2. A count alleging indebtedness of defendant to plaintiff in a certain amount on account of moneys paid, laid out, expended, loaned, and advanced to and for defendant, at his request, by plaintiff, need not specify any time, nor set forth the items of the account, though a bill of particulars may be demanded, under Code Civ. Proc. § 454.

3. A complaint resting on the fact that plaintiff was compelled to and did take up and pay notes which he had made for defendant's accommodation is not demurrable on the ground that the action is barred, the complaint not showing when plaintiff made the payments.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Mary E. Pleasant against David Samuels. Judgment for defendant. Plaintiff appeals. Reversed.

N. Hamilton and R. M. F. Soto, for appellant. Naphtaly, Friedenrich & Ackerman, for respondent.

PER CURIAM. This action was commenced June 3, 1895, and the complaint contains two counts or causes of action, separately stated. The first count alleges that defendant is indebted to the plaintiff in the sum of $32,364.06 on account of moneys heretofore, at the special instance and request of defendant, paid, laid out, expended, loaned, and advanced to and for the defendant by the plaintiff, and that the defendant had not paid to plaintiff any part or portion of said sum. The second count alleges that plaintiff executed to defendant, at his special instance and request, and for his accommodation, without any consideration therefor, 32 promissory notes, the date, amount, and maturity of each of said notes being stated. The first note became due and payable on May 17, 1885, and the last on September 7, 1888, and the aggregate amount of principal due on all the notes was $32,364.06. It is further alleged that "after the execution by the plaintiff to the defendant of the said notes hereinbefore referred to, and before the maturity thereof, the defendant indorsed each one of them, and, as so indorsed, delivered the same to other parties, who, as plaintiff is informed and verily believes, acquired title thereto in good faith, for value and without notice. Subsequently, the plaintiff took up each of said notes, and paid the amount of principal and interest thereon to the holder thereof"; and that defendant had not paid to plaintiff any part of the money so paid by her on said notes. The defendant demurred to the first cause of action set up upon the ground that it did not state facts sufficient to constitute a cause of action, and upon the further ground that it was ambiguous, unintelligible, and uncertain in certain respects named; and to the second cause of action upon the ground that it is barred by subdivision 1 of section 339, and by section 337, of the Code of Civil Procedure. The court below sustained the demurrer, and, the plaintiff declining to amend, judgment was entered that she take nothing by her action. From that judgment, this appeal is prosecuted.

1. The objection that the common counts are inconsistent with the provision of the Code that a complaint must state the facts constituting the cause of action in ordinary and concise language, and are therefore insufficient, is not tenable. It was held in this state at an early day, and has since been repeatedly held, that the common counts may be used to state a cause of action, notwithstanding the provision referred to, which was found in the old statutes, and was adopted into the Code. Freeborn v. Glazer, 10 Cal. 337; Abadie v. Carrillo, 32 Cal. 172; Farwell v. Murray, 104 Cal. 464, 38 Pac. 199. And this rule has been recognized and acted upon in most of the states where the Code practice has been adopted. Allen v. Patterson, 7 N. Y. 476; Cudlipp v. Whipple, 4 Duer, 610; Grannis v. Hooker, 29 Wis. 65; Ball v. Fulton Co., 31 Ark. 379; Pom. Code Rem. §§ 542, 543. The first count was therefore not subject to a general demurrer. Was it then ambiguous, unintelligible, or uncertain in any material respect? It was not necessary to state when the plaintiff paid, laid out, expended, loaned, or advanced to and for the defendant the moneys sued for, or when defendant became indebted to plaintiff therefor, or when defendant requested plaintiff to make such payments, expenditures, loans, or advancements. Nor was it necessary to set forth the items of the account. The statute expressly provides that the items of an account need not be set forth in a pleading, but a bill of particulars must be furnished on demand. Code Civ. Proc. § 454. If, therefore, the defendant desired more particular information as to the account, he should have resorted to the remedy provided for by the statute, and not to a demurrer. Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Burns v. Cushing, 96 Cal. 669, 31 Pac. 1124; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836; Farwell v. Murray, 104 Cal. 464, 38 Pac. 199.

2. As to the second count: The rule is settled beyond controversy that the defense of the statute of limitations cannot be raised by demurrer, unless it clearly and affirmatively appears on the face of the complaint that the cause of action is barred. If it does not so appear, the defense must be raised by answer. Harmon v. Page, 62 Cal. 448; Wise v. Williams, 72 Cal. 544, 14 Pac. 204; Doe v. Sanger, 78 Cal. 150, 20 Pac. 366; Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137; Curtiss v. Insurance Co., 90 Cal. 245, 27 Pac. 211. Where an action is brought upon a promissory note by the payee or an indorsee against the maker, and it appears that the note had matured more than four years before the commencement of the suit, the defense of the statute of limitations may be set up by demurrer. In such a case the complaint shows the exact time at which the cause of action arose, and, if it appears upon the face of the complaint that the statutory period of limitation has elapsed before the commencement of the action, the plaintiff, if he desires to escape the bar of the statute, must allege some fact which has prevented the running of said statute. This has been held a number of times by this court, particularly in Smith v. Richmond, 19 Cal. 476, where it was held that, when a new promise is relied upon, it must be alleged, and in Bass v. Berry, 51 Cal. 264, where it was said: "The action being founded upon an instrument in writing, executed out of the state, the statutory bar of two years presumptively applies. If the plaintiff's case could be relieved in this respect by the fact of the absence of the defendant from the state, that fact should have been averred in the complaint." But, where the defense of the statute does not clearly appear upon the face of the complaint, it must be pleaded by answer. In such a case it is not enough to say that the statute might have run. As was said by this court in Kraner v. Halsey, 82 Cal. 211, 22 Pac. 1138: "A court is not allowed to speculate on what might have happened, or what might not have occurred in view of the averments of the complaint." In Wise v. Hogan, 77 Cal. 187, 19 Pac. 279, the court, speaking on the same subject with respect to what the complaint would show, says: "The fact that it did not show whether it was or was not barred would not defeat a recovery." And in Doe v. Sanger, 78 Cal. 151, 20 Pac. 366, the court, discussing the matter of setting up the plea of the statute of limitations by demurrer, say: "The fact that a cause of action, as set out in the complaint, does not show on its face whether or not it is barred by the statute of limitations, would not defeat a recovery. It could only be determined on the trial of the case whether the whole or any part of the damages claimed was barred by the statute. Unless it appears upon

the face of the complaint that the cause of action is barred by the statute of limitations, that objection cannot be raised by demurrer." And in Curtiss v. Insurance Co., 90 Cal. 245, 27 Pac. 212, the court say: "The question is as to a rule of pleading, and we do not understand that a complaint showing money to have been loaned at a date sufficiently remote to admit of the running of the statute raises the presumption that it has run." In the case at bar the action is not brought upon a promissory note to recover against the maker upon the promise which he has made in such note. The cause of action rests upon the fact that the plaintiff was compelled to take up and pay, and did take up and pay, notes which she herself had made for the accommodation of the defendant. The cause of action arose at the time when the plaintiff made such payments of money for the benefit of defendant; and it does not appear, nor is it necessary for it to appear, upon the face of the complaint when said payments were made. Therefore they may have been made within the statutory period. It is no valid objection to this view to say that, if the holders of said notes had brought suits against plaintiff at the time this present suit was commenced, such actions would apparently have been barred by the statute. Such actions may have been commenced before such notes were barred; and, for this and other reasons that might easily be suggested, the plaintiff here may have rightfully paid and taken up said notes at a time which would have prevented the statute of limitations from barring this present action. The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

114 Cal. 42

## WALLACE et al. v. SISSON et al. (S. F. 204.)

(Supreme Court of California. Aug. 14, 1896.)

SECOND APPEAL—LAW OF THE CASE—QUESTIONS OF FACT.

The principle of the law of the case on a second trial does not apply to determinations of fact on conflicting competent evidence, especially where there is additional, though cumulative, evidence.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Emiline Wallace and another against Joseph H. Sisson and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

A. N. Drown (D. M. Delmas, of counsel), for appellants. Mastick, Belcher & Mastick, for respondents.

HARRISON, J. Upon a former trial of this cause, the court made findings of fact, and rendered judgment thereon in favor of the defendants. This judgment and an order denying the plaintiffs' motion for a new trial were subsequently reversed by this court, upon the ground that certain findings of fact were not justified by the evidence. 33 Pac. 496. Upon the second trial of the cause, the court made similar findings of fact, and again rendered judgment in favor of the defendants. From this judgment, and an order denying a new trial, the plaintiffs have appealed. It was contended by the plaintiffs at the trial, and is also contended by them here, that the evidence is substantially the same as upon the former trial, and that the former decision of this court that this evidence was insufficient to justify the findings then under consideration became the law of the case, and that the trial court was thereby precluded from making the present findings, although its own judgment concerning the effect of this evidence might be contrary to the decision of this court. Both of these propositions are controverted by the defendants.

An unbroken line of decisions, commencing with Dewey v. Gray, 2 Cal. 374, has established the rule in this state that a decision of this court upon any question of law in a case appealed to it from an inferior court becomes thereby the law of that case, and is thereafter, in all subsequent stages of the case, binding, not only upon the inferior court, but also upon this court if again brought before it. It has never been held, however, that the decision of this court upon a question of fact is subject to this rule. On the contrary, it has been frequently said that the rule is limited to questions of law, and is not applicable to questions of fact. In Sneed v. Osborn, 25 Cal. 629, it was said: "It is upon questions of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact." Although the law of the case was not then the issue in dispute, the expression was made in response to a petition for rehearing suggesting that the statement by the court of the facts established by the evidence would be so regarded upon another trial, and is entitled to the respect due to the opinion of a court deliberately given upon a point directly presented. In Mitchell v. Davis, 23 Cal. 384, the court had said that cases in which the rule had been applied show that it applies only to principles of law announced in a case, and not to mere questions of fact which may have been passed upon, and also, with reference to the proposition here contended for by the appellants: "If no further evidence had been introduced by the plaintiff on the second trial upon this point, there might have been some grounds for saying that the question had been put at rest by the former adjudication,"—thus pointedly showing that the former decision was not conclusive. In McLeran v. Benton, 73 Cal. 337, 14 Pac. 879, it was held that the rule could not be invoked where the evidence was introduced for a different purpose from that for which it was presented at the previous trial. And in Nieto's Heirs v. Carpenter, 21 Cal. 483, it was held that the rule did not apply in a case in which an incorrect translation of a Spanish document was the basis of the former decision. In Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147, the court said: "The facts disclosed by the record upon this appeal are in substance the same as those which were before the court on the former appeal; and the propositions of law there decided are therefore the law of this case, and we are not at liberty to reconsider them. It is true that nothing that was said in that opinion as to the facts could bind the court, upon the second trial, nor be conclusive now, since the rule of the law of the case has no application to questions of fact." And in People v. Hamilton, 103 Cal. 496, 37 Pac. 630, the court said: "This rule does not apply * * * to questions of fact." In Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 201, the court said: "It is settled beyond controversy that a decision of this court on appeal as to a question of fact does not become the law of the case." It frequently happens that the sufficiency of the evidence to justify the decision depends upon the competency of the evidence, or the effect of an act or admission, or the construction to be given to a written instrument. If, in such a case, the appellate court holds that the evidence was incompetent, or received an erroneous construction by the trial court, and that for this reason the evidence was insufficient to justify the decision, such ruling of the appellate court becomes the law of the case, since the sufficiency of the evidence depends upon the question of law which is thus decided. See Leese v. Clark, 20 Cal. 387. But, when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision. This results from the relative functions of the trial court and the appellate court, the former alone being authorized to determine questions of fact, and the latter being limited to determining questions of law. The appellate court cannot itself make a finding of fact when the evidence is all before it, or find the ultimate fact from other probative facts, unless such ultimate fact follows as a conclusion of law therefrom; and if, in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not a finding of that fact. Kimball v. Semple, 25 Cal. 455. "We do not pass upon the weight or preponderance of evidence, nor in a case where opposing inferences may be drawn can we review a finding because, in our judgment, the inference deduced by the trial court is improbable, or more unlikely to be true than the opposite one." Reynolds v. Robinson, 82 N. Y. 106.

Whether the evidence in a case tends to prove a fact is a question of law which arises when the admissibility of such evidence is questioned, or when it is relied upon for the purpose of establishing a controverted fact; and the decision of the appellate court that such evidence does or does not tend to establish the fact is a decision upon a question of law which is conclusive upon the trial court; but whether the evidence is sufficient to establish the fact is a question of fact, which must be determined by the tribunal to which it is submitted. A declaration by the appellate court that it does establish the fact would be outside of its functions, and would not be binding upon the trial court. So, too, whether a particular inference can under any circumstances be drawn from certain evidence is a question of law; but whether the inference shall in any particular case be drawn from the evidence is a question of fact. "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Code Civ. Proc. § 1958. Whether there is any evidence in support of a finding, or whether there is a conflict of evidence upon a controverted fact, must be determined by the appellate court when presented to it upon an examination of the record. This includes the right to determine whether any of the evidence tends to support the decision, since that is a question of law; and, if it determines that it has no such tendency, that evidence is excluded from consideration. If, upon an examination of the record, the appellate court determines that there is no evidence in support of the decision, it reverses the judgment, for the reason that the court committed an error of law in finding a fact without any evidence in support thereof. Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Mason v. Lord, 40 N. Y. 484. "When there is a total want of evidence upon some essential fact, but the jury nevertheless finds such fact, the finding is erroneous as matter of law; but, when there is slight evidence in support thereof, a finding thereon would be one of fact, upon which men might differ in opinion. But for a court to attempt the correction thereof upon writ of error would be but a correction of errors in fact, and not in law,—a power which this court does not possess." Conely v. McDonald, 40 Mich. 159.

A comparison of the opinion rendered upon the former appeal herein with the record upon the present appeal shows that, in making its decision upon the evidence before it, the superior court did not disregard the decision of this court upon any question of law determined by it upon the former appeal. Indeed, upon that appeal the decision of this court was in the main in reference to questions of fact, rather than questions of law. The question chiefly discussed in the opinion, and which is termed by the appellants the pivotal question of the case, was whether there was any contract relating to Chinamen between Sisson, Wallace & Co. and the railroad and construction companies, or whether Sisson, Wallace & Co. had any contract right by virtue of the arrangement made with Koopmanschap for bringing the Chinamen to San Francisco. The statement in the opinion "that a written contract was made between one of the construction companies, Koopmanschap, and Sisson, Wallace & Company concerning such importation is clear, though such written contract was not produced on the trial, nor shown to be then in existence"; and the expression in the opinion, after giving the evidence in support of the above statement, and that Douty's testimony was corroborated by the Haswell letter, that "it is inconceivable that he [Douty] would direct the agent of the steamship company to draw drafts upon Sisson, Wallace & Company for each of the two contemplated shipments, amounting to $40,000 each, without a contract right so to do," can neither of them be considered as a decision upon a question of law, but, at most, only an inference of fact drawn from the other evidence in the case. So, also, the statement in the opinion, while commenting upon the testimony of Horn: "While he is clearly in error in some particulars, and inconsistent in others, it is apparent that he had a knowledge of facts that he could not have known unless he had seen such a contract, or learned them in some manner in Sisson, Wallace & Company's office, and, if the firm and its other employés had no knowledge of such contract or agreement, he could not well have learned it from them;" and the subsequent statement in reference to the testimony of other witnesses, that "a careful reading of the testimony, however, will show that these witnesses also testified to conclusions, rather than to the facts which constituted the terms of the contract," and that "these denials are not sufficient, in view of the whole evidence, to create a doubt that there was a contract or agreement for the importation of these Chinamen, to which Sisson, Wallace & Company was a party,"—are in reality only propositions of fact proper to be considered by a trial court, but can in no wise be regarded as decisions upon questions of law. It was for the reason that in the opinion of this court the trial court had erroneously decided these questions of fact that its decision was reversed, but this court did not assume to direct that court how it should again decide the questions. And, as we have seen above, that court, when the questions should again be presented to it for decision, was authorized and required to exercise its own judgment in determining the facts which were justified by the evidence. If the evidence had been identical with that given at the former trial, and the trial court had still been of the opinion that it justified the former findings, it would not be precluded from so finding merely because this court had reversed its former decision. This court might again reverse the decision, but, before doing so, would consider whether it might not be that that portion of the evidence which could not be reproduced in printed form—the demeanor of the witnesses, as well as their credibility, the weight to be given to contradictory testimony, the inferences to be drawn from different portions of the evidence—was such as to support the conclusion of the trial court. If it should appear to this court that it was possible for the trial court, under these considerations of the evidence, to so decide the issues, it might deem it its duty to yield to that court, even though the decision were contrary to its own opinion, since the trial court is the ultimate arbiter upon all questions of fact.

The "evidence" from which a fact is to be determined does not consist merely of the language used by the witnesses. It includes their appearance and demeanor on the witness stand, the manner in which their testimony is given, the credit to which they are entitled, the opportunity for knowing the matters of which they give testimony, the strength and clearness of their recollection of the transaction, the inferences of fact which may be drawn from the testimony which they give, or from other evidence in the case, the harmony of one portion of the testimony with another. The consideration of these elements is peculiarly within the province of the trial court, and, whenever the decision of a fact depends thereon in whole or in part, the appellate court cannot prescribe the mode in which the decision shall be made, or, by any opinion of its own upon the effect of the evidence, take from the trial court the power of determining the sufficiency of the evidence to establish a fact. There was, morever, at the last trial, additional evidence before the trial court which was not before this court upon the former appeal; and even if it be conceded, as is claimed by the appellants, that this evidence was cumulative, still it was not for that reason to be disregarded. For the purpose of establishing that there had been no contract of the character claimed by the plaintiffs, several witnesses had given their testimony, to the effect that they had no knowledge of such contract. While mere negative testimony of this character is not conclusive, the strength of the proof varies according to the number of witnesses who may have had knowledge of the existence of the contract. While, of 10 persons connected with a transaction, the testimony of one that he had no knowledge of a certain act claimed to have been a part of the transaction would not be conclusive, the testimony of each of the 10 to the same effect would be convincing; and, upon the same principle, the testimony of each additional witness strengthens the proof of the fact. In the present case the testimony of C. F. Crocker, and of Burke and other witnesses, to the effect that they knew nothing of the contract, although their position was such that, if there had been a contract, they would have been likely to know of it, strengthens the defense upon that issue, and presented evidence to the trial court from which to make its finding that was not before this court upon the former appeal.

The issues before the trial court were questions of fact, which were to be determined by that court upon a consideration of evidence that was in many particulars in direct conflict, and in others depending upon the memory of the witnesses as to transactions and conversations that had occurred many years prior thereto. This involved, among other considerations, the balancing of these conflicting statements, the weight to be given to the testimony of the different witnesses, as well as the credibility of the witnesses themselves, the probability of the accuracy of their statements, depending upon the clearness of their recollection, the interest they might have in the result, the attention given by them to the transactions or the conversations at the time they took place. All of these considerations are peculiarly within the function of the trial court, and its decision thereon ought not to be lightly disregarded. A careful examination of the record herein fails to show that the evidence before the superior court was insufficient to justify its decision. The judgment and order are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

GAROUTTE, J. (concurring). I think the principle of the law of the case cannot be invoked here, for the reason that the evidence contained in the present record is not the same as that presented to this court upon the former appeal. I concur in affirming the order and judgment for this reason.

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114 Cal. 51

## PEOPLE v. ROEMER. (Cr. 149.)

(Supreme Court of California. Aug. 14, 1896.)

HOMICIDE—SELF-DEFENSE—INSTRUCTION—CROSS-EXAMINATION.

1. Where defendant in a homicide case is asked on direct examination if he had ever been charged with killing anybody, and answers "No," he may, on cross-examination, after proper foundation laid, be asked whether he had not stated that he had been accused of the murder of a man, but that they could not prove it against him.

2. A requested instruction on self-defense, commencing, "If you believe the defendant, at the time of the killing, had a reasonable apprehension and belief that deceased was about to execute his threat to kill him," is erroneous, as declaring as a fact that deceased had threatened to kill defendant.

Garoutte, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Frank Roemer appeals from a conviction of murder in the second degree. Affirmed.

J. C. Rives, Johnston Jones, and N. Newby, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant, charged with murder, and convicted of murder in the second degree, presents these appeals from the judgment and from the order denying him a new trial. The killing was admitted, and the plea was self-defense.

1. It is first claimed that the verdict is against the evidence. But without detailing the accounts of the different witnesses, which could serve no useful purpose, a critical examination of the record shows that the evidence is ample to sustain the verdict. The testimony for the defense raises, as is not unusual, a sharp conflict; but in such cases, under the well-settled rule, the jury is the final arbiter of the facts, and its determination cannot here be disturbed.

2. Defendant, upon direct examination, was asked by his counsel if he had ever been charged with killing anybody, and answered that he had not. Upon cross-examination he was asked, after the proper foundation had been laid, whether he had not stated that he had been accused of the murder of a man, but that they could not prove it against him. The question was not permissible, generally, upon cross-examination. But in this case the defendant had opened the door and invited the inquiry by his own testimony, and it became permissible to refute that testimony by direct evidence to the contrary, or to impeach it by showing contrary declarations made by him. Code Civ. Proc. § 2052.

3. Defendant proposed the following instruction, which was refused by the judge as having been given before: "If you believe that the defendant at the time of the killing had a reasonable apprehension and belief that deceased was about to execute his threat to kill him, and that it was necessary for the protection of his own life that he should kill deceased, though defendant had resolved to kill deceased before the fatal shot was fired, the killing was not murder, and your verdict should be, 'Not guilty.'" The law of self-defense had been adequately set forth. Aside from other objections to the proposed instruction, it is erroneous in declaring as a fact that deceased had threatened to kill defendant.

4. The court gave an instruction identical in language with that considered in People v. Kennett (Cr. 161; filed Aug. 13, 1896) 45 Pac. 994. This was not error. The judgment and order are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; VAN FLEET. J.: TEMPLE, J.; McFARLAND, J.

I dissent: GAROUTTE, J.

114 Cal. 63

## PEOPLE v. HIGGINS. (Cr. 174.)

(Supreme Court of California. Aug. 18, 1896.)

CRIMINAL LAW—APPEAL BY PEOPLE.

The people cannot appeal from an order setting aside an information; this not being one of the cases enumerated in Pen. Code, § 1238, authorizing appeals by the people.

Department 1. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Information against J. F. Higgins was set aside on his motion, and the people appeal. Dismissed.

Atty. Gen. Fitzgerald, for the People. Joseph Hutchinson, for respondent.

PER CURIAM. This is an appeal taken by the people from an order of the superior court setting aside the information upon motion of the defendant. The appeal cannot be entertained. While the objection is not made by respondent, the appeal is one of which we have not jurisdiction, since the instance is not one in which the people are authorized to appeal. Pen. Code, § 1238; People v. Richter, 45 Pac. 811 (filed July 24, 1896). Appeal dismissed.

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114 Cal. 64

## FINGER v. McCAUGHEY. (L. A. 178.)

(Supreme Court of California. Aug. 18, 1896.)

INTEREST—CONTRACT—COMPOUND INTEREST.

1. A contract for interest at 10 per cent. per annum, provided the note is paid at maturity, but, if not then paid, interest to be at 12 per cent. from date of note, is a proper contract for interest, the increase not being a penalty.

2. A provision in a note that, if interest is not paid at the end of a year from date, it shall become a part of the principal and bear interest, authorizes the compounding only of the interest accruing at the end of the first year.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by H. J. Finger against Susan McCaughey, administratrix of George McCaughey, deceased. Judgment for plaintiff. Defendant appeals. Modified.

W. S. Day and Thomas McNulty, for appellant. A. E. Putnam, for respondent.

BRITT, C. Foreclosure of a mortgage made by George McCaughey on June 6, 1889, to secure his note of same date in plaintiff's favor for the principal sum of $500, payable February 6, 1890, which note contained a clause respecting interest as follows: "With interest from date at the rate of ten per cent. per annum, provided this note is paid at maturity, but, if not paid at maturity, then it shall bear interest at the rate of twelve per cent. per annum from its date until paid, and, if the interest is not paid at the end of one year from date, it shall become a part of the principal, and bear twelve per cent. interest per annum." George McCaughey died on March 1, 1890, and the defendant became his administratrix. The demand of plaintiff, founded on said note and mortgage, was duly allowed as a claim against the estate of said deceased "for the sum of $500, and the interest due or to become due thereon, at the rate of twelve per cent. per annum." Judgment of foreclosure and sale was rendered March 11, 1895; the court declaring that there was then due to plaintiff, as principal and interest of his debt, the sum of $783.10. In ascertaining this amount the interest was compounded at 12 per cent. per year from date of the note, with annual rests, giving credit for a payment of $150 made October 18, 1893. Defendant made no contest in the court below. Appellant argues that only simple interest at 10 per cent. per annum was collectible on the note; that "the attempt to increase the rate of interest on breach, and to have such increase relate back to the date of the note, is a penalty, and void under section 1670, Civ. Code." We differ with appellant. In this state the rate of interest agreed upon in writing must be allowed according to the terms of the agreement until the entry of judgment. Civ. Code, § 1918. And it is competent for the parties to agree upon an increased rate, contingent upon nonpayment of either principal or interest when due. Thompson v. Gorner, 104 Cal. 168, 37 Pac. 900. We see no substantial ground for distinguishing this case from that. But in such a contract the right to compound interest must find support in the terms employed by the parties, and the stipulation in this note that, if the interest is not paid at the end of one year from date, it should become part of the principal and bear interest, looks to the compounding of the interest accruing to June 6, 1890, but not afterwards. See Civ. Code, § 1919; Doe v. Vallejo, 29 Cal. 385; Estate of Den, 35 Cal. 692; Dean v. Applegarth, 65 Cal. 393, 4 Pac. 375. It follows that the judgment for $783.10, principal and interest, was too great by $40.20, and should be modified accordingly. Several other points are made by appellant; but we do not find them sufficiently meritorious to require discussion. The sum of $40.20 should be deducted from the amount found to be due the plaintiff, and thus modified the judgment should be affirmed, without costs to appellant.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the sum of $40.20 is deducted from the amount found to be due the plaintiff, and thus modified the judgment is affirmed, without costs to appellant.

5 Cal. Unrep. 415

## PEOPLE v. McDONALD. (Cr. 167.)

(Supreme Court of California. Aug. 18, 1896.)

ROBBERY—CONVICTION—SUFFICIENCY OF EVIDENCE.

On a trial for robbery, the testimony showed that defendant and a confederate, late at night, found the prosecuting witness intoxicated in a saloon; that, under the pretext of escorting him to his hotel, they took him along the street till they came to a blind alley; that, while one of them choked the witness, the other rifled his pockets; that they had been seen by an officer to enter the alley, and, when he came upon them, defendant was stooping over the witness, and his confederate was standing near by; that a small amount of coin was found on the confederate, and a spectacle case belonging to the witness was found near where the confederate was standing. The accomplices claimed that the witness was their friend and shipmate, and that they were taking him home, but in fact they were strangers to the witness. *Held*, that a verdict of guilty was sustained by the evidence.

Department 1. Appeal from superior court, city and county of San Francisco.

Michael McDonald was convicted of robbery, and from the judgment of conviction, and an order denying him a new trial, he appeals. Affirmed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Defendant appeals from a judgment of the superior court of the city and county of San Francisco, convicting him of robbery, and from an order denying him a new trial. The single contention upon which a reversal is asked, is that the verdict is not sustained by the evidence. The contention is untenable. The evidence of the prosecution tended to show that defendant and a confederate found the prosecuting witness, Wilson, late at night, in a basement saloon, commonly designated as a "dive," near the water front in said city, under the influence of liquor, and offered to escort him to his hotel. He went with them, and they took him along the street until they reached a blind alley, into which they turned, and while one choked him, the other rifled his pockets, and took what money he had on his person, amounting to between one and two dollars. They were discovered in the act by an officer who had seen them enter the alley, and was induced to investigate by hearing a scuffle. When the officer approached the defendant was stooping over the prostrate form of the prosecuting witness, and his confederate was standing some six or seven feet distant. Upon being arrested and searched, a small amount of coin—$1.25—was found on the confederate; and on searching the alley after the arrest a pair of spectacles, with their case, belonging to the prosecuting witness, and which had been in his trousers pocket, was found lying near where the confederate was seen standing. When approached they stated to the officer that the prosecuting witness was their friend and shipmate, and was intoxicated, and that they were taking him home. This statement was shown to be wholly untrue, and that they had had no previous acquaintance with him. Under these circumstances, the jury were fully justified in finding the defendant guilty. It is true, the defendant denied the robbery, and gave evidence tending to put an entirely innocent face upon the transaction; but the jury were not bound to believe him, and evidently did not. The fact that none of the fruits of the robbery were found on his person was but a circumstance making in his favor, but in no way conclusive of innocence. We think the evidence amply sufficient to sustain the verdict. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(114 Cal. 69)

## LEONARD v. SHAW et al. (S. F. 197.)[1]

(Supreme Court of California. Aug. 19, 1896.)

NEW TRIAL—NOTICE OF MOTION—APPEAL—RECORD —STIPULATION.

1. Denial of new trial cannot be reviewed where the statement contains no specification of errors, or the particular reasons relied on for new trial.

2. An instrument printed in the record, and purporting to be a copy of notice of motion for new trial, stating that the motion will be made on the minutes, forms no part of the record, when not verified and embodied in a statement or bill of particulars as required by Code Civ. Proc. §§ 659, 661.

3. By express provision of Code Civ. Proc. § 659, when motion for new trial is made on the minutes the notice of motion must state the particular errors and objections relied on.

4. A stipulation that the transcript is correct merely obviates the necessity of a certificate by the clerk, and does not preclude a denial of the sufficiency of the statement.

Commissioners' decision. Department 1. Appeal from superior court, San Benito county; J. H. Logan, Judge.

Action by L. R. Leonard against A. D. Shaw and another. Judgment for defendants. Plaintiff appeals. Affirmed.

L. W. Jefferson and John A. Percy, for appellant. Scott & Dooling and Briggs & Hudner, for respondents.

SEARLS, C. This is an action to recover $5,000 from the defendants for an alleged libel published of and concerning plaintiff on January 12, 1894, in the San Benito Advance, a newspaper printed and published by defendants at Hollister, in the county of San Benito, state of California. The following is a copy of the article: "Gone to Fresh Pastures. L. R. Leonard, the erstwhile manager of an Industrial Publishing Company that never had a legal existence, has gone where the woodbine twineth; and the Nash brothers, who indulged in the luxury of running a newspaper to vary the monotony of farm life, mourn as the whangdoodle o'er its first born. As manager of the semiweekly Wet Hen, Leonard made the ghost walk longer than any of the journalistic pirates who ever located in Hollister, and he left a deeper hole in the pockets of his backers. Leonard has been getting ready to skip for some time past, but he stayed just long enough to induce a hidebound board of supervisors to fix county printing rates according to his own starvation schedule, and then skipped off to pastures new, in search of another batch of suckers." Defendants answered, raising issues of fact, which were tried before a jury, and a verdict in favor of defendants returned, upon which judgment was entered in their favor for costs. This appeal is from the judgment, and from an order denying plaintiff's motion for a new trial.

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[1] Rehearing denied.

We cannot consider the motion for a new trial for several reasons, the most important of which is that the statement contains no specification whatever of errors, or the particular reasons on which the moving party relies. Nye v. Railroad Co., 97 Cal. 461, 32 Pac. 530; Hersney v. Kness, 75 Cal. 115, 16 Pac. 548; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Ferrer v. Insurance Co., 47 Cal. 416; Spencer v. Long, 39 Cal. 700; Budd v. Drais, 50 Cal. 120; People v. Railroad Co., 43 Cal. 398.

There is printed in the record what purports to be a copy of the notice of motion for a new trial, which states that the motion will be made upon the minutes of the court; but it is not embodied in any statement or bill of exceptions, and is not verified in any way, and hence forms no part of the record, and cannot be recognized. Code Civ. Proc. §§ 659-661. If it be conceded that the motion was made on the minutes of the court, it follows that the notice was required to state the particular errors and objections relied upon. Code Civ. Proc. § 659. This did not, however, obviate a specification of the errors and objections in the statement to be made in such cases after a hearing of the motion. In practice, this is frequently done by including in the statement a copy of the notice of motion containing such specification. A better practice is to make a formal statement of the causes relied upon and argued at the hearing, as it is only the formal objections stated in the notice, and argued at the hearing of the motion, that are entitled to be included in the statement. Code Civ. Proc. § 661. This court cannot be expected to grope through the record in quest of errors, which with little labor can be grouped together and succinctly stated, so as to be comprehended at a glance. Sharon v. Sharon, 79 Cal. 636, 22 Pac. 26, 131, cited by appellant's counsel, is not in point. There certain exhibits were referred to in the statement, made a part thereof, and referred to by their numbers, and the place where they were to be found at the end of the statement. The court held that those exhibits were so referred to and made parts of the statement as to bring them under the certificate of the judge authenticating the statement. In the case at bar there is no reference whatever to the notice of motion, and nothing in the statement to indicate that it was ever given, or, if given, as to its contents.

It is urged by appellant that, as counsel for respondents stipulated as to the correctness of the transcript, they are now estopped from objecting thereto. This simply obviated the necessity of a certificate by the clerk (Todd v. Winants, 36 Cal. 129) and did not preclude respondents from denying the sufficiency of the statement (Wetherbee v. Carroll, 33 Cal. 549). Nothing appears upon the face of the judgment roll to warrant a reversal.

The instructions given and refused by the court are not incorporated in the judgment roll, and are only to be found in full in the purported notice of motion for a new trial, which, for reasons hereinbefore pointed out, cannot be considered. Those referred to in the statement are not, as before stated, fortified by an assignment of error in their giving or refusal. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(114 Cal. 56)

## PEOPLE v. BENNETT. (Cr. 82.)[1]

(Supreme Court of California. Aug. 15, 1896.)

FORMER JEOPARDY—WAIVER OF PLEA.

Under Const. art. 1, § 13, declaring that "no one shall be twice put in jeopardy for the same offense," and Pen. Code, § 687, providing that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted," one tried without a plea of former jeopardy cannot for the first time raise the question of former acquittal on motion for new trial, though both trials were in the same court and before the same judge.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

C. R. Bennett was tried for assault with intent to commit murder, and convicted. From an order granting a new trial, the people appeal. Reversed.

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[1] Rehearing denied.

Atty. Gen. Fitzgerald, for the People. D. M. Connor and R. E. Hewitt, for respondent.

GAROUTTE, J. The defendant was charged, by information, with the crime of assault with intent to commit murder, and, on being arraigned, pleaded not guilty to the charge. He was tried, and found guilty of assault with a deadly weapon. Thereupon he gave notice of a motion for a new trial, which motion was subsequently heard and granted upon the ground that the verdict was not supported by the evidence. Thereafter, without being called upon or offering to enter any new plea to the information, he was again tried in the same court, and before the same judge, and found "guilty as charged." In due time he moved for a new trial upon several grounds, and, among others, that he was acquitted by the former verdict of the charge of assault to commit murder, and had been twice placed in jeopardy for that offense. The court granted the motion upon the last-named ground, and from that order the people appeal.

Our constitution provides that "no person shall be twice put in jeopardy for the same offense" (article 1, § 13); and the Penal Code contains the following provision (section 687): "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." May the defendant for the first time raise the question of once in jeopardy upon his motion for a new trial? The practice here followed is certainly a novel one, and, if justified by the law, such declaration, in effect, will be a nullification of all those sections of the Penal Code providing for special pleas; for if a defendant charged with crime may be allowed to take the chances of an adverse verdict after trial upon a plea of not guilty, and, having lost, may then for the first time upon his motion for a new trial set up a previous acquittal or conviction, or once in jeopardy, every defendant will follow that course, and a procedure which has been practiced since time immemorial, both in this country and in England, will become a thing wholly of the past. Indeed, if defendant's contention be sound, and the court's decision be allowed to stand, this defendant can never have a final judgment rendered against him, even for the minor offense included in the principal charge; for by the order of the court a new trial is granted, and upon such trial the defendant cannot be compelled to interpose his special plea of once in jeopardy. Neither has the court any power to enter such plea for him. Therefore upon another conviction for the same offense he would again secure a new trial upon the same grounds which were previously successful, and the practice could be continued indefinitely. To allow a defendant, as was done in this case, to sit idly by during the progress of his trial, and then, upon conviction, set up, upon motion in arrest of judgment, or for a new trial, a special defense that he could have raised at the very inception of the trial, would be to sanction a practice which might well be termed trifling with the court. If a defendant could raise this question after trial and conviction, he could with equal success raise it after a plea of guilty, no trial having been had. The defendant's plea of not guilty puts in issue all the allegations of the indictment or information, and nothing more. In this case the defendant would not have been allowed to prove at the trial that he had been once in jeopardy, for there was no such issue in the case, and could be none unless he saw fit to make it by plea. To say that evidence could be introduced before the court upon his motion for a new trial that would not have been admitted if offered at the trial would be an anomaly, and is entirely without the law.

The authorities upon the foregoing question appear to be in entire accord. In Com. v. Olds, 5 Litt. (Ky.) 140, the court, speaking as to special pleas, said, "It is well settled that these two pleas must be pleaded in bar, and that they cannot be given in evidence under the general issue." And in People v. Olwell, 28 Cal. 462, this court said, "At common law, upon a second indictment for the same offense the prisoner could not avail himself of a former conviction under the plea of not guilty, but he was required to plead it specially." And again, in People v. Lee Yune Chong, 94 Cal. 386, 29 Pac. 778, this language is found: "Counsel for appellant argue the question of 'once in jeopardy,' but that question can arise only after an issue has been made by a plea of 'once in jeopardy.'" An eminent author upon criminal law declares: "The law's methods must be pursued by him who seeks the protection of the law. Hence, as to pleas, to be entitled to show a particular matter in defense he must tender the plea which the law has provided, in the law's form and at the law's time." Again the same author says: "The only method for taking advantage of the former conviction or acquittal we have seen is this plea. Thus there cannot be an arrest of judgment." Bish. New Cr. Proc. §§ 744, 813. See, also, Zachary v. State, 7 Baxt. 1; State v. Washington, 28 La. Ann. 129; Pitner v. State, 44 Tex. 578; State v. Barnes, 32 Me. 534; Rickles v. State, 68 Ala. 538. Section 1020 of the Penal Code in substance declares the same principle. We see nothing violative of any constitutional provision in adhering to the foregoing views. While it is true the constitution declares that no man is to be placed twice in jeopardy for the same offense, still, as Mr. Bishop says, "the law's methods must be pursued by him who seeks the protection of the law," and this the defendant has not done. Again, the fact that the first trial was had in the same court, and before the same judge, as the second trial, in no way excused the necessity of the plea of once in jeopardy. The whole question of once in jeopardy was entirely foreign to the case, unless raised by a special plea; and, when so raised, an issue of fact was presented, which the jury alone possessed the power to pass upon. For the foregoing reasons the order granting a new trial is reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

114 Cal. 91

## CHATEAU v. SINGLA. (S. F. 73.)

(Supreme Court of California. Aug. 20, 1896.)

PARTNERSHIP—SUBLETTING OF APARTMENTS—DISORDERLY HOUSE—ILLEGALITY OF CONTRACT.

Where a contract of partnership has for its business purpose the subletting of furnished apartments for purposes of prostitution, in direct violation of Pen. Code, § 316, its illegality is not cured by the facts that the co-partnership, and the individual members thereof, are not participants, in any manner, in the business of prostitution, and that the tenements are located in a section of the city mainly inhabited by prostitutes, who are permitted to remain there by the police authorities.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Charles A. Chateau against Justin Singla to dissolve a co-partnership and wind up the business. From a judgment as prayed by plaintiff, defendant appeals. Reversed.

A. Ruef, for appellant. A. B. Treadwell, for respondent.

HENSHAW, J. The action is a proceeding in equity by one partner to dissolve a copartnership between himself and defendant, for the appointment of a receiver, for a statement of accounts, and generally for the closing up of the business of the partnership. In the complaint it is averred that the partnership was formed for the business "of subletting and renting certain tenements, and in supplying and furnishing the necessary household furniture therein to fit the same for habitations and dwellings for human beings." Further averments of the complaint were that the defendant had excluded plaintiff from all share in the proceeds and profits of the partnership, and from all dealings with the partnership property, and had collected rents and profits of the partnership, which he claimed to own and hold as his individual property, and for which he refused to account. Defendant admitted the partnership, made denial of any and all the wrongful acts charged against him, and, for a further and separate defense, averred that the co-partnership was and is illegal, against good morals, and against public policy, "in this: that the same consisted in the letting, subletting, leasing, and hiring of said tenements and premises in the complaint set forth, and the furniture therein contained, for immoral and unlawful purposes, to wit, for the purpose of maintaining, keeping, conducting, and carrying on brothels and houses of ill fame, and houses, places, apartments, and resorts for the purposes of assignation and prostitution, and that the business carried on by said co-partnership has been the letting of said premises, tenements, and furniture for such purposes, and that the plaintiff at the time of entering into and forming said co-partnership, and at all times since, well knew that such was to be and was the business of said co-partnership, and that said copartnership was carrying on said business and letting said premises and furniture for the purposes aforesaid, and that all the rents received or collected, by or on account of said co-partnership, from the tenants in the complaint referred to and mentioned, were received and collected as rents for the houses and apartments used for the purposes aforesaid." The court found "that the said copartnership business has not at any time, never has been, and is not now, illegal, against good morals, or against public policy; that said co-partnership firm simply rented the real property from one David M. Richards, between said December 30, 1890, and October 31, 1893, and then and thereafter sublet said property, consisting of four tenements, to four common prostitutes, and that said common prostitutes during all of said time have been common prostitutes, supporting themselves by prostitution at said premises; that said prostitutes, as tenants of said co-partnership firm, composed of plaintiff and defendant, paid to said co-partnership the rents of said premises so occupied and hired by said tenants of and from said co-partnership, and that said copartnership firm, and the individual members thereof, are not participants in any manner with said prostitutes in carrying on said business of prostitution; that said premises are situate in a section of this city and county of San Francisco occupied mainly and largely by common prostitutes, and said common prostitutes, including the tenants of said co-partnership firm, are permitted and allowed by the police authorities of the city and county of San Francisco to carry on their said business in said district, and on said premises." The court then proceeded to decree a dissolution of the partnership and the winding up of its affairs, instructing the receiver to hold the partnership property, effects, moneys, debts, etc., subject to the further order of the court.

It is extremely difficult to see how the court, in view of the evidence and of the law, could have found that the co-partnership business was not illegal, against good morals, and against public policy. Section 316 of the Penal Code declares that every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor. If this contract of co-partnership had for its purpose the letting of apartments for purposes of prostitution, and if the business of the co-partnership, as pleaded by the answer, was the doing of this precise thing, then the co-partnership contract was illegal, against good morals, against public policy, and against the express mandate of the statute, and equity would no more entertain an action founded upon such contract, for the relief of either of the parties to it, than it would entertain an action between two thieves for an equitable division of their plunder. A void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity. In re Groome's Estate, 94 Cal. 69, 29 Pac. 487; Buck v. City of Eureka, 109 Cal. 504, 42 Pac. 243; Pars. Partn. (4th Ed.) § 8; Lindl. Partn. 105. That this partnership was based upon such an illegal contract, and had for its business purpose the unlawful act of letting furnished apartments for purposes of prostitution, the evidence does not for a moment permit us to doubt. Going no further into the consideration of the evidence than is necessary, the testimony of the plaintiff himself concludes the question. He says: "The houses are used for purposes of prostitution, and no other purpose, and the women who occupy them are common prostitutes. When I sold Mr. Singla a half interest in this business, and took him in as a partner, I knew what these houses were being used for. We were to rent the houses for women to carry on the business of prostitution there, and, on getting the leases from Mr. Richards on the several occasions, it was for the purpose of being able to sublet the premises for those purposes." The evidence of the defendant, Singla, is identical in effect, and throughout the whole record there is no conflict upon the subject. The latter portion of the finding, to the effect that the section of the city where these tenements are located is mainly inhabited by prostitutes, who are permitted to remain there by the police authorities, is meaningless in the case. Public policy is not made or unmade by the acts or omissions of a police department; nor will it be contended that the police department may abrogate a penal statute, or annul an express mandate of the law. The finding, therefore, that the co-partnership business was not illeal, is unsupported, and cannot stand. It must fall, and with it must fall the judgment and decree which depend upon it. The cause must be reversed, with directions to the trial court to take evidence, and determine, in accordance with these views, whether or not the business of the co-partnership was the letting of apartments or tenements for the purpose of assignation or prostitution, knowing that the same were to be so used. If it shall determine that such was in truth the purpose for which the co-partnership was formed, and that such was the business which the co-partnership conducted, it will deny to either party in this proceeding any relief. It is ordered accordingly.

We concur: McFARLAND, J.; TEMPLE, J.

114 Cal. 67

## PEOPLE v. ROBERTS. (Cr. 166.)

(Supreme Court of California. Aug. 19, 1896.)

CRIMINAL LAW—DIRECTING VERDICT—FORMER JEOPARDY—APPEAL.

1. Under Pen. Code, § 1118, declaring that, "if at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice,"—the court has no power to command a verdict for defendant.

2. Where, after introduction of evidence by the people, a verdict of not guilty is rendered at the "command" of the court, defendant cannot be tried for the same offense, though the court was authorized only to "advise" such a verdict.

3. Rejection of evidence offered by the people cannot be reviewed on appeal, under Pen. Code, § 1238, subd. 5, authorizing an appeal from an order directing the jury to find for defendant.

Department 1. Appeal from superior court, Kern county; B. T. Williams, Judge.

On a prosecution of E. M. Roberts, a verdict of not guilty was directed and returned, and the people appeal. Affirmed.

Atty. Gen. Fitzgerald, for the People. Laird & Packard and J. W. Mahon, for respondent.

GAROUTTE, J. The defendant was charged with felony. At the trial certain evidence was introduced by the people. Certain other evidence was then offered, but upon objection by the defendant it was not admitted, whereupon the following proceedings took place: "Mr. Fay: If you honor please, under the rulings of the court we have nothing further to offer. Mr. Laird: We have no testimony to submit to the jury. The Court: Under the conditions of the case, gentlemen, there is nothing left for the court but to instruct this jury to return a verdict. You will prepare a verdict, Mr. Clerk, of not guilty. Gentlemen, sitting as you are, you may select from your number a foreman. Gentlemen of the jury, nothing remains for you to do but for your foreman to sign this verdict of not guilty. Step to the clerk's desk and sign it." Thereupon a verdict of not guilty was rendered, and defendant discharged. Under subdivision 5 of section 1238, the people appeal from the order made by the trial court, directing the jury to find a verdict in favor of defendant.

Section 1118 of the Penal Code provides: "If at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice." It will thus be observed that the trial court was not authorized to summarily direct the jury to find a verdict of not guilty. The power and the duty of a trial court, under the circumstances here presented, was to advise the jury what action to take; but the court had no power to command, and hence no power to enforce its commands. After the case was submitted upon the evidence, however weak that evidence, it was still the duty of the jury to pass upon its sufficiency, and find a verdict according to its own best judgment, paying all due respect to the advice and opinion of the judge as to its insufficiency. The trial court has the power, and it is its duty, to set aside the verdict of a jury under certain circumstances, but it has no power to demand a certain kind of verdict. While the action of the court of which complaint is here made was erroneous, we deem the error of that peculiar character not demanding a reversal of the judgment. And we arrive at this conclusion for the reason that, if the order should be reversed and the cause remanded, the defendant could not be again tried upon the charge here involved, and hence a reversal could avail nothing in the interests of justice. The defendant has been once in jeopardy for the offense set out in this information, and for that reason is forever freed from a second trial upon those matters. As to defendant's jeopardy, see People v. Webb, 38 Cal. 467; also, People v. Horn, 70 Cal. 17, 11 Pac. 470.

It has been attempted upon this appeal to review the soundness of the court's ruling upon the rejection of evidence. We are clear that no such question can be raised. Indeed, we are not prepared to say what particular question may be successfully raised upon an appeal by the people under subdivision 5 of section 1238 of the Penal Code. For the foregoing reasons the order is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

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(113 Cal. 593)

## CALLAN v. BULL. (S. F. 68.)[1]

(Supreme Court of California. Aug. 3, 1896.)

MASTER AND SERVANT—PERSONAL INJURY—NEGLIGENCE OF FELLOW SERVANT—PLACE OF EMPLOYMENT—SAFETY—EXPERT EVIDENCE.

1. In an action for personal injuries it appeared that defendant entered into a contract with agents of the United States to construct a harbor jetty; that plaintiff was injured by the breaking of a cap on a bent, which had been negligently constructed. The contract provided that: "The work is to be executed under the supervision of the engineer officer in charge, or his agent. * * * No material of any description will be placed in the works without his knowledge and instructions at the time. * * * The contractor must keep upon the works at all times responsible agents, who shall have full authority to carry out the instructions of the agent of the United States; * * * and all material, supervision, and labor furnished by the contractor will be subject to the approval of the engineer officer in charge." *Held*, that defendant was not the agent of the United States in the performance of the contract, but, under its provisions, was an independent contractor and employer.

2. Under the provision in the contract that "the contractor must keep upon the works at all times a responsible agent," defendant appointed B. as superintendent. The men employed by defendant were divided into several crews, with each of which there was a foreman. B. was in charge of them all, and himself at times helping in the work. If one portion of the work was in advance of the others, the men were taken from that, and placed at work on other portions. The men were all engaged in the same general business. *Held* that, with reference to those acts which were not within the personal duties of defendant, B. was but a fellow servant with all of the other employés, within Civ. Code, § 1970, and hence defendant was not liable for the negligence of any of such fellow servants in the construction of the bent at which the accident occurred.

3. The work upon which plaintiff was employed was to construct a jetty into the waters of the bay, and the making of the bent was a part of the work to be done by the laborers themselves out of materials furnished by defendant. *Held*, that the bent was not a place furnished by defendant, within the rule that an employer must see that the place in which his employé is to work is reasonably safe.

4. Expert testimony is admissible to show the strength of materials, and to show that a structure was not properly constructed to sustain the weight to which it was subjected.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by one Callan against one Bull to recover damages for personal injuries. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Reversed.

Buck & Cutler and Frank McGowan, for appellant. Chamberlain & Wheeler and Ernest Sevier, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages for an injury sustained by him while in the employ of the defendant. The defendant, in December, 1892, had entered into a contract with Maj. W. H. Heuer, of the corps of engineers, acting on behalf of the United States, for constructing a breakwater or jetty on each side of the entrance to Humboldt Bay, and in April, 1893, had hired the plaintiff as a laborer to work on the jetty. In constructing the jetty, trestlework was built out from the shore, on which was laid a double railroad track on which to carry rock and other material with which the jetty was to be formed. This trestlework was constructed of bents of piling 16 feet apart, each bent consisting of four piles, upon which a cap was fastened, and across these caps were laid stringers, upon which were placed the rails on which the cars were to run. Brush mattress work was constructed about the trestlework, and sunk to the bottom of the sea, and on this brush work was deposited rock, thus forming a riprap embankment for the jetty. The mode of laying the brush mattress was as follows: After some of the bents had been placed in position, and the track laid thereon, a grillage of poles the width of the jetty, and varying in length from one to four bents, was laid beneath the bents, and bundles of brush placed thereon in alternate layers to the thickness of nearly four feet, on the top of which was laid another grillage of poles, and, after these grillages had been secured, the whole was dropped to the bottom, and the rock afterwards dumped thereon. During the construction of a mat it was suspended at each end by sling poles hung from the bents, and on these sling poles were laid the poles forming the bottom grillage of the mattress. After the north jetty had been built for the distance of about a quarter of a mile from the shore, the defendant commenced to construct a spur on the outer side for its protection, and for this purpose placed a bent, consisting of two piles and a cap, parallel to the main jetty, and about 16 feet therefrom. These piles were driven 16 feet apart, and on them was placed a cap 32 feet long. The defendant was directed to construct a mattress at this point, 24 feet wide, measured in a direction parallel to the trestle, and as long from the trestle as it was practicable to make it from a single bent, the inner edge of the mattress being 12 feet inside of the spur bent. For the purpose of sustaining this mat during its construction, two sling poles about 40 feet long were slung about 8 feet under the cap, and outside of the piles, the inner ends running in and resting upon the rock of the jetty already built, and tied to the caps of the main trestle, and the outer ends suspended from the projecting ends of the cap on the spur bent. Two stringers, 32 feet in length, were also laid across the cap of the spur bent, one end of which was fastened to the end of the caps of the main trestle, and the other projected out over the spur cap, and 16 feet beyond it. The northernmost of these stringers was placed with its center 18 inches outside of the center of the pile, and to these stringers the sling poles were also suspended by steel cables at a point near their outer end. On August 12th—the next day after these stringers had been placed in position—the plaintiff, with other laborers, was engaged in laying the mat with the bundles of brush, and after a few loads of brush had been placed thereon the cap broke near its northern end, and a portion of that end of the cap fell upon the mat, and struck the plaintiff, seriously injuring him. The jury rendered a verdict in favor of the plaintiff, and from the judgment entered thereon, and from an order denying a new trial, the defendant has appealed.

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[1] Rehearing denied.

There was conflicting evidence upon the character of the timber, and also upon the amount of weight which it bore, as well as the support which a sound stick of its size would bear; but, in view of the verdict of the jury, we must assume that the evidence showed that the weight of the mattress at the time it fell was too great for the sustaining force of the cap, either from its inherent defect or from the manner in which it was supported, and that there was negligence, either in the construction of the bent or in the mode in which the stringers were placed. The contract of the appellant contained the following provision: "The work is to be executed under the supervision of the engineer officer in charge, or his agent, who will prescribe the order in which the materials are to be placed, and who will give the lines and levels to be used. No material of any description will be placed in the works without his knowledge and instructions at the time, and any materials so placed will not be paid for. The contractor must keep upon the work at all times responsible agents, who shall have full authority to carry out the instructions of the agent of the United States. The contractor shall remove from the work at the request of the engineer officer in charge, any person who is not acceptable to the agents of the United States;" and also a provision that "all material, supervision, and labor furnished by the contractor will be subject to the approval of the engineer officer in charge." From these provisions it is contended by the appellant that he was acting under the directions of the officers of the United States, and was but the agent or servant of the United States in the performance of the contract; that by the terms of the contract the United States reserved such control over the construction of the jetty as to deprive him of the power to select the mode of construction, or the laborers whom he would employ; and that, consequently, he is not liable for any injury resulting from following the directions of these officers, or for any fault or negligence in the manner of doing the work; and further, that if there was any negligence in the performance of the work, which resulted in the injury sustained by the plaintiff, it was the negligence of the fellow servants of the plaintiff, for which he cannot be held responsible. On the other hand, the plaintiff contends that the defendant was bound to furnish to him a safe place in which to work, and safe appliances with which to do his work, and that he could not divest himself of this responsibility by intrusting to others, whether they be fellow servants or not, the care of providing such appliances and place of work.

The master's liability for the negligence of his servant rests upon his right to select the servant and to control his work, but, when this selection and control rests in another, he is freed from such liability. The same principles govern the liability of a contractor for an injury resulting from the use of defective materials in his work. He can be held liable only when he has the right of selecting the materials. If he is to perform the contract with only such materials as may have been previously selected and furnished by his employer, he cannot be held liable for any defect in such materials. These principles are, however, subject to the rule that this right of selection and control is to be determined by the terms of the contract of employment, and that, unless by the contract this right is reserved to the employer, the contractor will be presumed to have the right of selection and control of all whom he employs. It is not enough that, while performing the contract, he may ask for and act upon the advice of his employer, or listen to his suggestions as to the mode of doing the work. Unless he is required to act according to his directions, he will not be released from liability to his employés for the consequences of his action, merely because he was so directed by the employer. He is not freed from this liability by a provision in the contract that the work is to be done "under the direction and to the satisfaction" of a superintendent (Kelly v. Mayor, etc., 11 N. Y. 432), or "under the general supervision of the chief engineer of the company" (Eaton v. Railway Co., 59 Me. 520), or "as the engineer may direct" (Callahan v. Railroad Co., 23 Iowa, 562), unless such provision extends to directing the manner in which the work is to be performed, rather than as to the results of the work. City of Cincinnati v. Stone, 5 Ohio St. 38. The reservation by the employer of the right to remove any of the employés of the contractor does not relieve the latter from liability for the negligence of his employés. Reedie v. Railway Co., 4 Exch. 244; Cuff v. Railroad Co., 35 N. J. Law, 17. The contract in the present case does not contain any provision by which the appellant was deprived of the power to employ such persons for the performance of the work as he might select. By the contract he was to supply all the materials, and perform all the labor necessary to construct the jetty according to the specifications which were annexed thereto, and he himself testified that he employed all the laborers engaged in the work, and furnished all the materials. These specifications prescribe the character of the materials to be used, and the only control or interference in reference thereto on the part of the United States provided in the contract was that such as did not conform to the specifications should be rejected; and there is no evidence that any of the material furnished by the appellant was ever rejected by any officer or agent of the United States, or that he was ever requested to remove from the work any person employed by him. The clause requiring the work to be executed under the supervision of the engineer officer, and authorizing him to prescribe the "order" in which the materials should be placed, and to "give the lines and levels" to be used, did not authorize any interference with the mode or manner of doing the work, but left that, as well as the men by whom it should be done, and the means to be employed, under the control of the appellant. The further provision that he should do the work or furnish the materials as he might be directed by the agent of the United States, refers merely to the quantity of material or place for the work that was to be furnished or performed, according to the specifications named in the contract, and did not authorize any interference with the manner in which the work should be done. Pack v. Mayor, etc., 8 N. Y. 222; Hughes v. Railroad Co., 39 Ohio St. 475.

Under the provision in the contract that "the contractor must keep upon the work at all times responsible agents, who shall have full authority to carry out the instructions of the agent of the United States," the appellant testified that he appointed one Butler "as superintendent," and "as my representative, to obey the instructions of the engineer in charge." Under this appointment Butler acted as the general superintendent of the work, and received orders from the appellant, and also from the representatives of the government. He had the right to hire and discharge men, but in fact the appellant himself hired all the laborers engaged on the work, and paid Butler as he paid the other men. The appellant does not appear to have been present at the work much of the time during its construction, or to have given any directions in reference thereto. The men employed upon the work were divided into several "crews" for different portions of the work,—the mat crew, the pile-driver crew, the rock crew, and the apron crew,—with each of which there was a foreman; and Butler was in charge of them all, giving directions to each as to the mode of the work and the place at which they were to work, directing the members of one crew to aid in the work of another, and himself at times helping in the work. Butler thus held varied relations in reference to the work to be performed, and also to the appellant and the other laborers. As the "responsible agent" of the appellant, required by the contract to carry out the instructions on behalf of the United States, he fully represented the appellant. As superintendent in charge of the work, he sustained a dual relation towards the other laborers. In respect to those duties from which the appellant could not be relieved by delegating their performance to another, he sustained towards them the character of what is termed a "vice principal," and for his acts or omissions in the performance of these duties the appellant is as fully liable as if they had been performed by himself in person; but with reference to those acts in the performance of the contract which were not within the personal duties of the appellant, he was but the fellow servant of the other employés. His relation to them, as superintendent of the entire work, was the same with reference to these acts as that of the foreman of either of the crews with reference to its work. They were all employed by the same employer in the same general business,—the construction of the jetty,—and for any negligence on the part of either of such fellow servants the appellant is not liable. Civ. Code, § 1970. These men were none the less fellow servants of the plaintiff by reason of being divided into different crews. They were all in the service of the same common employer, and engaged in the same business, each contributing to the completion of the work of constructing the jetty. It was shown that it was quite common for the men to be transferred from one kind of work to another. At the commencement, and when the plaintiff was first employed, the men all worked together, but as the work advanced they were divided into crews for the better expedition of the work. If one portion of the work was in advance of others, the men were taken from that as occasion might suggest, and placed at work upon other portions. Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020, presents many points in common with the present case. In that case the defendants, while engaged in grading a line of railroad, conveyed the material taken from a cut to an adjacent fill by means of dump cars laid upon a temporary trestle. As the dump was filled, the trestle was extended by raising additional bents and laying stringers thereon. The different portions of the work were performed by different crews, and a foreman in charge of all of the men gave them directions what to do and where to work. The ordinary employment of the plaintiff was on the dump, but, it being desired to raise some bents and extend the trestle, the foreman directed him to aid them, and while on the trestle it fell by reason of not being properly braced. The court held that the plaintiff was a fellow servant, saying: "The work which the defendants were engaged in was grading a railroad, and they employed various servants in different departments of labor on that work, but all liable to be called upon the orders of the foreman from one department to another. All those engaged in these different departments bore to each other the relation of fellow servants. They were all serving the same master, under the same control, and all engaged in the same general work. The thing to be done was the building of the road, and the co-operation of all the employés in each department was necessary to bring about that result." In Fraser v. Lumber Co., 45 Minn. 235, 47 N. W. 785, the defendant was engaged in manufacturing lumber, and had a number of employés, some of whom were engaged in piling green lumber and others in measuring and scaling it after it had dried. In piling the lumber, boards were projected for steps on which to go up and down the piles. The plaintiff had nothing to do with the piling, but while going up one of the piles of lumber, in the performance of his duty as measurer, he stepped upon one of the projecting boards, which was defective and broke by reason of its defective nature, whereby he sustained injury. The court said: "All the men employed in this lumber yard, whether pilers, scalers, sorters, or measurers, although engaged in different departments of the work, were all in the employment of the same master, under the same general control, and engaged in promoting the same common object. The making of the piles, including the projecting steps, was itself but a part of the work which these men were employed to perform, and all who were engaged in that yard, whatever the particular line of their service, were, as to each other and as to every part of the common enterprise which they were promoting, "fellow servants."

The liability of the appellant is to be determined by the character of the act through which the injury was sustained, or of his functions in reference to the act, and not by the rank or station of the employé under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is responsible for the negligence. If, on the other hand, it is in an act which may be delegated to another, or may be performed by an employé, the person by whom it is performed is a fellow servant with the other employés, irrespective of his rank, and the master is not responsible for his negligence in its performance. Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Noyes v. Wood, 102 Cal. 389, 36 Pac. 766; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020; McGinty v. Reservoir Co., 155 Mass. 183, 29 N. E. 510. Whether one acts as a fellow servant or as a representative of the master, is a question of law. Johnson v. Towboat Co., 135 Mass. 209.

Among the personal duties of the employer which are recognized as binding upon him, even though the performance of the work is turned over to another, is that his employés shall have a safe place in which to work, and that the appliances with which the work is to be done shall be reasonably safe; and it is contended by the plaintiff that, in neglecting to provide a cap of sufficient strength to support the mat upon which the plaintiff was working at the time of his injury, the defendant failed to comply with this obligation. The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. "The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employés are to adjust the appliances by which the work is to be done." Burns v. Sennett, supra. The work upon which the plaintiff was employed in the present case was to construct a jetty extending from the shore several thousand feet out into the waters of the bay. Manifestly, the place at which the work was to be done was not provided by the defendant, nor can it be said that different portions of the work in which the laborers might be engaged as it progressed was the "place" furnished by their employer, within the meaning of the above rule, or that the bent or trestle from which was suspended the mat on which the plaintiff was at work at the time of his injury was one of the appliances to be furnished by the defendant. On the contrary, the making of this bent was a part of the work to be done by the laborers themselves in the construction of the jetty, and the bent was in fact made by them out of materials furnished by the defendant. In Consolidated Coal & Mining Co. v. Clay's Adm'r, 51 Ohio St. 542, 38 N. E. 610, certain laborers in a mine were injured by the falling in of the roof, by reason of its not having been sufficiently propped; and, to the contention of the plaintiff that the employer became liable for the injury, on the ground that he had failed to furnish a safe place in which to work, the court said: "Here the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and, instead of being a place furnished by the master for the employés, within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform." In Lindvall v. Woods, supra, the court said: "The trestle was not a structure furnished by the defendants for their employés to work on, but was itself a part of the work which they were employed to perform. It was a thing which they themselves made, and was as much a part of the construction of the road as was digging in the pit, loading cars, driving teams, or tamping dirt on the dump." See, also, Marsh v. Herman, 47 Minn. 537, 50 N. W. 611; Ling v. Railway Co., 50 Minn. 160, 52 N. W. 378; Peschel v. Railway Co., 62 Wis. 338, 21 N. W. 269; Kelley v. Norcross, 121 Mass. 508; Beesley v. F. W. Wheeler & Co., 103 Mich. 196, 61 N. W. 658; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017. In McNamara v. MacDonough, 102 Cal. 575, 36 Pac. 941, it was shown that the owner of the building had assumed the preparation of the scaffold upon which the plaintiff was at work.

The principle which controls in the present case is the same as that applicable in the construction of a house or other building where the contractor agrees to furnish all the labor and materials requisite for its completion, and the carpenters, the plasterers, and the brick masons contribute their labor thereto. All of his employés are fellow servants, and the preparation of the scaffolds, ladders, staging, or other appliance for doing the different portions of the work is within the scope of their employment. The structure by which the mat on which the plaintiff was at work was suspended was in substance no more than an appliance for doing the work, in the nature of a suspended staging or scaffold such as is frequently used by painters upon a building, and the preparation of this appliance was made by the workmen themselves. There was testimony tending to show that the cap broke by reason of its own defects, and there was also testimony tending to show that it broke by reason of the defective mode in which the mat was suspended therefrom; that, if the stringers had been placed directly over the heads of the piles, instead of being placed outside of them, the strain of the mat's weight upon the cap would not have been sufficient to break it; but whether the cap broke by reason of its own defect, or by reason of the manner in which the stringers were placed upon it, is immaterial. It was selected and placed in position by the fellow servants of the plaintiff, and the stringers were also placed upon it by his fellow servants. If they were negligent or careless, either in selecting the piece of timber to be used as the cap, or in the manner in which the stringers were laid thereon, it was the negligence of a fellow servant, for which the defendant is not liable. When the construction of the spur was determined upon, Butler directed some of the men to take a cap to the place where the spur was to be built, and the cap in question was taken from those lying at the landing and carried there. Ditty, who belonged to the train crew, testified: "Butler told me to bring a cap out there. Jud Crane, who was on the car, went in with me, and we selected the cap, and took it out. There were lots of other caps at the landing where we selected this one from." Larkin, the foreman of the pile-driving crew, placed the cap on the piles. Forbes, who was a member of the same crew with the plaintiff, helped to load the cap upon the car, and testified also that members of the mat crew, rock crew, and apron crew took part in adjusting the stringers and placing them across the cap. Hennegar, who was a member of the mat crew, and was also engaged in dumping rock, testified that he helped put the stringer on the cap, with the assistance of the rock crew and the mat crew.

Witnesses were called as experts on behalf of the plaintiff, for the purpose of showing that the structure to which the mat was suspended was not properly constructed to sustain the weight of the mat, and also to show what weight a cap of the dimensions of the one in question would sustain. These questions were objected to by the defendant, upon the ground that it was for the jury to determine, from the facts that might be shown in the case, whether the structure was properly made. These objections were properly overruled. The matters sought to be shown by these witnesses—the weight of timber, the amount of strain to which a given piece of timber can be subjected before breaking, the difference of resistance to such strain between a cylindrical and a square piece of timber and between different kinds of timber, the amount of weight that would be concentrated at the different points of the stringers at which the cables suspending the mat were attached—were matters not presumably within the common knowledge of men, and were eminently proper to be shown by those who had made these subjects a matter of special study. Prendible v. Manufacturing Co., 160 Mass. 131, 35 N. E. 675. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

114 Cal. 60

## SPRECKELS et ux. v. SPRECKELS.

(S. F. 430.)

(Supreme Court of California. Aug. 17, 1896.)

APPEAL—BOND—FILING NEW UNDERTAKING—PRACTICE.

1. Code Civ. Proc. § 954, providing that no appeal shall be dismissed for insufficiency of the undertaking if a sufficient undertaking be filed before the hearing of the motion to dismiss, authorizes, in case two appeals are taken in the same case, and only one undertaking, reciting the taking of the two appeals, and providing for the payment of all costs and damages on either appeal, is given, the filing of a sufficient undertaking.

2. Code Civ. Proc. § 951, requiring appeals from orders to be heard on the papers used on the hearing in the court below, and court rule 29, requiring, in all cases of appeals from orders of the superior court, that the papers and evidence used or taken on the hearing of the motion shall be authenticated by incorporating the same in a bill of exceptions, except when another mode of authentication is provided by law, govern appeals from orders dissolving injunctions, and the failure to bring up such papers cannot be remedied on motion to dismiss by bringing up all papers on file in the court below, as it cannot be shown therefrom on what papers the hearing was had in the court below.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Claus Spreckels and wife against Rudolph Spreckels. From an order dissolving an injunction and from the judgment plaintiffs appeal. Heard on motion to dismiss appeals. Dismissed.

Delmas & Shortridge, for appellants. Rothchild & Ach, for respondent.

TEMPLE, J. In this case two appeals were taken by plaintiffs; one from an order dissolving an injunction, the other from the judgment. Only one undertaking on appeal was given, which was intended to serve for both appeals. The undertaking sufficiently recites the order and the judgment, and the sureties stipulate "that the said appellants will pay all damages and costs which may be awarded against them, or either of them, on the appeals, or either of them, or on the dismissal thereof, or of either of them, not exceeding six hundred dollars, to which amount we acknowledge ourselves jointly and severally bound." The statute requires an undertaking for each appeal to the effect that the appellant will pay all damages and costs, not exceeding $300. When there are several appeals in the same case, the different undertakings may be in the same instrument. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187. The instrument should, however, contain an undertaking for each appeal. A motion to dismiss both appeals was made, based upon the supposed defects of the undertaking. It is claimed that it does not constitute an undertaking in either appeal, and that this court has no jurisdiction. The undertaking is jurisdictional only because it is made so by statute. In section 954, Code Civ. Proc., it is provided that "no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." We are given jurisdiction by the constitution, and the statute is valid only because it is a reasonable regulation of the exercise of that jurisdiction. It is a mere rule of practice, and is just what the statute makes it. It could have been provided that an undertaking should be filed after the motion was noticed, although none had been previously given. The provision is that a new undertaking may be filed in cases where the undertaking already given is so insufficient that, but for the privilege of giving a new one, the appeal would be dismissed; for it is implied that in some cases the appeal will be dismissed unless a new undertaking be filed. It cannot be held, then, that unless the undertaking is sufficient to sustain an appeal, this court has no jurisdiction to allow a new undertaking. But an undertaking may be so insufficient as not to amount to an undertaking at all. To allow the filing of an undertaking in such a case would not be to allow a new undertaking in lieu of an original, which is all the court is authorized to do. The cases cited are really cases in which it could not be said that any undertaking at all had been filed. In Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799, two appeals were taken and one bond of $300 given. It did not show to which appeal it applied, and could not be considered as applying to either. The same is true of several other cases cited. We cannot in advance say what degree of insufficiency will be tantamount to no bond. It has been held, however, that where the bond fails to recite the appeal,—that is, where it does not purport to be in consideration of the appeal,—it is absolutely ineffectual. That cannot be said of the present undertaking. Indeed, it is doubtful if it is not entirely sufficient. We think, therefore, it is a case in which new undertakings may be filed.

A motion was also made to dismiss the appeal from the order dissolving the injunction, on the ground that the appellants had failed to furnish the requisite papers. Such an appeal must be heard upon the papers used on the hearing in the court below. Code Civ. Proc. § 951. Rule 29 of this court is: "In all cases of appeal to this court from the orders of the superior courts the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." Manifestly the appeal from the order comes directly within this rule. Appellants propose now to bring up all the papers on file in the court below. But, aside from the fact that the rule prescribes a different method, the deficiency could not be thus supplied. This would not show what papers were used on the hearing of the motion in the court below. It is not of interest to know upon what papers the notice given based the motion, but what were read. And then evidence may have been taken or papers read which are not on file. We are not required to select from the mass of papers those which are pertinent or which were used. That must be done in the court below. The motion to dismiss both appeals because of the insufficiency of the undertaking is denied, and the new undertakings filed are approved and accepted as the undertakings on appeal, but the appeal from the order dissolving the injunction is dismissed upon the ground last discussed.

We concur: McFARLAND, J.; HENSHAW, J.

114 Cal. 73

## In re LUX'S ESTATE. (S. F. 137.) [1]

(Supreme Court of California. Aug. 19, 1896.)

FAMILY ALLOWANCE DURING ADMINISTRATION—DEATH OF WIDOW BEFORE PAYMENT—LAW OF THE CASE.

1. On appeal from an order making an allowance, under Code Civ. Proc. § 1466, for support of the widow during administration of the deceased husband's estate, it appeared that deceased had devised to her a life estate in certain land, and that she had received a certain amount from sale of said life estate; and the appellate court, speaking with reference to the money thus derived, said that an allowance should be made to her without regard to her having separate property sufficient for her support. *Held*, that it was the law of the case that such money could not be considered in making the allowance to her. Temple and Henshaw, JJ., dissenting, on the ground that it appeared on the first appeal that she derived her money from a sale of her life estate, subject to administration, and that on the second appeal it appeared that she received it through a partial distribution of the estate.

2. Where a family allowance, under Code Civ. Proc. § 1466, is made for support of deceased's widow, she being the only surviving member of the family, money payable to her, under the order therefor, prior to her death, belongs to her estate, though payment was stayed by appeal from the order, which was not affirmed till after her death.

In bank. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. From an order making an allowance for support of the widow, the next of kin appeal. Affirmed.

J. H. Campbell (D. M. Delmas, of counsel) for contestants. E. B. & Geo. H. Mastick and Geo. C. Ross, for respondent.

McFARLAND, J. This is an appeal by the next of kin (called generally the "German heirs") of Charles Lux, deceased, from an order of the court, sitting in probate, made March 22, 1894, allowing Miranda W. Lux, widow of the deceased, for her maintenance, $2,500 per month from the 30th day of August, 1888, during the progress of the settlement of the estate; and we are asked to reverse the order upon the grounds that the allowance was for too large an amount, and that she was not entitled to any allowance at all. We will not discuss at length the question whether the court below abused its discretion by making an allowance for too much. The estate was found by the court, and admitted by counsel, to be of the value of $10,000,000; and it was free from debt or incumbrance. It was nearly all community property, accumulated by the joint efforts of the spouses, one-half of which would go after settlement to the widow; so that, practically, she herself would pay one-half of the allowance. The evidence shows that the amount allowed was in keeping with the scale of expenditures existing before the death of the husband. The proposition that under these circumstances, and as against collateral kin and strangers, the court below so abused its discretion in allowing the sum named that this court, for that reason, should set aside the order, has no foundation whatever in the law or the evidence.

Appellants contend that the court below did not take into consideration certain things which it should have considered. The things which it is contended were not considered are these: The deceased owned one piece of separate property, consisting of land known as the "Buri-Buri Rancho"; and, by his will, he gave to his wife, the respondent, during her lifetime, the rents, profit, and income of said rancho, and provided that "all income and interest derived therefrom shall be her sole and separate property," the remainder, after her death, to go to certain named collateral heirs. Now, it appeared from the evidence that in July, 1890, there was a partial distribution of the said Buri-Buri rancho, by which her said life estate therein was distributed to respondent, and the remainder to certain other persons; and at that time, or immediately afterwards, she sold her life estate for $110,000, the other persons, heirs or devisees, getting for their share $370,000. She had also received some rents from said rancho before the sale. All (substantially) of the community property of the deceased and the respondent consisted in a one-half interest in the firm of Miller & Lux, who owned immensely large properties in lands, cattle, etc.; and, by a written contract between the deceased and Miller, it was covenanted that, upon the death of either partner, the survivor should continue to carry on the business for the joint use of himself and the estate, heirs, and legatees of the deceased for seven years, if necessary, after the death of the deceased partner; and, in his will, the deceased requested his wife to allow her share of the common property to remain under the care and control of the surviving partner, Miller. The respondent complied with this expressed wish of her deceased husband, and allowed all her share of the community property to remain in the business of said firm, under the management of Miller; and the said money which she received from the sale of said rancho she immediately loaned to Miller, to be used in the firm business, although afterwards she invested some of it in other property, and she received (although for what length of time does not appear) income from this money in the amount of $458 per month. The will also gave her $500 per month "out of my estate" during her life, and his trustees were directed to "set apart so much of my estate as may be necessary to yield that sum for that purpose"; but no part of the estate was ever set apart for that purpose, and no part of said $500 per month was ever received by respondent. There was also a provision in the said written contract between Lux and Miller that so much of the "rents, issues, and profits, and proceeds of sales which may be necessary for the support of the family of the deceased" should be paid to such family; but such rents, profits, etc., were put by Miller into the business, and none paid to respondent. And these items above mentioned —particularly money received from the Buri-Buri rancho and the said $500—are the main matters which, it is contended, the court did not consider.

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[1] Rehearing denied.

It does not clearly appear that the court did not consider these items. Findings were made by the court; but it can hardly be said that they affirmatively show that, in arriving at the conclusion that $2,500 per month was a proper allowance, the court did not consider the said items. However, there is in the transcript an "opinion" of the judge of the court below, in which, referring to a former appeal, he said: "Upon the former hearing, this court took into consideration, in arriving at its conclusion, certain matters which, upon said appeal, the supreme court held should not have been considered in fixing the family allowance, and, in the reversal of the order, indicated and pointed out the course this court should pursue in fixing the family allowance. At the first hearing, the value of the estate was fixed at $4,000,000; while now it is placed at $10,000,000. In view of the evidence presented, and under the decision of the supreme court, an allowance," etc. And it is contended that from this opinion it appears that the probate court erroneously construed the opinion of this court on the former appeal as holding that the said items should not be considered. But, in the first place, if this "opinion" of the court below can be considered at all, it does not carry on its face the meaning sought to be given it. It expressly refers to, and apparently rests largely on, the fact that, at the first hearing, the estate was supposed to be worth $4,000,000, while now it is shown to be worth $10,000,000. And, in the second place, if the court below construed the decision of this court on the first appeal as contended, then it construed it correctly; for this court, in that decision, held that, in fixing a proper allowance, neither the Buri-Buri rancho nor said $500 mentioned in the will should be considered. The history of that appeal is, briefly, as follows: Charles Lux died in March, 1887. On May 4, 1887, upon the application of the widow (respondent here), the court made an order granting her $2,500 per month from the death of the deceased "until the return of the inventory, or until further order of the court." There was a difference of opinion as to when the "return of the inventory" legally took place; and, under the construction which the executors put upon said order, they continued to pay the respondent $2,500 per month until November 15, 1891. It was held afterwards, however, that the inventory was legally returned on August 30, 1888. On March 17, 1892, the respondent filed a petition for an order to be made nunc pro tunc as of the date of the return of the inventory (which she then took to be May 16, 1890), allowing her $2,500 per month during the progress of the settlement of the estate, to which petition appellants herein filed written objections. Upon the hearing of the issues thus raised, the court, on May 13, 1892, made an order allowing her $1,000 per month from August 30, 1888, until November 15, 1891. From such order, respondent herein took an appeal, and that is the appeal hereinbefore referred to. It is reported in 100 Cal., commencing at page 593, and 35 Pac. 341, under title of In re Lux's Estate. The order was reversed, with certain directions to the court below. It was held that the order of allowance should have embraced the entire period of the settlement of the estate; but the respondents there (appellants here) contended that as the widow had received money from said Buri-Buri rancho amounting to $137,000, including rent and the sum for which her life estate therein had been sold, and had been given the $500 per month by the will, therefore she had sufficient means to support herself, and was not entitled to any further allowance; and it was in response to this contention that this court made rulings which are the law of the case.

The evidence and facts were the same on that hearing as on the second hearing, out of which this present appeal arose, except as to the fact of the partial distribution of the Buri-Buri rancho (which will be noticed hereafter), and the further fact that, at the second hearing, the estate was shown to be vastly more valuable than at the first hearing. The financial situation and ability of the respondent was exactly the same at both hearings. Then, as now, the moneys which she had received from the said rancho, and the said provision of the will, were before the court. And, under these circumstances, this court, on the former appeal, said: "The court below found that the property set apart to the widow is insufficient for her support, and also made additional findings to the effect that the deceased, in his will, bequeathed to her a legacy of five hundred dollars per month during her life, and a life estate in certain property, from the rents and sale of her interest in which she had received one hundred and thirty-seven thousand dollars, and that the deceased also provided in his will, as well as by agreement with his partner, Miller, that said Miller should pay to her monthly such sum as might be needed for her support. It is claimed by respondents that these findings show that the widow has sufficient property of her own to support herself, and that, under such circumstances, she was not entitled to any allowance whatever from the estate, and therefore she cannot be heard to complain because the order appealed from does not continue the allowance during the administration of the estate; and, in support of this proposition, it is argued that the object of the statute is 'to meet the actual wants and necessities of the widow and her family,' and that when, as in this case, the widow is childless, and has abundant private means of her own, there are no wants or necessities to relieve, and the law does not contemplate that any allowance shall be made for her support. But, however the rule may be in other states (and there are decisions which seem to support this contention of respondents), we do not think section 1466 of the Code of Civil Procedure can be so construed. Its language is express and mandatory, and, in the language of the counsel for appellant, 'the duty of maintaining the family, which the law imposes upon the deceased husband or father in his lifetime, is continued against his estate pending its administration,' if the estate is not insolvent. It declares that the court must make a reasonable allowance out of the estate if the property set apart to the family is insufficient for their support; and for the court to hold that no allowance shall be made to the widow if she has sufficient property of her own, although the property set apart to her is insufficient of itself for her support, would be, in effect, an amendment of the law by judicial construction. There was nothing actually decided in Estate of Walkerley, 77 Cal. 643, 20 Pac. 150, in conflict with this conclusion, although it may be conceded that there are expressions in the opinion which, considered apart from the facts before the court, lend some support to the argument of respondents to this point." And the court concluded its decision as follows: "The order appealed from will be reversed, and the superior court will, upon the evidence already before it, and such further evidence as the parties may desire to present, make an order for an allowance to the widow, to continue during the progress of the settlement of the estate, and in such amount as it shall deem reasonable, and without regard to the fact that she may have separate property sufficient for her support. Order reversed." This language can receive no other construction than that the court below was to allow her a proper support out of the general estate, notwithstanding the special gift in her husband's will of the Buri-Buri rancho as "her sole and separate property." In the phrase at the close of the opinion, "without regard to the fact that she may have separate property sufficient for her support," the word "separate" was clearly used in the sense in which the deceased used it in his will,—to denote, generally, property owned by a single individual, and not in the technical sense in which it is used in certain parts of the Codes to distinguish, as between a living husband and wife, property owned by both jointly, called "community property," from that owned by one of the spouses individually, called "separate property." Indeed, in this technical, statutory sense, the word "separate" is hardly applicable at all to the property of a person at a time when he or she is single or unmarried. Moreover, the language of the court was directed to the facts of the case before it,—to the contention that, because respondent here received sufficient money from the Buri-Buri rancho to supply her necessaries, therefore she was not entitled to any allowance. Moreover, the record showed that the respondent had no other property than that derived from the Buri-Buri rancho to which the language of the court can be applied.

It is contended that there is a difference between the two appeals, in this: that, at the first hearing, the record did not affirmatively show that there had been a partial distribution of the Buri-Buri rancho property, while the record on this present appeal does show that fact. If that be so, we cannot see what possible difference it makes. The material point around which appellants' contention revolves is that respondent received a certain amount of money from this particular Buri-Buri property, sufficient to support her, and that, therefore, she is not entitled to further allowance; but the fact that she received this money appeared just as clearly and just as fully in the first record as in the present one.

That being so, how would the situation have been substantially changed by the fact that a formal order of distribution had been made? But the truth is that the former decision was made with the understanding and upon the theory that the order of distribution had been made. When that appeal was pending, there were also pending several other appeals growing out of the estate of Lux, which were intimately related to each other, and submitted at the same time, and decided on the same day. See 100 Cal., from page 593 to page 617, and 35 Pac. 341, 345, 639. In one of these, at least (Miller v. Lux, 100 Cal. 609, 35 Pac. 639), the transcript showed this distribution. Whether or not the court, in deciding one of these appeals, had the right to look into the records in the others, need not be discussed, because, in the appeal we are now discussing (In re Lux's Estate, 100 Cal. 593, 35 Pac. 341), counsel for respondents there (appellants here) stated affirmatively that the distribution had been made, and argued upon that basis. In their brief in that case, speaking of the petition for allowance, they say: "On the contrary, it shows that she has $110,000 derived from said estate through the sale of her life estate in the Buri-Buri rancho, theretofore distributed to her, from which she gets an income of $458.33 per month." And, again: "More than that, her testimony shows affirmatively that the petitioner was not then dependent upon the estate for support; that she had received $110,000 from the sale of her life estate in the Buri-Buri rancho (theretofore distributed to her)." See Supreme Court Records, vol. 1165, pp. 13, 15. Under these circumstances, there is nothing in the very technical point that the record in the former appeal did not show the distribution. Of course, the contention, even if sound, would not apply to any period prior to the date of the distribution, which occurred in July, 1890.

It appears by affidavit that, since this appeal was taken, the respondent has died; and the point is made by the appellants that the right died with her as to all the allowance not actually paid her before her death. The views of this court on the point were pretty fully indicated at the oral argument by conversations between counsel and the Chief Justice. It is sufficient to say that the order, like any money judgment, was the property of the respondent. The appeal merely suspended its operation; but upon its affirmance, if pending the appeal she has died, it goes to her heirs or personal representatives. Of course, there can be no allowance for any time subsequent to her death.

We see no other matters necessary to be discussed. On the former appeal this court said: "The amount of the allowance is a question which rests very largely in the discretion of the superior court, and its action in the matter will not be disturbed on appeal unless it clearly appears that the discretion has been improperly exercised. Of course, as was said in Re Stevens' Estate, 83 Cal. 325, 23 Pac. 380: 'The court is not restricted in making this allowance to a bare support to the widow. Regard should be had * * * to the mode in which she lived during the lifetime of her husband.' The allowance is to be sufficient to provide all the necessaries of life, and this will include all those things which are reasonable and proper for use in the home and in social intercourse, in view of the condition and value of the estate, and the station and surroundings of the family." Tested by these views, the conclusion of the court below cannot be disturbed here, unless we travel beyond the legitimate province of an appellate court. The order appealed from is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

BEATTY, C. J. I concur in the order of affirmance. If the case was rightly decided on the former appeal, there is no error in the last order of allowance; and, if it was not rightly decided on the former appeal, that decision has, nevertheless, become the law of the case. The contention here is that the superior court erred at the last hearing in disregarding the legacy of $500 a month and the partial distribution of the Buri-Buri rancho. As to the legacy of $500 a month, the superior court rightly understood the decision of this court as containing a direction to disregard it. I think myself that it should have been considered, because it was a provision made by the testator himself for the support of his widow out of the community property, and to that extent I think the former decision of this court was erroneous. As to the Buri-Buri rancho, I do not think the life estate devised to the widow is, upon a proper construction of the will, chargeable with the support of the family. That interest, whether distributed pending the administration or at the close of it, was to go to the widow intact and undiminished by any charge for expenses of administration or support of family.

TEMPLE, J. I dissent. The former appeal, reported in 100 Cal. 597, 35 Pac. 341, was taken by the widow from an order made May 13, 1892. The order was reversed, and the cause remanded for further proceedings. Such proceedings were had, and a new order was made March 22, 1894, from which the present appeal is prosecuted by the next of kin. Lux died testate in March, 1887, and it is stipulated that his estate is of the value of $10,000,000. Nearly all was community property. His family consisted solely of his widow. The first allowance was for $2,500 per month until the return of the inventory. This sum was paid to her monthly until November, 1891,—four years and eight months. The court ruled, however, that the inventory had been returned August 30, 1888, and that after that time the allowance was paid by the executors at their peril; that is, they would only be allowed a credit for such sum as the court should determine ought to have been allowed. The order of May 13, 1892, was for $1,000 per month from August 30, 1888. From this order the widow took an appeal, and on the appeal contended that the order was erroneous (1) because it was retroactive, and deprived her of the preliminary allowance which she claimed continued until the filing of the inventory of May 16, 1890; and (2) because it only continued the allowance until November 15, 1891, instead of during the progress of the administration. This court held that the order was properly made to operate from August 30, 1888, but reversed the order appealed from, and directed the probate court to make an allowance to the widow to continue during the progress of the settlement of the estate, and in such amount as it shall deem reasonable, without regard to the fact that she may have separate property sufficient for her support.

One trouble with the judgment of reversal and with the opinion is that there was no claim made that Mrs. Lux had any separate property, and in fact she had none except the homestead, which had been conveyed to her before the death of the testator. There was no claim that she was deriving any income from it. It appears, then, that she had sold her life estate in the Buri-Buri rancho, and had realized $137,000 from the sale, and it was this resource which was specially considered, although it is inaccurately called "separate property." The report does not show that it then appeared that there had been a partial distribution of the estate by which the Buri-Buri rancho was set apart to Mrs. Lux, and, with the record used on that appeal before me, I find no evidence that such partial distribution had been made. The case presented was that Mrs. Lux had sold her interest as a devisee, the grantee taking it subject to administration. But a widow is not compelled to sell her interest in the estate in order to procure the means of living. The court, in its opinion, carefully guarded against the contention that, if there had been a partial distribution of the estate, such fact would not affect the right of the widow to her support out of the estate. It said: "Of course, we are not to be understood as holding that the value of the property set apart for the use of the family, under section 1465 of the Code of Civil Procedure, or the income of such property, is not to be considered in determining what is a reasonable allowance to be made from the remaining portion of the estate for the support of the family during the progress of the settlement of the estate; nor that such order for family support, when made, may not be subsequently modified by the court if the condition of the estate or the relation of the family thereto should change; as if, for instance, it should appear that the value of the estate was materially less than shown at the date of the order sought to be modified, or that its indebtedness is greater than was then supposed, or in the event of a partial distribution to the widow or children before the final distribution of the estate." If the court may modify or discontinue an allowance because there had been a partial distribution, such fact should be considered in making the allowance if the distribution was made before the discretion of the court is called into exercise. The record on this appeal shows that there had been a partial distribution by which the Buri-Buri rancho was set apart to Mrs. Lux for life, and also rents which had then accrued, amounting to $33,460. It was assumed that the amount of rents, after deducting expenses, was $27,000. This was in July, 1890. The order of reversal must be construed in the light of the opinion. It cannot be understood as directing the court to fix an allowance which should not be modified, even if those changes should take place which are mentioned in the above extract from the opinion. And so, I think, if, on the rehearing, a different state of facts were shown, there is nothing in the opinion or the judgment which would prevent the court from taking such new facts into consideration.

Respondents argue the case as though the probate court was bound to determine the question as to what allowance will be necessary during the entire progress of the settlement of the estate, at the time the exempt property is set apart to the widow and family. There is no such requirement in the statute, and, if there were, it would have been a very unwise one. The power of the court and its duty extends to the entire period of administration. It must make such allowance—and such only—as shall be necessary during the progress of the settlement of the administration. The general expectation is that the administration will be closed in about one year. The exempt property may be amply sufficient for that period, and utterly insufficient for a further period. If forced to determine the matter when the exempt property is set apart, it would necessarily determine that no further allowance was necessary. So, too, the exempt property may be unproductive for the first year, and after that produce an ample revenue. I think, if the court were to make an allowance for the first year, and none for the second because none was required, it would literally comply with the statute. It would have made such reasonable allowance out of the estate as was necessary for the support of the family during the progress of the settlement of the administration. The duty of the court to make such allowance as may be necessary, and its control over the allowance that it may do so, continues during the entire administration. This proposition is, I think, involved in the above extract from the opinion rendered on the former appeal. The true doctrine was accurately stated in Re Walkerley, 77 Cal. 643, 20 Pac. 150. Upon this subject, the former opinion, taken as a whole, merely holds that the family of the deceased is entitled to a support from the estate during the progress of the settlement of the estate, although the widow or children may have other resources sufficient for that purpose. The probate judge was of the opinion that, under the order made, he was not at liberty to take into consideration the fact that there had been a partial distribution, or the fact that the widow was entitled, under the will, to $500 per month for life. His construction of the opinion was a reasonable one, but, as to the paragraph above set out, the court expressly disclaimed the intent to so hold. I think the probate court in this matter erred. As the court found that $2,500 per month was necessary for the support of the family, and it appears that through the partial distribution and the provision made in the will, of which the widow might have availed herself, the sum of about $1,000 was provided, that sum should be deducted from such monthly allowance.

Mrs. Lux has died since this appeal was taken, and it is claimed that her right to an allowance died with her; that she had no title or vested right which could descend to her heir or pass to her administrator. There is surely much plausibility in this contention. In the former opinion it was suggested that the duty of the husband and father for the support of the wife and children rested upon his estate during administration. If a father give to his wife or minor child money to spend for her or its support, the money belongs to the father or husband until expended. If the money were placed in the hands of the widow or guardian for the minor children, it must be held in trust for that purpose. Upon this theory, logically, when allowance money is paid to the widow, she takes it in trust for the purposes for which it was allowed. Certainly, the widow has no vested interest in an allowance before it is actually made. It is not on the same plane as her distributive share as an heir in the estate. The intent is that the money shall be immediately expended, and shall not swell the estate of the beneficiaries. She is not, before the amount is judicially determined, entitled to any specific sum, or indeed to anything, but only that the probate judge shall determine whether there is a necessity for an allowance. The title to the money paid as an allowance is not settled by section 1468. The provisions of that section would be inapplicable. Take the case where there are minor children who are not the children of the widow, and who have guardians of their person and estate. In such case the court might conclude that the widow's share of the exempt property was ample for her support, but that the children needed an allowance. In such case she would not be entitled to any portion of it, and there can be no doubt of the power of the court to dispose of the fund so that the children would be supported. And in such a case, if one of the children were to die, would its share of the unused allowance go to its estate? In this case there are no children, and the suppositions are made simply by way of an argument that, until there is money due under some valid order, the widow has no vested interest. Ordinarily, the allowance is doled out in such small sums, by means of frequent payments, that this question does not become important; but here the allowance was $30,000 per annum, and payments have been stayed for several years by appeals taken from the order. Therefore, when Mrs. Lux died, a large amount had accrued. Since there were no minor children, we are not forced to consider questions that might be embarrassing under different circumstances. The practice has been that, when the money has been paid, the court is not further concerned about it. It will not require the beneficiaries to account for it, but will assume that it was necessary. So far, therefore, as concerns the money which has been paid,—if not above what is finally adjudged to be necessary,—no question can arise. And I think the same rule must prevail in regard to allowances which had accrued, but which had not been paid, when Mrs. Lux died. Since it was adjudged in the former appeal that the court would not consider other resources in determining what allowance is necessary, if she had been forced to look elsewhere for her means of support while payments were suspended by the appeals, she, or, in case of her death, her estate, should be reimbursed therefor.

It is said that, until the order has become final, she had no vested right. I do not think it necessary to hold that the order must be final in the sense in which a judgment must be final to be used as evidence of a right. If there had been no appeal, it would not have been final, in that sense, until the time for the appeal had elapsed. It was operative, however, and, though the right to claim the benefit of it was suspended by the appeal, it was at all times so far operative that her right to the allowance accrued as each fell due, subject to the chance that the order would be reversed. I think the order appealed from should be modified by reducing the amount of the allowance to $1,500 per month, and, as modified, affirmed.

I concur: HENSHAW, J.

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114 Cal. 89

## In re LUX'S ESTATE. (S. F. 51.)

(Supreme Court of California. Aug. 19, 1896.)

EXECUTORS — ACCOUNTING — PAYMENTS WITHOUT ORDERS FOR FAMILY ALLOWANCE.

That payments by executors to testator's widow for a family allowance were without a previous order of court does not deprive them of a right to credit therefor to the extent that the court may find that they were reasonable and proper.

In bank. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. From an order settling certain accounts of the executors, the next of kin appeal. Affirmed.

J. H. Campbell and D. M. Delmas, for appellants. Mastick, Belcher & Mastick, Garber, Boalt & Bishop, and F. E. Spencer (Wm. Rix, of counsel), for respondents.

McFARLAND, J. This is an appeal by the next of kin of Charles Lux, deceased, from an order settling certain accounts of the executors of the will of said deceased. The only items to which objections are pressed are certain disbursements of $2,500 per month to the widow of said deceased, as allowance for her maintenance. A decision was made and an opinion rendered this day in another appeal (In re Lux's Estate [S. F. 137] 45 Pac. 1023), taken by these same appellants, from an order making an allowance of $2,500 per month for maintenance of said widow, by which said order was affirmed; and this present appeal has been presented by appellants mainly upon the theory that the records in the two appeals are substantially the same. If that be so, then the order therein appealed from must be affirmed, upon the authority of the decision in said appeal, S. F. 137. However, the two records are not the same. In the appeal S. F. 137, the main objections urged against the correctness of the allowance were that it appeared that the court did not consider certain moneys received by the widow from certain property of the deceased; but in the present appeal the court expressly found the fact of her receipt of said moneys, and that, "taking into consideration" that fact, the $2,500 per month were "reasonably and properly advanced to said widow as a family allowance, and for her use and support." Moreover, in this appeal, as was held by this court when these matters were before it on former appeals (In re Lux's Estate, 100 Cal. 606, 35 Pac. 345; Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639), the question is not whether there had been a valid pre-existing order for allowance when the executors made the disbursements to the widow, but whether they were reasonable and proper, and therefore should be allowed in the settlement of their accounts. This court there said: "The fact that such payments were made without a previous order of the court does not deprive the executors of the right to a credit therefor, to the extent that the court found such advances were reasonable and proper." In re Lux's Estate, 100 Cal. 608, 35 Pac. 345. We see no reason for disturbing the action of the court below. The order, decree, and judgment appealed from are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.

5 Cal. Unrep. 417

## BARTLETT v. McGEE. (S. F. 97.)

(Supreme Court of California. Aug. 20, 1896.)

VENDOR AND PURCHASER—SUFFICIENCY OF TITLE—RECOVERY OF MONEY PAID.

Where a purchase contract gives the vendee 30 days for examination of title, provides for a deposit, and its return if title proves invalid, without specifying the time within which the conveyance is to be made, an unrecorded contract for sale of lands, of which the vendee has no notice, between the vendor and a third person, existing when the contract was made, and which, by mistake, included the same land, is a defect which will render the title invalid, and entitle the vendee to recover the deposit if the vendor fails within a reasonable time to remove the defect.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Samuel Bartlett against James McGee to recover a deposit on a contract for the purchase of land on defendant's failure to furnish a good title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

A. A. Moore, for appellant. Whitmore & Schutleff, for respondent.

VANCLIEF, C. On August 26, 1887, the defendant agreed to sell to A. Bartlett (brother of plaintiff) a certain lot of land situate in Berkeley, Alameda county. At the date of the agreement, A. Bartlett deposited with defendant $950 as a partial payment of the purchase money, on the express condition that it should be returned to him in case defendant's title should prove invalid. The agreement and deposit were evidenced by the following written memorandum, signed by the defendant:

"$350. Berkeley, August 26, 1887. Received of A. Bartlett the sum of three hundred and fifty ($350) dollars, being partial payment on a deposit of eleven hundred dollars in the sale of a certain block in the McGee tract, in Berkeley, bounded by Catherine street, McGee avenue, Bancroft Way, and Allston Way, containing twenty-four lots, 50x130, the purchase price being eleven thousand dollars, and the terms as follows: Deposit, ten per cent.; one-third cash on perfection of title and surrender of deed, and the balance at seven per cent. interest, payable in one and two years; thirty days allowed to search title. If the title proves invalid, the deposit will be returned. The sale is subject to the approval of the owner, James McGee. C. H. McLenathen & Co.

"This sale is approved.

his
"James X McGee.
mark

"August 26th. Received $600 additional on above deposit. C. H. McLenathen & Co."

On April 3, 1888, A. Bartlett assigned the agreement, with all his rights thereunder, to plaintiff, who, on April 23, 1888, commenced this action to recover the deposit of $950, on the alleged ground that defendant had failed and refused to make or tender conveyance of a valid title. The judgment was in favor of the plaintiff for the sum demanded; and defendant has appealed from the judgment, and also from an order denying his motion for a new trial.

It is alleged in the complaint that the defects in defendant's title were (1) that the land described in the agreement was subject to a recorded mortgage; and (2) that it was subject to an agreement in writing by and between defendant and one George Bates, executed August 25, 1887 (one day prior to that between defendant and Bartlett), whereby defendant agreed to sell said lot of land to Bates, and to give Bates until October 1, 1887, to examine the title. Upon the expiration of the 30 days allowed plaintiff in which to examine the title, to wit, on September 26, 1887, A. Bartlett met defendant and his counsel, at the request of the latter, for the purpose of paying the first installment of purchase money, receiving deed from defendant, and executing mortgage to defendant to secure deferred payments, as per agreement. Bartlett then produced and tendered to defendant a sufficient sum of money to make the first payment, but on the express condition that defendant should first show satisfaction of the mortgage, but said nothing on that occasion about the contract of sale to Bates. Defendant then admitted the existence of the unsatisfied mortgage of record, but said he could not satisfy it so late in the day (it then being about 5 o'clock p. m.), but that he would satisfy it the next day, and would allow Bartlett to retain sufficient of the money tendered to satisfy the mortgage until defendant should satisfy it. Bartlett declined to accept this proposal, and refused to pay any part of the purchase money, except on the condition upon which he made the tender. On the next day (September 27th) defendant satisfied the mortgage, and tendered to Bartlett a deed of the land, with proper certificate of satisfaction of the mortgage, and demanded of Bartlett payment of the first installment, and that he perform his part of the agreement. Bartlett refused to take the papers thus tendered, or even to hear them read, though he was informed of their general purport. A few days thereafter, about October 3d, Mr. Bates notified Bartlett that he (Bates) held a contract with defendant, dated August 25, 1887, for the purchase of the same lot described in defendant's contract with Bartlett, and that he was about to commence an action against defendant to enforce specific performance thereof. Thereafter, on October 25, 1887, Bartlett demanded of defendant a return of said deposit of $950, and then, for the first time, objected to defendant's title, on the ground of defendant's agreement to sell the land to Bates. Defendant then (as in his answer) denied the existence of the alleged contract with Bates, and refused to return the deposit. Thereafter, on November 11, 1887, Bates commenced an action for the specific performance of his said contract, of which the following is a copy:

"For and in consideration of the sum of one thousand dollars to me in hand paid, and the receipt of which I hereby acknowledge, I covenant and agree to sell to George Bates, of the town of Berkeley, a certain block of land situated in the town of Berkeley, county of Alameda, state of California, and bounded as follows: On the south side by Bancroft Way, on the east by Grant street, on the north by Allston Way, and on the west by McGee avenue, otherwise called 'Hamilton Street,' on the following terms: George Bates shall be allowed till October 1, 1887, to examine title; and, if title is not perfect, then the deposit shall be immediately returned. If the title be good and valid, George Bates shall pay on or before said first day of October the sum of two thousand six hundred and sixty-six dollars and sixty-six cents ($2,666.-66), and on the first of October, 1888, a further sum of three thousand six hundred and sixty-six dollars and sixty-seven cents ($3,-666.67), and on the first day of October, 1889, a further sum of three thousand six hundred and sixty-six dollars and sixty-seven cents ($3,666.67); making in the aggregate the sum of ten thousand dollars in addition to the thousand dollars already paid. Deferred payments shall bear interest at the rate of seven per cent. per annum from October the first, 1887, and shall be secured by a mortgage on the property sold. On the completion of the payment to be made on October the 1st, 1887, the two thousand six hundred and sixty-six $^{66}/_{100}$ dollars, I agree to give to said George Bates a grant, bargain, and sale deed to the whole of the block hereinbefore described, free of all liens and incumbrances, except the mortgage to be given by him to me for the balance of the purchase money. And whereas said George Bates intends to subdivide said block, and sell the subdivisions, I hereby agree to release from the effect of the mortgage any portion of the block in behalf of the purchaser of such subdivision, on the following terms: Whenever I shall receive a sum of three hundred and thirty-three dollars, I will release a lot not greater than fifty feet broad by a hundred and thirty feet long, and in the same proportion for larger or smaller lots. I also agree to open the street past the block, called 'Allston Way,' whenever said George Bates shall wish it.

his
"James X McGee.
mark

"Witness: R. A. Morse."

Though this contract bears no date, it is admitted that it was executed on August 25, 1887; and there is no question that the description therein plainly embraces the whole lot described in defendant's agreement with Bartlett of August 26, 1887. But it is claimed, and for all purposes of this action may be assumed, that the lot which defendant afterwards agreed to sell to Bartlett was included in the description by mistake. It is further claimed by appellant that the mistake was corrected on August 26, 1887, by canceling the contract of August 25th, and executing another, which excluded the Bartlett lot; but, on sufficient evidence, the court found that the contract of August 25th never was canceled nor reformed, and that no substitute therefor was ever executed. About five months after the commencement of Bates' action, and while it was pending, to wit, on April 23, 1888, the plaintiff commenced this action; and the pendency of Bates' action continued about 17 months after the commencement of this action, to wit, until September 27, 1889, when it was dismissed; but on what terms or for what reason it was dismissed does not appear.

It is admitted, and I think properly, by counsel on both sides, that time of performance by either party was not of the essence of the contract, and that each party was entitled to a reasonable time within which to perform his part, provided he did not absosolutely refuse to perform it before the expiration of such reasonable time; and, accordingly, I think defendant satisfied the mortgage, and removed all objection to his title on that ground, within a reasonable time; but, assuming that the Bates contract was a valid objection to his title, he was bound to cure that defect also before he would have been entitled to performance on the part of Bartlett, unless Bartlett had waived that objection by failing to urge it on September 26, 1887, when the only ground of objection urged by him was the incumbrance by mortgage. As to such waiver, it is sufficient to say that the court properly found that Bartlett did not know of the existence of the Bates contract until after the 26th day of September, 1887, nor until about the 1st day of October, 1887, when he was notified thereof by Bates as aforesaid. On this point the evidence was conflicting, but the preponderance thereof seems to be clearly in favor of the plaintiff. Surely, Bartlett could not have waived a defect in the title before he had notice thereof, actual or constructive. The Bates contract was not recorded.

The court found, under the heading of "Facts," that the defendant did not exercise due or reasonable diligence in clearing his title from the contract of August 25, 1887, or from the effects thereof, nor within a reasonable time make said title good or valid, as provided in his agreement with Bartlett; and in this connection it should be observed that the defendant never offered to clear his title of the cloud cast upon it by the Bates contract. In his answer, he simply denied the existence of the Bates contract, although Bates' suit on that contract had been pending five months before he answered. The court found, as a conclusion of law, "that the making and existence of the contract of August 25, 1887, between defendant and said George Bates, rendered the title to the said land and premises invalid and imperfect, and subjected the same to reasonable doubt and litigation, * * * and not good or valid as contemplated by said agreement." I think this conclusion is fairly deducible from the facts found, and is correct. Turner v. McDonald, 76 Cal. 177, 18 Pac. 262; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Peckham v. Stewart, 97 Cal. 147, 31 Pac. 928; Reynolds v. Borel, 86 Cal. 538, 25 Pac. 67. To satisfy defendant's contract, the title must not only have been good in point of fact, but it must also have been free from any reasonable objection. It is not sufficient that it may be shown to be good as the result of an action instituted for the purpose of reforming defects in any deed or contract by which it appears to be defective.

In his brief, counsel for appellant contends that several of the findings are "contrary" to the evidence, but there is no specification in his statement on motion for new trial of any particular in which he claims that the findings are not justified by the evidence. The findings of fact cover 12 pages of the transcript, and are numbered from 1 to 16, some of which contain several distinct propositions. The nearest approach to a specification of any particular in which it is claimed the evidence does not justify the findings is the following: "The findings of fact numbered from one to sixteen, inclusive, are contrary to the evidence, and each and every one thereof are contrary to the evidence, in finding precisely to the contrary of the facts proven; and, for like reason, the said decision and the whole thereof is against law." Nevertheless, I have carefully examined the evidence, with the result that, in my opinion, it is sufficient to justify all the findings. The objections to the findings are based upon the assumption that the evidence showed that the cloud upon defendant's title might have been removed by correcting a mistake in the Bates contract; but conceding the mistake, and that the evidence in this case was prima facie sufficient to warrant a decree correcting it, at suit of defendant against Bates, yet, so far as plaintiff was concerned, the cloud remained, and so obscured the title that he was not bound by his contract to accept it, and risk the result of a lawsuit with Bates. That Bates denied the mistake, and insisted upon the validity of his contract, was sufficiently evinced by the pendency of his action against defendant to enforce that contract, which action had been pending five months before this action was commenced. The only answer offered by appellant to this view of the case is a charge of collusion between plaintiff and Bates, of which there is no evidence, and which was positively denied by plaintiff and Bates.

Certain errors in law are specified by appellant in the statement on motion for new trial, and some of them are relied upon here, but none of them are sufficiently plausible to merit special consideration. They, too, are principally founded on the mistaken view of the law that it would be a sufficient defense to prove that the land for which plaintiff contracted was included in the Bates contract by mistake, and that the Bates contract ought to be reformed so as to exclude it. Unfortunately for this theory, the Bates contract could not have been reformed in this action, nor in any action to which Bates was not a party, and possibly not in any action. I think the order and judgment should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

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5 Cal. Unrep. 423

## OULLAHAN et al. v. BALDWIN et al.

(Sac. 112.) [1]

(Supreme Court of California. Aug. 21, 1896.)

APPEAL—JUDGMENT—WHEN ORDERED FOR APPELLANTS—FINDINGS—REVIEW.

1. A judgment cannot, on appeal, be reversed on the evidence, and judgment ordered for appellants, when the findings of fact support the judgment.

2. Where the evidence is conflicting, findings of fact will not, on appeal, be disturbed.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Robert B. Oullahan and others against Frank T. Baldwin and others to recover brokerage commissions under contract of defendants with Gaman & Lyon, assigned to plaintiffs. From a judgment for defendants, plaintiffs appeal. Affirmed.

Mich. Mullaney, Louttit, Woods & Levinsky, Carter & Smith, and F. H. Smith, for appellants. J. C. Campbell and Nicol & Orr, for respondents.

GAROUTTE, J. This action was brought by a real-estate broker to recover commissions for services performed in finding a purchaser of certain real estate. Judgment went for respondents, and this appeal is prosecuted from that judgment, upon a bill of exceptions setting out the evidence. The court is now asked to reverse the judgment upon the evidence, and order a judgment for appellants; but it has no power to make such an order upon this record, for the findings of fact are against appellants, and it is only when those findings are favorable to an appellant that judgment may be ordered in his favor. Here those findings are attacked as unsupported by the evidence, and under such circumstances a new trial is all the relief that could be granted by this court, conceding the appeal to be meritorious. The case has been before the court in the past (100 Cal. 648, 35 Pac. 310); and a new trial was then ordered upon practically the same grounds relied upon by this appeal, namely, the insufficiency of the evidence to support the findings of fact. At that time the case was carefully considered from the standpoint of both law and fact, and for that reason we deem it unnecessary to now express our views in detail. In various particulars the evidence is materially different from that disclosed by the record upon the previous appeal; hence the doctrine of the law of the case cannot be invoked. And, weighing and testing this evidence as to its sufficiency, we have concluded that the findings of fact have sufficient support therein. Upon the most material issues of fact we find a sharp conflict, and as to those issues the evidence of respondents is now much more direct and explicit than that given at the previous trial.

The court made the following findings of fact: "That defendants were at all times from the making of such power of attorney to Gaman & Lyon to and including the whole of the 22d day of September, 1887, ready, able, and willing to sell said lands to said Barrows on the terms and conditions stated in said power of attorney, and were ready, able, and willing to enter into a written agreement with said Barrows for the sale of said premises; that said Barrows was not ready or willing to purchase said lands on the terms and conditions set forth in said power of attorney, nor was he at any time ready or willing to pay defendants for said premises on the terms and conditions set forth in said power of attorney made by defendants to Gaman & Lyon." Again: "That defendants then requested said Barrows to enter into a written contract with them for the purchase of said premises in accordance with the terms and conditions set forth in the power of attorney by them made with said Gaman & Lyon, and then demanded payment of $10,000 in accordance with the terms of said power of attorney; that said Barrows refused to make or enter into any agreement with defendants for the purchase of said premises." These findings of fact were supported by the evidence of Judge Budd and respondent McDougall, and, even conceding findings of fact looking in the opposite direction would not be disturbed by this court as being without support in the evidence, still such concession gives appellants no help here. The record now discloses that Dr. Barrows withdrew from all negotiations at noon upon September 22d. Hence any acts of his brokers after that time would avail nothing in proving Barrows a purchaser ready, able, and willing to purchase under the terms of the contract. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

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[1] Rehearing denied.

114 Cal. 95

## PACKARD v. CRAIG. (L. A. 102.)

(Supreme Court of California. Aug. 20, 1896.)

ELECTION CONTEST—NEW TRIAL—APPEAL—EVIDENCE TO SUSTAIN JUDGMENT—REVIEW—EVIDENCE—TESTIMONY OF ELECTION OFFICERS—TALLY SHEETS.

1. Code Civ. Proc. §§ 1111–1127, regulating election contests, are special and summary; and, the only remedy provided therein for a party aggrieved by the decision of the superior court being an appeal to the supreme court, a motion for a new trial cannot be made.

2. The objection that the judgment in a contested election case is not sustained by the evidence cannot be made on appeal, under Code Civ. Proc. § 1126, authorizing such appeal subject to rules of law regulating appeals in other cases, unless the appeal has, as required in other cases, been taken within 60 days after judgment.

3. In a contested election case, testimony of election officers as to the regularity of the election, of the count of ballots, and of the tally sheets, and the tally sheets themselves, are admissible.

In bank. Appeal from superior court, Kern county; Lucien Shaw, Judge.

Action by N. R. Packard against F. W. Craig. From a judgment for plaintiff, and an order refusing a new trial, defendant appeals. Affirmed.

J. W. Ahern, J. W. P. Laird, and Reddy, Campbell & Metson, for appellant. N. E. Conklin, Alvin Fay, and J. E. Patten, for respondent.

McFARLAND, J. This is an election contest brought by Packard, plaintiff, against Craig, defendant, to determine the right between said parties to the office of county clerk of Kern county. Judgment went for the defendant, Craig; and plaintiff appeals from the judgment, and also from the refusal of the court to grant the motion for a new trial, which Packard made, or attempted to make. The appeal from the judgment was not taken until more than 60 days after the judgment was rendered.

The main point for a reversal made by the appellant is that the decision is not justified by the evidence. But respondent contends that the evidence cannot be reviewed here—First, because the appeal from the judgment was not taken until 60 days after it was rendered; and, second, because in this procedure a motion for a new trial cannot be entertained. He objected to any proceedings being taken with respect to the motion for a new trial, and one of the grounds for denying it was that a motion for a new trial had no place in this action. The contention of the respondent that we cannot here review the evidence must be sustained. This question was thoroughly considered and disposed of by the court in the case of Dorsey v. Barry, 24 Cal. 449. That case reviewed the act of 1850 upon the subject of contested election proceedings, to be found in Wood, Dig. 380–382. That act was the same as the provisions of the Code of Civil Procedure upon the subject, commencing at section 1111, and extending to section 1127. There are some few verbal differences between the said act of 1850 and the said provisions of the Code, but substantially, and almost literally, they are the same. In Dorsey v. Barry the court said, "The act itself provides a complete mode of procedure, leaving but little, if anything, dependent upon implication, or the common law powers of the court." The court, after reviewing the whole question, and saying that in any event the proceeding would be void unless the special term provided for in that act had been extended, then said: "Even in the event that the court was still holding the special term, the order granting the petitioner's motion for a new trial was without authority and void. The statute has not made provision for the reexamination of the issues of law or of fact in that court, but has expressly provided for the taking of an appeal." The court declares that the proceeding is a summary one, wholly statutory in its nature, and intended to be expeditious, and not incumbered by the delays which would be occasioned by such proceeding as a motion for a new trial. The fact that the county court then had jurisdiction of the matter, while such jurisdiction is now in the superior court, does not affect the rule there declared. That decision was approved in Casgrave v. Howland, 24 Cal. 457, and the principle restated as follows: "In Dorsey v. Barry, 24 Cal. 449, we held that the proceedings authorized by article 6 of the act to regulate elections are special and summary, and that no remedy can be had under the provisions of that article, except such as is therein expressly or by necessary implication provided. We also held that a new trial was not authorized by the provisions of the article in question, and that the remedy of a party who is dissatisfied with the judgment of the county court is by appeal only." In People v. Rosborough, 29 Cal. 417, the court, in distinguishing a proceeding in insolvency from a contested election case, say: "We held in Dorsey v. Barry, 24 Cal. 449, relied upon in argument, that the jurisdiction in contested election cases was special,—a statute creation; that the proceedings were intended to be summary, and that the subject-matter made it essential that they should be so in order to make them of any avail, and that the special procedure was withal so complete in itself that it was manifestly the intention of the legislature that the litigation should be kept to the method which the act prescribed, and end where it ended; and, therefore, that that class of cases was not within the scope of the 193d section of the practice act, relating to new trials." We have been referred to, and have been able to discover, no subsequent case overruling or inconsistent with the cases above cited. Mr. Hayne, in his work upon New Trials (volume 1, par. 5), says that from his examination "the decision in Dorsey v. Barry has never been disturbed, and it may therefore be taken to be the settled rule that there can be no motion for a new trial of an election contest." We have not been referred to any case, since the decision in Dorsey v. Barry, where the court has been asked to entertain a motion for a new trial in such a case; and it will be observed that, in nearly all the other special and summary statutory provisions, express authority is given to use the proceeding of a motion for a new trial, while in the case of a contested election the appealing party is confined to an appeal from the judgment. The cases cited by appellant are cases which merely involve the constitutional right of this court to entertain an appeal from a judgment in a contested election case. We therefore hold that the court below was right in refusing to entertain the motion for a new trial in the case at bar. Section 1126 of the Code of Civil Procedure provides that "either party aggrieved by the judgment of the court may appeal therefrom to the supreme court, as in other cases of appeal thereto from the superior court"; and therefore an appeal from the superior court to the supreme court, in a contested election case, is subject to the provision that upon such appeal the point that the decision is not sustained by the evidence cannot be raised unless such appeal shall have been taken within 60 days after the judgment. Therefore in the case at bar we cannot inquire whether or not the judgment is supported by the evidence, and there is no doubt that the findings support the judgment.

The only question before us, therefore, is whether or not the court erred in admitting certain evidence offered by the respondent and objected to by the appellant. That evidence was of this character: The respondent called a number of persons as witnesses who were officers of election at several precincts in the county in which the election here involved took place, who testified that the elections at the said precincts were properly conducted; that the ballots were properly counted, and the tally sheets properly filled up, etc. Respondent also introduced, in one or two instances, the tally sheets themselves. We cannot say that such evidence was not admissible. Whatever weight might or should be given to such evidence, it certainly had some relevancy to the matters at issue, and cannot be said to be incompetent or immaterial. The fact which the appellant endeavors to show is that a count of the ballots themselves, received by the court in evidence, shows a majority for the appellant; but, under the views above expressed, that fact cannot be inquired into here. There is nothing in the findings themselves which shows that state of facts. Therefore, upon the face of the record as it presents itself to us in this case, we can see no reason for reversing the judgment. The judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.; HARRISON, J.

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(5 Cal. Unrep. 414)

## In re THOMPSON. (Cr. 170.)

(Supreme Court of California. Aug. 4, 1896.)

ATTORNEY—PROCEEDING TO REMOVE FROM OFFICE —APPEAL.

An appeal by the accuser in a proceeding to remove one from his office of attorney and counselor is not contemplated by the law, and will therefore be dismissed.

Department 2. Appeal from superior court, Sonoma county.

Proceeding to remove R. K. Thompson from the office of attorney and counselor at law. The proceedings were dismissed on objection to the sufficiency of the accusation, and R. B. Tappan, the accuser, appeals. Dismissed.

M. W. Simpson, for appellant. H. C. Gesford, for respondent.

PER CURIAM. Motion to dismiss appeal granted, upon the ground that an appeal by the accuser in such a proceeding is not contemplated by law.

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(114 Cal. 107)

## PEOPLE v. COMYNS. (Cr. 133.)

(Supreme Court of California. Aug. 21, 1896.)

GRAND LARCENY — EVIDENCE — CONVICTION OF LESSER OFFENSE.

Defendant was indicted for grand larceny. The evidence showed that a large number of persons were in the house from which the property was stolen, after the theft; that the value of the articles missing was $150; that the value of the articles traced to defendant's possession was less than $50. *Held* error to withdraw from the jury the question of defendant's guilt of the crime of petit larceny, under Pen. Code, § 487, defining petit larceny to be the theft of articles of which the value does not exceed $50.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Frank Comyns was convicted of grand larceny, and appeals. Reversed.

Robert Ferral and Edward M. Comyns, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. Defendant was convicted of grand larceny. Upon this appeal he urges but one ground for reversal. That is an alleged error of the trial court in instructing the jury. The court charged the jury as follows: "If you are not satisfied that he [defendant] is guilty of the offense charged against him, your verdict will be not guilty." Thereupon the attorney for the defendant asked, "Does your honor say to the jury that petit larceny is not embraced in the charge?" To which the court answered, "Precisely." To this ruling defendant's counsel entered his exception, and urges it as error upon this appeal. The jury returned a verdict, "We, the jury, find the defendant guilty as charged." It appeared by the record that defendant and one James Goggins were charged with having upon the 22d day of August, 1895, stolen various articles, principally jewelry, which articles in the aggregate exceeded in value the sum of $50. Defendant demanded and obtained a separate trial. Upon the trial it was shown that the articles in question were taken from the house of Charles F. Tay. Neither Tay nor his family was living in the house upon August 22d, nor had they been for some time prior thereto. The house was in charge of a Chinese servant. Upon the evening of August 22d, Tay was summoned to his home by a telephone message. Upon his arrival he found several people in the house, who were gathered there by the commotion created by the Chinaman. "There was a good deal of confusion upstairs. The bureau was open, the contents on the floor, the mattresses turned up." The owner of the property testified that in his opinion the value of all of the articles which he missed was about $150. He testified further that, as to most of them, he had seen them for the last time during the week preceding that in which he discovered their loss. The defendant, Comyns, was seen in Mr. Tay's yard about half-past 2 o'clock of the afternoon of the day when Mr. Tay was first notified of his loss. So far as the evidence shows, he was alone. The Chinese servant testified that he left the house at about a quarter of 2 o'clock in the afternoon of that day, and, upon his return, found that the house had been entered, and some of the rooms ransacked and rifled. He had last seen any of the missing articles four or five days preceding the discovery of their loss. Upon the 7th day of September, following, defendant was arrested while in company with the said Goggins. Of the property taken, there were traced into or through the possession of defendant an opera glass, a ring, and a pistol, of an aggregate value far below $50.

Under this state of the evidence, was the court justified in withholding from the jury the consideration of the lesser offense of petit larceny? There are several separate and distinct offenses which are grouped by our Code under the common designation of grand larceny. If the property stolen is taken from the person of another, then, without regard to its value, the crime is grand larceny. If the property taken is a horse, cow, mule, goat, sheep, etc., then, without regard to the value of the animal, the crime is grand larceny. In all other cases the value of the property taken becomes an essential element in determining the offense. When the property taken is of a value exceeding $50, the crime is grand larceny. When the property taken does not exceed in value $50, the crime is petit larceny. Pen. Code, § 487. In this case, conceding the defendant to have committed the crime of larceny, it was essential for the jury to determine the value of the property which he stole. If, as a result of their deliberations, they believed the defendant to have stolen property exceeding in value $50, their verdict should have been guilty of the offense charged in the information. If, however, they believed that the property stolen by the defendant did not exceed in value the sum of $50, defendant would not have been entitled to an acquittal at their hands, but, under proper instructions from the court, they should have found him guilty of the lesser offense. All this is undisputed and indisputable, but it is argued that, because the evidence for the people showed without conflict that the property stolen did exceed in value the sum of $50, the court was justified in removing from the jury the consideration of the lesser offense of petit larceny embraced within the graver charge. But, making for the purpose of this consideration the utmost concession which could be claimed by the people, namely, that the jury was conclusively bound by the evidence to find that the property stolen exceeded in value $50, and that they could not, in the exercise of their legal discretion in weighing evidence, find it to be of any less value, still no justification is shown for the refusal of the court to instruct upon the lesser offense. If, for example, but a single article had been stolen, a diamond, and the only evidence in the case was that the diamond greatly exceeded in value the sum of $50, some force would appear in the argument that the defendant, if the jury believed he stole that article, was guilty of the crime of grand larceny, and some reason would appear in justification of the court's refusal under such circumstances to submit to their consideration the lesser offense. But in this case only a small portion in value of the articles stolen was traced to the defendant. The evidence shows that at the time the owner's attention was called to the loss of his property, and at the time when he entered the house and made personal discovery of his loss, the house was in confusion, and people were in and about it. The evidence also shows that most of the articles had not been seen by the owner, or by any one else, for several days before the date upon which it is charged this defendant stole them. It was for the jury to say and decide whether the defendant was guilty of a larceny of articles in value exceeding $50. Under the circumstances indicated, they might have been satisfied that the defendant stole the property found in his possession, and might have doubted whether the theft of the other articles not traced to his possession was to be attributed to him, or to some other criminal acting independently of him. We do not here mean to imply that the evidence presented to the jury was not sufficient to warrant them in finding the defendant guilty of the offense of grand larceny. It was quite sufficient; but that is not the question. They might not have been satisfied, or have entertained a reasonable doubt of his guilt of the graver offense, and have been entirely of the opinion that he was guilty of the lesser. But the consideration of the lesser offense was withdrawn from them by the court. In so doing, it in effect charged the jury that if they believed the defendant to have stolen any of the property, whether much or little in value, they must find him guilty of having stolen property exceeding in value $50. They were thus denied the right to consider any of the other facts or circumstances in the case. If, in other words, they believed that the defendant had stolen the few articles found in his possession, and no others, and that these articles so stolen by him were of a less value than $50, nevertheless, under the instructions of the court, it would have been their duty to render the verdict which they did. Under the facts and circumstances of this case, therefore, it was clearly error for the court to withdraw from the consideration of the jury the question of the defendant's guilt of the lesser crime of petit larceny, embraced within the one charged; and the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: TEMPLE, J.; McFARLAND, J.

114 Cal. 176

## HIGGINS v. WILLIAMS et al. (S. F. 165.[1]

(Supreme Court of California. Sept. 5, 1896.)

INJURY TO EMPLOYE—NEGLIGENCE OF MANAGER—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. The negligence of a foreman and manager, under whose direction and superintendence a steam shovel was set up and put to work, in failing to have a key put in a pin to hold it in place, which defect he knew of, or should have known of, and by reason of which a bucket fell from it onto an employé working with the shovel, is the negligence of the master.

2. The employer is none the less liable for the negligence of a foreman and manager to whom he had intrusted the construction of a sewer, in setting up and putting to work a steam shovel in an unsafe condition, because the employer did not own the shovel, and did not know that the manager had hired it and put it to work.

3. An employé working in a trench, in excavating, is not precluded from recovering for injury from the falling of a bucket from the steam shovel because a pin had not been made secure by a key, though one outside the trench could have seen that the key had not been put in; he having been hurriedly put into the trench, without opportunity to examine the shovel, and having a right to rely on the machine being all right.

4. An instruction, in an action against a master by a servant for injury, that the duty which defendant owed plaintiff, to furnish safe machinery, was a personal one, which he could not escape by intrusting it to an employé, cannot be complained of because not stating that defendant was only required to furnish "reasonably safe" machinery, as the court was not passing on the degree of safety required.

5. A requested instruction, that "I also instruct you that it was not needful to instruct plaintiff, although a minor of eighteen years, that if a bucket of 500 pounds weight should fall on him it would hurt or injure him," may be refused, because not a statement of law.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Henry C. Higgins against C. B. Williams and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. C. Bates, for appellants. J. C. Needham and C. L. Russell, for respondent.

BELCHER, C. The plaintiff, a minor 18 years of age, was employed by defendants in digging a trench for the construction of a sewer in the city of Modesto. While so employed, he was seriously injured by the falling of an iron bucket which was being used to hoist the earth from the bottom of the trench. He brought this action, by his guardian ad litem, to recover damages for the injuries sustained, and recovered a verdict, on which judgment was entered, for the sum of $3,000; from which judgment, and an order denying their motion for a new trial, defendants appeal.

Two points only are made for a reversal: First, that the court erred in denying defendants' motion for a nonsuit; second, that the court erred in its instructions to the jury.

The motion for nonsuit was based upon two grounds: (1) That plaintiff had failed to prove that defendants knew of any defect in the machine by which the bucket was hoisted; and (2) that the injury to plaintiff was the result of the fault of a fellow servant. It appears that defendants had entered into a contract to construct a system of sewers in the city of Modesto, and were engaged in performing the contract. They had intrusted the management of the work to one Arthur R. Wilson, who was their foreman, and had authority to hire and discharge and direct the men employed. At the point where the plaintiff was injured, the trench had been sunk to such a depth that it was necessary to have the earth hoisted by machinery; and, to do this hoisting, Wilson, without the knowledge

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[1] Rehearing denied.

of defendants, caused a machine known as the "Carson Trench Machine" to be set up and used. The machine was operated by a steam engine, and by it the buckets, when filled with earth, were hoisted, and, after being emptied, were lowered back, to be again filled. The trench was divided into sections about seven feet long and five or six feet wide, and in each section two buckets were used, and two men were employed. The machine was set up and started in the afternoon of one day, to see if everything was in order; and the next day it was started with a full crew, and in the afternoon of that day the accident happened. About 1 or half past 1 o'clock of that day, plaintiff was directed by Wilson to go to work in the trench where the machine was, to fill empty buckets. As directed, he went to work, and about two hours thereafter one of the filled buckets which was being hoisted fell and struck him, causing the injuries complained of. One Daniels, who was working in the same section with plaintiff, was called as a witness for him, and, after describing the machine, stated how the accident happened, as follows: "I made an investigation right then as to the cause of the accident. I found that the pin that held the headblock had come out, which was the immediate cause of the accident. That is the headblock that held the main cable. * * * The pin in that block came out, letting the cable down, and the tubs fell, of course. When the pin came out, the cable was not detached altogether from the block. The cable was over this block, and the tubs were being hoisted; and while they were being hoisted the pin came out, the block dropped, and the cables gave way, and the tubs fell. That pin did not break. It came out. A key was supposed to hold it there. There was no key in the pin. If there had been, it would not have come out. Nothing was supposed to hold the block there after the pin came out. * * * Mr. Wilson, the superintendent, said right after the accident that he knew the key was out. He said he didn't think the pin would come out; that he calculated to have a key put in there, and it rather slipped his mind. * * * I saw the Carson trench machine partly set up. In a machine they generally put a key in the end of the pin. I did not look to see whether any pin was in there, in the block, until after the accident occurred. The pin was out of the block then. I did not look at any time to see whether there was a key in the pin, but immediately I looked for the key to see if there was any key there. * * * Before we went into the trench that block was in plain sight on the machine, where we could see it. * * * I saw the block in plain sight, or could have if I had looked at it. I had as good an opportunity to see it as anybody, and so did Mr. Higgins, I suppose. * * * The bucket struck Mr. Higgins first, before it struck the empty bucket. It hit Mr. Higgins apparently back of the shoulders,—right on the shoulders. Mr. Higgins had been standing in the corner as close as he could get. His shovel was standing right up against this partition, and he turned and put his hand upon the shovel just as the bucket fell. It struck Higgins first, and then struck the empty bucket. It just struck the top of my head as it came down, and also struck Higgins on the shoulder and knocked him down,—a bucket filled with earth, maybe two feet deep. He was found with the bucket on top of him, resting partly upon the empty bucket and partly upon him. The bucket fell sixteen or eighteen feet." The above statements were corroborated by other witnesses, and, among other things, the plaintiff testified: "I did not know anything about the condition of the pin or cable before I went into the trench. I thought the machinery was all right, or Mr. Wilson would not send me in there. * * * I didn't have any opportunity to examine the machinery prior to going into the trench. Mr. Wilson did not invite me to look at the machinery. He invited us to hurry up. He said he wanted to start the machine, and he told us to get right down." It was also proved that the pin which held the block was about 1¼ inches in diameter and 4 or 5 inches long; and at its lower end was a small hole, through it, to put a key in, to prevent it from working up. "It was such an arrangement as is usually held fast by a key, and not left loose." The pin, when in place, stood about 10 or 15 degrees from perpendicular.

1. Upon the facts proved, the first question is, did the court err in denying the motion for nonsuit? The rule of law is well settled in this state that it is the duty of an employer to furnish his employés reasonably suitable and safe machinery and appliances with which to do the work required of them, and keep such machinery and appliances in repair and order. And it is a duty which cannot be delegated to another, so as to exonerate the employer from liability to an employé who is injured by the omission to perform the duty, or by its negligent performance. In Fuller v. Jewett, 80 N. Y. 52, the court said: "In respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do, by selecting competent servants, or otherwise, to secure the safety of his employés." And see Sanborn v. Trading Co., 70 Cal. 265, 11 Pac. 711, where the above language was quoted approvingly. In Daves v. Southern Pac. Co., 98 Cal. 24, 32 Pac. 710, the court said: "If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury

of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible." And to the same effect are the cases of Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720; Nixon v. Lead Co., 102 Cal. 458, 36 Pac. 803; and Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535. It clearly appears that the machine was set up and put to work under the direction and superintendence of Mr. Wilson, who was the foreman and manager for the defendants. It was defective and unsafe, because no key was put in the pin to hold it in place; and hence the accident. Wilson knew of this defect, or should have known of it, and his knowledge was the knowledge of defendants. In performing his duty he acted, not as a fellow servant with plaintiff, but as the representative or agent of defendants, and for his negligence they are responsible. It is urged for appellants "that plaintiff had as good a chance to see that the key was out as any one," and hence that he should not recover. But he did not know that the key was out, and no opportunity to examine the machine was given him. He was taken from other work in another part of the town, and hurriedly put into the trench to fill buckets with earth. He relied on the machine being all right, and had a right to so rely. Magee v. Railroad Co., 78 Cal. 430, 21 Pac. 114. Besides, unless he also knew, or ought to have known, of the danger to which he was exposed by working near the machine, he cannot be said to have recklessly exposed himself to such danger, or to have voluntarily assumed the risks of working there. Sanborn v. Trading Co., 70 Cal. 261, 11 Pac. 710; Colbert v. Rankin, 72 Cal. 197, 13 Pac. 491; Gisson v. Schwabacher, 99 Cal. 419, 34 Pac. 104; Mullin v. Horseshoe Co., 105 Cal. 83, 38 Pac. 535. It follows, in our opinion, that the motion for nonsuit was properly denied.

2. Appellants complain of instructions numbered 2, 4, and 5, given to the jury at the request of the plaintiff, and insist that they were erroneous and misleading. The instructions referred to read as follows: (2) "The duty which the defendants owed to the plaintiff to furnish him with safe machinery and appliances, was a personal one, and such a duty as the law will not permit them to escape by trusting it to an employé who negligently performs it." (4) "To render defendants liable to plaintiff in damages, it is not necessary that they should have had actual knowledge of the unsafeness of the said machine. The proof is sufficiently made out by plaintiff when it is shown that said machine was defective and unsafe in such respect that, if a proper inspection of it had been made by defendant, such unsafeness and defectiveness would have been ascertained in time to prevent the injury. If the unsafeness was conspicuous, defendants will be presumed to have had knowledge of it." (5) "The duty of the master to furnish safe machinery is not affected by the fact that he does not own the machinery furnished. It is sufficient if it is used by such employer. The duties which an employer owes to his servants, and which he is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provisions for the safety of employés as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by an employer to a servant, so as to avoid responsibility for the injury caused to another servant by his omission." It is objected that instructions 2 and 5 were erroneous because they implied that defendants were required to furnish safe machinery for plaintiff to work with, when in fact they were only required to furnish reasonably safe machinery. But the court was not passing upon the question suggested. It simply, in effect, told the jury that the duty of defendants to furnish safe machinery was a personal one, which could not be delegated so as to relieve them from responsibility for its negligent performance, and in this there was no error. It is further objected that instructions 4 and 5 were erroneous because they, in effect, told the jury that, to render the defendants liable, it was not necessary that they should have had actual notice of the unsafeness of the machine, or have been the owners of it. And it is said that they never saw the machine, or knew of its being used, until after the accident, and never authorized its use, and that plaintiff had as good an opportunity to see that the key was out of place as defendants, even if present. It was entirely immaterial whether defendants owned the machine, or knew of its use, before the accident occurred, or not. They lived in San Francisco, and intrusted the doing of the work to Mr. Wilson. They paid for the transportation of the machine to Modesto, and for the use of it, at the rate of $8 per day, during all the time it was used on this contract,—some three months. Wilson testified that in his judgment the use of the machine was the best thing to do, and he did it. His use of it was therefore defendants' use of it, and his knowledge of its defects their knowledge. In Stephenson v. Southern Pac. Co., 93 Cal. 561, 29 Pac. 234, it is said: "The rule is, of course, well settled that the master is civilly liable for the wrongful or negligent act of the servant, committed while in his service and within the scope of his employment; that is, in the transaction of the master's business." And the following language is quoted with approval from the opinion delivered in Cosgrove v. Ogden, 49 N. Y. 257: "The test of the master's responsibility for the act of the servant is, not whether such act was done according to the instructions of

the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do." The instructions, as given, were, in our opinion, proper, and without prejudice to defendants. The court refused to give the first instruction asked by defendants, and this refusal is assigned as error. The instruction did not include, as one of the conditions upon which plaintiff could not maintain his action, that he knew, or might have known, that his employment involved danger to himself. This was an obvious defect in the instruction, and the refusal to give it was therefore not error. See cases before cited. All that was material in instruction No. 6 was given in the exact language asked by defendants. The part omitted was as follows: "I also instruct you that it was not needful to instruct the plaintiff, although a minor of eighteen years, that, if a bucket of five hundred pounds weight should fall on him, it would hurt or injure him." This was not a statement of any rule of law, and the failure to give it did not constitute error. The court refused to give instruction No. 8 asked by defendants, and this refusal is also assigned as error. In Brymer v. Southern Pac. Co., 90 Cal. 496, 27 Pac. 371, an instruction in the same words was asked and refused, and the refusal was held to be error. In that case the injury resulted from the breaking of a chain used in raising a derailed and wrecked car, and the defect was latent and concealed, while in this case the defect consisted in failing to put a key in a pin or bolt, and was patent. In some respects, therefore, the instruction was not applicable to the facts of this case. In so far, however, as it was applicable, the law declared in it was clearly stated in other instructions given, and we think that was sufficient. We discover, therefore, no prejudicial error in the refusal. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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**5 Cal. Unrep. 432**

## MINI v. MINI. (Sac. 53.)

(Supreme Court of California. Sept. 3, 1896.)

DIVORCE—COMPLAINT—DESCRIPTION OF PROPERTY.

An allegation in a complaint for divorce that plaintiff is possessed of "considerable property, both real and personal, situate and being in the state of California," plaintiff's separate property, is sufficient to admit of evidence of a definite description, there being no special demurrer, but a default.

Commissioners' decision. Department 1. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by Damiana Mini against Erminia Mini. Judgment for plaintiff. Defendant appeals. Affirmed.

H. G. W. Dinkelspiel and A. Ruef, for appellant. Coghlan & Harvey, for respondent.

VANCLIEF, C. Action for divorce on the ground of adultery. After the statement of a complete cause of action for a divorce on the ground of adultery the complaint contains the following: "That the plaintiff is possessed of considerable property, both real and personal, situate and being in the said state of California, all of which is the separate property of the plaintiff, having been acquired by him before his said marriage, or acquired by him subsequent thereto, from the rents, issues, and profits thereof." The prayer of the complaint is for a divorce, "and that it be adjudged and decreed therein that the said defendant has no right, title, claim, or interest in or to said property owned and possessed by plaintiff, or any part thereof." Summons having been regularly served on the defendant in the county of Solano, in which the action was brought, she failed to appear by demurrer or otherwise, and judgment for the relief prayed for was rendered against her by default. The judgment describes the separate property of the plaintiff, in which it was adjudged that the defendant had no title nor interest, with great particularity and certainty. The defendant brings this appeal from the judgment, and the only ground upon which a reversal is asked is that the complaint does not describe the separate property of the plaintiff with sufficient certainty. Conceding that, in respect to the alleged separate property, the description thereof was not sufficiently definite or certain, the defect was waived by defendant's default and failure to demur. Code Civ. Proc. §434; Gimmy v. Gimmy, 22 Cal. 633; Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467. In the absence of a special demurrer, the allegation was a sufficient foundation for evidence of a definite description of the property. Bates v. Babcock, 95 Cal. 484, 30 Pac. 605; San Francisco v. Pennie, 93 Cal. 468, 29 Pac. 66; Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659; Garner v. Marshall, 9 Cal. 269. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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5 Cal. Unrep. 425

## LOVE v. ANCHOR RAISIN VINEYARD CO. (S. F. 256.)

(Supreme Court of California. Aug. 21, 1896.)

CORPORATIONS — NOTICE TO OFFICER — DECLARATIONS OF PRESIDENT—SPECIFICATIONS OF ERROR—EXCEPTIONS.

1. A specification of insufficiency of evidence, "that the evidence clearly showed that the total amount due * * * was not the sum of ——, but was the sum of ——, and no larger or greater sum whatever," is insufficient.

2. Notice to one who is secretary, bookkeeper, and director of a corporation, that a note given by it had been assigned, is notice to the corporation.

3. In an action by the assignee of a note given by a corporation to its president, declarations of the president as to the amount due at the time of the transfer are not admissible against the corporation.

4. An exception, "To which said charge, and the whole thereof, defendant then and there duly excepted," is not sufficiently specific.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Louisa P. Love against the Anchor Raisin Vineyard Company, a corporation. Judgment for plaintiff. Defendant appeals. Affirmed.

C. F. Hanlon, for appellant. Thos. A. McGowan, for respondent.

SEARLS, C. This is an action to recover upon a promissory note, made by the corporation defendant August 4, 1892, for $6,261.29, payable one day after date to the order of John Conly, in gold coin, with interest at 8 per cent. per annum, and indorsed by the payee thereof to plaintiff. Plaintiff had a verdict for $5,532.38, upon which verdict judgment was entered. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

The evidence embodied in the statement on motion for a new trial shows that the note was indorsed to the plaintiff herein after maturity, viz. on October 4, 1893. Plaintiff, in her complaint, admitted the payment of certain sums of money to Conly on account of the note, and at the trial it was shown and admitted that those payments amounted to $1,687.55. They were indorsed upon the note, and tallied with a ledger account of defendant in evidence, in which, under bills payable, the note was entered as a liability in favor of the payee, Conly, and the several payments credited to defendant in said account on account of money, etc., paid to said Conly. This is all plain and simple, and the verdict of the jury is founded on this basis. Defendant, however, produced another account, kept with Conly personally, in which he stands charged with a balance of, say, $2,667.80, which defendant claims should have been deducted from the balance due on the note, thus reducing the verdict by that amount. We will refer hereafter to this individual account with Conly, and to the circumstances which probably actuated the jury in concluding that it was not entitled to be treated as a payment on the note.

Upon the close of the testimony the court instructed the jury, in part, as follows: "Gentlemen of the Jury: This is a question of accounting and bookkeeping. You have heard the evidence in this case, and you will have to ascertain from it, as best you can, the amount of money that is due to the plaintiff here. That the defendant owes the plaintiff is admitted by the defendant; but the question is, how much? The defendant claims that the amount claimed by the plaintiff is excessive, and that it is entitled to certain credits thereon, in consequence of demands which they had as against John Conly, who was the payee of the note transferred to the plaintiff. If you should find from the evidence that any of these items which counsel have called to your attention were designed and intended at the time to have been payments on account, or to the credit of the note, and that such items were agreed upon and determined before the date of the indorsement of the note to the plaintiff, which was October 4, 1893, they would be entitled to have them credited upon the amount due upon the note,—principal and interest. If you should conclude that they are not entitled to any of these credits, then it would be your simple duty to ascertain the amount of principal and interest due, after deducting the amount of the cash payments which are contained on the back of the note." The propriety of this instruction depended upon the evidence in the case. That evidence tended to show: (1) That from the formation of the corporation up to, say, December, 1893, John Conly was president, director, general manager, and a large stockholder of the defendant. (2) That during 1892 and 1893 A. S. Neal was secretary of the corporation defendant. (3) That John Conly, the president, had advanced money to the corporation until on August 4, 1892, the corporation was indebted to him in the sum of $6,261.29, for which sum the note in question was given, and the account balanced upon the corporation books; the note being entered in the account of bills payable, and the sums as credited on the back of the note being charged in said last mentioned account. (4) Plaintiff, being aware that the note was overdue, and hence that any payments thereon were liable to be offset against the note, on or about the date of the transfer to her, and before such transfer, applied, through her husband, James Love, to A. S. Neal, the secretary of the defendant, to know if the indorsements on the note constituted all the offsets thereto, and was informed that they did, except that there might be one or two small payments not indorsed; that the amount due was about $5,000; that he and Conly had compared it recently, and found it exact. Two payments, aggregating $250, were not then on the note, but were indorsed thereon subsequently. (5) Defendant had notice of the transfer of the note to plaintiff on the 4th or 5th of October, 1893. (6) The individual account of Conly with defendant on the 4th day of October, 1893, the date of the assignment of the note to plaintiff, showed a balance in favor of said Conly amounting to some $1,143.86. This balance occurred in this wise: Some time in 1892 a resolution was passed by the directors of defendant allowing Conly a salary of $100 per month, as general manager, from the organization of the company, which salary on the 31st day of July, 1893, aggregated $3,416.66, which sum was placed to his credit in the books of the company. After the transfer of the note to plaintiff, and on the 15th day of October, 1893, the directors of defendant, with the consent of Conly, passed a resolution rescinding the resolution to allow said Conly a salary of $100 per month, and the sum of $3,466.16 so standing to his credit was charged back to him; thus leaving a balance in favor of the corporation, which, together with $420 charged him in December, 1893, on account of two assessments, aggregated $2,119.80. The reasons given by defendant for the rescission of the resolution allowing a salary to Conly were: (1) That there was an understanding with the stockholders of defendant that all of its officers should serve without pay. (2) That the resolution allowing the salary was passed when but three directors were present. It does not appear, so far as we have discovered, of how many directors the board consisted. The minute book of defendant was missing, and was claimed to have been lost. Under these circumstances, we are not surprised that the jury failed to credit defendant with the balance thus shown in its favor. It looked too much like an effort, after the transfer of the note, to saddle upon the plaintiff an offset not justly chargeable to her, and which defendant had not intended to so charge until after the transfer of the note. In view of the testimony, the instruction of the court to the jury was proper.

We have thus stated in a general way the tenor of the evidence, and its sufficiency to support the verdict. In strictness, however, the specifications of the insufficiency of such evidence, as contained in the statement on motion for a new trial, are so indefinite that they might well have been disregarded. There are some eleven specifications in reference to the evidence. One will serve as a sample of all the others: "(1) That the evidence clearly showed that the total amount due by defendant to plaintiff on the date thereof was not the sum of $5,532.38, but was the sum of $2,520.48, and no larger or greater sum whatsoever." This form of specification is clearly insufficient. Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Moore v. Moore (Cal.) 34 Pac. 90; Spotts v. Hanley, 85 Cal. 165, 24 Pac. 738; Eddelbuttel v. Durrell, 55 Cal. 279; Hayne, New Trials, § 150; Parker v. Reay. 76 Cal. 105, 18 Pac. 124.

The second point made by appellant for reversal is that the defendant had no notice of the transfer of the note until suit brought. The learned counsel overlooks the testimony of James Love, who testifies that he notified Neal, the secretary, bookkeeper, and a director of defendant, of the transfer of the note to plaintiff on the 4th or 5th of October, 1893, immediately after the taking of the note. This was a sufficient notice. Thomp. Corp. § 5195.

We think the court erred in admitting the declaration of Conly that there was $5,000 due upon the note at the date of its transfer to the plaintiff. It is true that he was president of the corporation defendant, and, under ordinary circumstances, his admission would bind the defendant, made within the scope of his authority. But as payee of the note, about to make a sale of it, his interests were antagonistic to defendant, and his declarations would not be binding upon the defendant. We are of opinion, however, that this error does not call for a reversal. The note showed for itself what was due, after deducting the indorsements. Defendant's secretary testified that there was due on the note October 4, 1893, the sum of, say, $4,603.53, without interest, and the interest up to that date was some $517.33; thus bringing the amount up to, say, $5,091.27. Defendant's books showed the same thing, and the only question really in dispute was as to the right of defendant, under the circumstances hereinbefore stated, to offset the individual demand against Conly. Plaintiff's calculation showing the amount due on the note, and defendant's claim for the amount of its demand against Conly, were not only admitted in evidence without objection, but both of them were, by consent of counsel, submitted to the jury for their consideration. Under these circumstances, the error complained of was harmless. Burnett v. Lyford, 93 Cal. 115, 28 Pac. 855; Silvarer v. Hansen, 77 Cal. 584, 20 Pac. 136; Duffy v. Duffy, 104 Cal. 605, 38 Pac. 443.

We need not again refer to the charge given by the court, upon its own motion, to the jury, or to the strictures thereon, for the reason that the only exception thereto is as follows: "To which said charge, and the whole thereof, defendant then and there duly excepted." This was general, and not sufficiently specific to call the attention of the court to the portions thereof now assailed. Rogers v. Mahoney, 62 Cal. 611; Frost v. Creamery Co., 102 Cal. 525, 36 Pac. 929; Moore v. Moore (Cal.) 34 Pac. 91; Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497. Upon the whole case, as presented, we recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

113 Cal. 503

### CULLEN et al. v. GLENDORA WATER CO.
(No. 19,360.)

(Supreme Court of California. Aug. 25, 1896.)

In bank. For former opinion, see 45 Pac. 822. Modified.

PER CURIAM. The judgment heretofore rendered herein is modified so as to read as follows:

The judgment and order appealed from are reversed, and the cause remanded for a new trial of the issues involving the regularity and validity of the order for the issuance of the bonds of the district. The denial of a new trial as to the issues involving the organization of the district is affirmed.

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114 Cal. 100

### ALTOONA QUICKSILVER MIN. CO. v. INTEGRAL QUICKSILVER MIN. CO. (No. 18,408.)

(Supreme Court of California. Aug. 20, 1896.)

MINES AND MINING—POSSESSION FOR STATUTORY PERIOD—WORK ON MINE—NEW TRIAL—ACTION TO QUIET TITLE—JUDICIAL NOTICE—PLEADING AND PROOF.

1. An action in a state court to quiet title to mining lands is not an action under Rev. St. U. S. § 2326, to determine which of the parties is best entitled to purchase from the United States; and therefore, though defendant has filed application in the United States land office for patent for the land, and plaintiff has filed an adverse claim, and such section provides that it shall be the duty of the adverse claimant, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and that a failure to do so shall be a waiver of his adverse claim, it is immaterial that the action to quiet title is not commenced within 30 days from the filing of the adverse claim in the land office, unless plaintiff, by his failure to commence action within that time, loses not only his claim to a patent, but also his right of possession; and as this, if so, constitutes a forfeiture, it must be pleaded and proved by defendant as a defense.

2. The court takes judicial notice, without averment and proof, of how long after a certain event an action pending before it was commenced, the date of such event being averred and admitted in the action.

3. In an action to quiet title to mineral lands, where plaintiff relies on a location by a certain person, he may prove, without having averred, that such person was a citizen of the United States, or had filed a declaration of intention to become such, and was therefore competent, under Rev. St. U. S. § 2319, to make the location.

4. Under Rev. St. U. S. § 2332, providing that, where a person holds and works a mining claim for the time prescribed by the statute of limitations for mining claims of the state in which it is situated, he may obtain a patent, "in the absence of any adverse claim," such possession and working for the statutory period, before the adverse right exists, is equivalent to a location under the acts of congress.

5. Where plaintiff, in an action to quiet title to mineral lands, bases his rights on two grounds,—possession and location,—and the verdict for him does not show on which ground it was based, a new trial is properly granted, the instructions having authorized the verdict on either ground, while there was no evidence in the case, at the time it was submitted to the jury, to establish a valid location, though evidence sufficient for the purpose, which had been introduced, was erroneously stricken out on defendant's motion.

6. While the mere placing of a watchman on a naked mining claim to warn prospectors, and thus prevent a relocation, is not labor on the mine such as is required to hold it, still the services of a watchman looking after buildings erected to work a mine constitutes such labor, though the mine is idle at the time.

In bank. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by the Altoona Quicksilver Mining Company against the Integral Quicksilver Mining Company. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

T. W. H. Shanahan (Cross, Hall, Ford & Kelly, of counsel), for appellant. D. G. Reid and Reddy, Campbell & Metson, for respondent.

TEMPLE, J. This is an action to quiet title to certain mining ground in the county of Trinity, in which the court and the parties have encountered many difficulties because, misled by the case of Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, they have persisted in treating it as a contest in the United States land office for the right to enter certain mineral lands. In the case referred to, counsel and the court so speak of the controversy, but no question in relation to the character of the proceeding was before the court. Congress could not impose upon the state courts the duty or the labor of determining for the land office who is entitled to purchase from the United States, and it has not attempted to do so. Nothing is referred to the state courts for trial. But the contestant is required to test his right to the possession of the mining ground in the local courts. This he must do, if in a state court, by some proceeding authorized by the laws of the state. If we could suppose that there was no mode provided in the state laws for doing this, no action of which the state courts would have jurisdiction in which this could be done, the act of congress would not confer the jurisdiction which was lacking. This is not an action brought under section 2326[1] of the Revised Statutes of the United States to determine which of the parties is best entitled to purchase from the United States, but only an ordinary action to quiet title. The proceedings in the land office of the United States are utterly immaterial here, unless they tend to show title or right of possession in one of the parties. Unless, therefore, defendant was prepared to maintain the proposition that if plaintiff did not commence his suit within 30 days from the time he filed his claim in the land office he not only lost his claim to a patent, but also his right of possession, it mattered not whether the suit was commenced within 30 days. This, if the position be correct, would constitute a forfeiture, and the defendant would be required to plead and prove it as a defense. Under the state laws either party may bring an action to determine an adverse claim, but the jurisdiction and the procedure governing the action depend entirely upon our state constitution and laws. This action seems well adapted to the object sought to be accomplished by the congressional law, for in it the rights of the parties are wholly determined by the acts of congress, and involve the same questions as to the relative rights of the parties which the officers of the land office would otherwise have been required to pass upon. But it does not matter to the state court whether its judgment can be made available in the land office or not. This view was taken by this court in Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1041, where it was said: "The action was brought 'to determine the question of the right of possession' of certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency." To the same effect is 420 Min. Co. v. Bullion Min. Co., 9 Nev. 240. It was there held that the act of congress simply required the contestant to bring such action as was authorized by the laws of the state to determine the right of possession, and that such action, when brought, would be governed and determined by the practice and rules of pleading there prevailing, irrespective of the act of congress requiring the suit to be brought. The rights of the parties will be entirely determined by the laws of the United States granting the right to enter upon the mineral lands, and to extract metals therefrom, and to acquire title thereto, but the suit must be tried in every respect as though no contest was pending in the land office of the United States in regard to the right to purchase the same. The court would be at liberty to order a special verdict if that was desired by the parties, because it would be more serviceable in the contest, for that may be done in any case, and such contingency is provided for in our practice.

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[1] Rev. St. U. S. § 2326, provides that where, during publication of notice of application for patent for mining lands, an adverse claim is filed, it shall be the duty of the adverse claimant, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and a failure to do so shall be a waiver of his adverse claim.

If these views be correct, it was, of course, error to instruct the jury to find against plaintiff on the ground that it did not appear that the suit was begun within 30 days after plaintiff filed its claim in the land office. For another reason I think it was error. The time of the filing of plaintiff's adverse claim in the land office at Redding was averred and admitted. The court knew judicially when the action was commenced, and therefore that the suit was commenced within 30 days. It is not necessary either to aver or prove facts which are within the judicial knowledge of the court. The instruction was a simple direction to the jury to find a verdict against the plaintiff. With the reason given for so instructing, the jury had nothing to do. This direction the jury disobeyed. Why the court proceeded to give other instructions, elaborately considering the law applicable to the facts of the case, after this explicit direction, it is impossible to conceive. It was confusing to the jury, for, if they were to obey the explicit direction, they had nothing to do with the other instructions, at least so far as plaintiff's case is concerned. Furthermore, the court, by subsequent instructions, expressly submitted to the jury the whole case, including plaintiff's claim, and even wrote out and handed to them the form of the verdict which they should render if they found for the plaintiff. In various instructions it submitted to the jury the question as to whether plaintiff or its grantors had complied with the law in regard to the location and working the mine, and as to its claim of right by actual adverse possession. The jury found for the plaintiff. In so doing they disobeyed the express direction to find against the plaintiff, but they obeyed the other direction to consider and pass upon the rights of the plaintiff, and to find according to the facts and principles of law declared by the court. The judge, in considering the case on motion for a new trial, was convinced that he had erred in directing the jury to find against the plaintiff, but thought, nevertheless, he was bound to grant a new trial on the authority of Emerson v. Santa Clara Co., 40 Cal. 543, in which it was held that a verdict against the instruction of the court is a verdict against law. This case is not within the reason of that case. Here the instructions were, in effect, contradictory, and the verdict, while opposed to one instruction, is warranted by others.

But, as the order granting a new trial must be affirmed for other reasons, this point need not be further discussed. This plaintiff relied in part upon a location of the land in controversy by one John A. Lytle. To show that Lytle was a competent person under the laws of the United States to make such location, it was incumbent upon plaintiff to show that Lytle was a citizen of the United States, or had filed his statement declaring his intention to become such. The plaintiff put in competent and sufficient evidence to show that Lytle was a natural-born citizen of the United States, but it was then stricken out on motion of defendant on the ground that it had not been pleaded. This ruling was very far reaching. By section 2319, mineral lands of the United States are open for exploration, occupation, and location to citizens and those who have declared their intention to become such, only. Under this ruling plaintiff could derive no title through the location or occupation of Lytle, because this fact was not averred. I do not think in an action to quiet title a plaintiff is bound to show the source of his title in his complaint, but to prove his right under that location it was incumbent upon plaintiff to prove that Lytle was competent under the laws of the United States to take, hold, and locate mineral land. The court instructed the jury to the effect that one who has not located mineral land in the mode prescribed by law and the custom of miners may yet acquire a right thereto by holding and working the same for five years "in the absence of an adverse claim." Defendant's counsel contend that section 2332—the section referred to—only provides that a patent shall issue in such case when there is no adverse claim, but, where any one has located the same land according to law and the custom of miners, then mere possession gives no right whatever. The act of congress has been otherwise construed in various cases. 420 Min. Co. v. Bullion Min. Co., 9 Nev. 240; Id., 3 Sawy. 634, Fed. Cas. No. 4,989. Judge Sawyer says that the laws of the state constitute a part of the laws by which a mining right is determined. It must therefore follow that, where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the laws of congress. See, also, Harris v. Mining Co., 8 Fed. 863; Belk v. Meagher, 104 U. S. 279; Anthony v. Jillson, 83 Cal. 302, 23 Pac. 419. But, while the instructions upon that subject state the law correctly, nevertheless I think the order must be affirmed. As already stated, the plaintiff also relied upon the location made by Lytle, and much testimony was taken upon that subject, and at the request of plaintiff the jury were told that if they found that plaintiff and its grantors had held the claim for 18 years, basing their right upon the location made by Lytle, then every reasonable presumption should be indulged in favor of the validity of such alleged location. In connection with this they were also told of the two modes provided by congress for acquiring title to mineral lands. This was in effect telling them that, if Lytle made the location, it could be relied upon by plaintiff as a source of title. But they were not only told in another instruction that they must find against plaintiff, but the court had stricken out all evidence of the citizenship of Lytle. Therefore, as the case then stood, there was no proof of a valid location made by Lytle. We cannot say that the jury did not base their verdict upon such alleged location, or that they found that plaintiff had held, worked, and possessed the claim for five years. We cannot say, therefore, that the instruction was not injurious.

The defendant also complains of the instruction of the court in regard to the work required upon a mine in order to hold the same. The jury were told that it might consist in digging, etc., "or, if the mine be idle, it may consist of the services of a watchman or custodian in looking after the property and taking care of the same." To constitute a general rule, this would require some qualification. If this sort of care was necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case work were resumed, I see no reason why it would not constitute work upon the mine as much as the erection of such structures in the first instance would. But if there was only the naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine in the sense of the statute. As applied to the facts of this case, the instruction was not injurious, for it was not disputed that there were reduction works, houses, and barns, as well as tunnels and pits, to be looked after. The buildings were upon the claim in dispute, but plaintiff claims two other locations, which are not involved in this controversy. Most, if not all, the earthworks from which ore was extracted were on the other two claims. Defendant contends that the work was not for the purpose of working the claim in controversy, nor adapted to that purpose. This raised a question of fact to be determined by the jury. The fact, however, if so it was, that the claims did not actually touch each other, and there was a narrow strip of land between the locations, would not determine the question. Mines may be conceived of as so situated that the same work may be, and appear to be, expended in opening or developing both mines, although they are not actually contiguous. On the other hand, not all expenditures made with a view to working a mine would be considered work expended upon a mine under this rule; for instance, work done at a distance from the mine in the construction of a mill.

The form of the verdict was sufficient. Whether it would answer the purpose of the parties in the land office does not concern us. It complies with all the requirements of our laws and practice. The order is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

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114 Cal. 112

## HALE v. McGETTIGAN et al. (Sac. 220.)

(Supreme Court of California. Aug. 25, 1896.)

ENACTMENT OF STATUTES—CONSTITUTIONAL LAW—PARTIAL INVALIDITY OF ACT—COUNTY OFFICERS—TERM OF OFFICE.

1. Where the legislative journals are silent as to the observance of any constitutional requirement in the passage of bills, it will not be presumed that such requirement was disregarded.

2. Const. art. 4, § 2, forbidding the introduction of bills after the expiration of 50 days from the commencement of the legislative session, does not invalidate Act March 24, 1893 (St. 1893, p. 346), which was reported, after

the expiration of said period, as a substitute for several bills introduced within the requisite time, some of which purported to amend the county government act of 1891 in toto, and others to amend certain sections of said act.

3. Act March 24, 1893 (St. 1893, p. 346), entitled "An act to establish a uniform system of county and township governments," provides (section 60) for the election of county officers every four years, except as otherwise provided. Section 57 designates the several officers of a county, while section 170 fixes the compensation of county and township officers in counties of the eighth class, and declares (subdivision 26) that "the officers mentioned in section 57 of this act" shall be elected every two years. *Held*, that the officers referred to in said subdivision are those in counties of the eighth class only.

4. The invalidity of section 170, subd. 26, as contravening the constitutional prohibition against special legislation, does not invalidate the rest of the act, which is complete in itself without the invalid provision.

5. County Government Act 1883, § 15 (St. 1883, p. 301), provided for the election of a board of supervisors in each county at the general election in 1884, and declared that such officers should so classify themselves by lot that three of them should hold office for four years, and two of them for two years, and that the supervisors elected in 1886, and every two years thereafter, should hold office for four years. Section 60, after providing that elective county and township officers, excepting superintendents of schools and assessors, should be elected every two years, declared that "supervisors shall be elected as hereinbefore provided," and that assessors and school superintendents be elected every four years. County Government Act 1891, § 15 (St. 1891, p. 297), provided that the supervisors elected in 1888 and 1890, and every four years thereafter, should hold office for four years, while section 60 was identical with the same section of the act of 1883. County Government Act 1893, § 15 (St. 1893, p. 349), is the same as the corresponding section in the act of 1891; and section 60, after providing that the election of all elective county and township officers except as otherwise provided shall be quadrennial, instead of biennial, declares that "supervisors shall be elected as hereinbefore provided." *Held*, that with the exception of the two supervisors in each county, to whom a term of two years fell by lot, as authorized by Act 1883, the term of office of supervisors, which was originally fixed at four years, has not been changed by any subsequent act.

In bank. Appeal from superior court of Solano county; A. J. Buckles, Judge.

Action by one Hale against McGettigan and others to determine the validity of a statute, and for a construction of the same. A demurrer to the complaint having been overruled, judgment was rendered for plaintiff, and defendants appeal. Reversed.

Calvin B. Webster, for appellants. R. B. Carpenter, Frank R. Devlin, Reed & Nusbaumer, F. C. Lusk, and Garret W. McEnerney, for respondent.

HARRISON, J. This action was brought for the purpose of determining the validity of the county government act, approved March 24, 1893 (St. 1893, p. 346), and to obtain a judgment that the county and township officers elected under that act hold their respective offices for the term of four years. A general demurrer to the complaint was overruled, and, the defendants declining to answer, judgment was rendered in favor of the plaintiff, from which the defendants have appealed.

1. It is contended on the part of the appellants that the act in question never became a law, for the reason that it appears from the legislative journals that the bill therefor was introduced in the legislature after the expiration of 50 days from the commencement of the session, in contravention of the provisions of section 2, art. 4, of the constitution. The respondent contends, on the other hand, that the enrolled bill deposited with the secretary of state is conclusive of the validity of the act, and that it is not competent for the court to go behind this enrolled bill for the purpose of determining whether the legislature complied with this requirement of the constitution, and, in support thereof, cites the case of Sherman v. Story, 30 Cal. 253, where it was held that the certificates of the presiding officers of the two houses that a bill had been passed were conclusive of the point in question. It is urged by the appellants, in response to this, that the present constitution prescribes certain formalities to be observed by the legislature, and certain times at and within which the steps essential to enact a statute are to be observed, which were not contained in the constitution of 1849, under which the case of Sherman v. Story was decided, and that, unless these constitutional requirements for the enactment of a statute are complied with, an act passed by the legislature does not become a law, and that the journals of the legislature may be examined for the purpose of ascertaining whether the act was passed in conformity with these requirements. It is, however, unnecessary for us to determine in the present case whether the journals of either branch of the legislature may, under any circumstances, be examined for the purpose of impeaching the validity of an act that has been duly enrolled and deposited with the secretary of state, since we are of the opinion that it does not appear from those journals that the act in question was not constitutionally passed. The session of the legislature at which the act in question was passed commenced January 2, 1893. Before the expiration of 50 days from this date, eight different bills, entitled "An act to amend 'An act to establish a uniform system of county and township governments, approved March 31, 1891,'" and 29 other bills amendatory of different sections of the same act, were introduced into the assembly. Of these latter, assembly bill No. 74 was entitled "An act to amend section 165" of said act. These several bills were referred to the committee on county and township government, and on March 2d that committee reported to the assembly a substitute for all of said bills, and recommended its passage, and the substitute was thereupon ordered printed. Assem. J. p. 824. March 8th, assembly

bill No. 74 was read the first time, and placed on file for second reading. March 9th, this bill was read a second time, whereupon "the committee on county and township governments offered a substitute [the county government bill], entitled 'An act to establish a uniform system of county and township governments,'" which was read and adopted. Assem. J. p. 1,001. And on the same day the assembly ordered that the other of the above bills that had been referred to this committee be withdrawn and stricken from the files, "they having been embodied in the omnibus county government bill, now known as 'Substitute for Assembly Bill No. 74.'" Page 1,003. Various amendments were thereafter made to the "Substitute for Assembly Bill No. 74," and on March 13th it was passed by the assembly, and transmitted to the senate, where it was afterwards passed by that body. There can be no presumption that the legislature has disregarded any constitutional requirements in the passage of a statute, and, if the journals are silent upon the observance of any constitutional requirement, it cannot be assumed that such requirement was omitted by the legislature. People v. Dunn, 80 Cal. 211, 22 Pac. 140. If a bill has been introduced in either house within the first 50 days of the session, whatever is proper in the way of amendment is as admissible after the 50 days as before, and this will include whatever is within the purpose of the bill. By the same rules a substitute that is germane to the subject of the bill may be adopted without violating this provision of the constitution, since such substitute is, in effect, only an enlarged amendment to the bill for which it is offered. Toll v. Jerome, 101 Mich. 468, 59 N. W. 816. The various bills for which the substitute in the present instance was reported related to the county government act of 1891,—some of them purporting by their titles to amend the entire act, and others to amend certain sections of the act; and it was within the proper function of the committee to which they were referred for consideration to consolidate them into one bill, if in its judgment it was expedient, and to report the same as a substitute for them all. Such report and substitute, instead of being the introduction of a new bill, was only bringing together before the house, in a revised form, bills that had already been introduced and referred to that committee, with a recommendation from it for the action by the house which that committee deemed advisable.

2. It is further contended by the appellants that the provision in section 60 of the act for holding the election of county officers every four years is either superseded by a provision in section 170 that such election shall be every two years, or, if the latter provision is to be limited to counties of the eighth class, that the uniformity of the act is destroyed, and the entire act must be held to be unconstitutional. The first 161 sections of the act are general in their character, prescribing the duties and powers of the several county and township officers, and are applicable to all the counties in the state. By section 162 the several counties are divided into 53 classes, "for the purpose of regulating the compensation of all officers hereinafter provided for," and in the succeeding 53 sections the compensation of the officers of these several classes is fixed. Section 57 of the act designates the several officers of a county, and section 58 those of a township. Section 60 declares: "All elective county and township officers, except otherwise provided for in this act, shall be elected at the general election to be held in November, 1894, and every four years thereafter, unless otherwise herein provided, and shall take office at twelve o'clock meridian on the first Monday after the first day of January next succeeding their election." Section 170 fixes the compensation of county and township officers in counties of the eighth class, and is divided into twenty-six subdivisions. Subdivision 26 is in the following terms: "The officers mentioned in section fifty-seven of this act, except as hereinafter provided, shall be elected in the year eighteen hundred and ninety-four, and every two years thereafter, and shall take office at twelve o'clock meridian on the first Monday after the first day of January next succeeding their election." And subdivision 24 provides that all of the provisions in the section relating to counties of this class shall take immediate effect. These provisions of section 170, if literally construed, are in direct conflict with the provisions of section 60, in this respect: that by section 60 "all elective county and township officers" are to be elected every four years, while by subdivision 26 of section 170 "the officers mentioned in section fifty-seven of this act" are to be elected every two years, and from this repugnance it is contended that the act is thereby rendered of no effect. It is a cardinal rule in the interpretation of a statute that all its provisions shall be given effect, if possible, and if, by proper construction of the language used in different sections, provisions which are apparently conflicting can be harmonized, it is the duty of courts to so interpret the statute that all its provisions will be allowed to stand. It is not to be assumed that the legislature intended by the same statute to enact two inconsistent provisions, and to declare that the terms of all county officers should be four years, and at the same time that they should be two years. For the purpose of ascertaining the intention of the legislature in the matter, we may consider the form in which the different provisions of the statute have been cast, as well as the position of the different provisions in reference to other parts of the act. The provision for holding an election every two years is found in the subdivision of the section relating to counties of the eighth class, and should not be construed as applicable to any other class, or as impairing

the previous provision for all classes, unless imperatively required by its language. By limiting the clause used in this subdivision of section 170—"the officers mentioned in section fifty-seven of this act"—to the officers mentioned in section 57 who may be elected in counties of the eighth class, we avoid a construction which would neutralize the provisions of section 60, and at the same time follow a natural rule of construction, in holding that the legislature intended the provisions of section 170 for counties of the eighth class alone, and that all of its subdivisions are subordinate to this intention, and inapplicable to the counties of any other class. This construction finds support in the fact that the day upon which the election for county officers is to be held is found only in section 60, whereas subdivision 26 of section 170 designates merely the year in which the officers are to be elected, thus impliedly referring to the former section for the day of election, and making that section applicable to the officers of the eighth class. It must therefore be held that the legislature did not intend that the provisions of this subdivision of section 170 should be applicable to any other counties than those in the eighth class.

The question is then presented, what effect does this special provision for the counties of this class have upon the entire act? It is contended by the appellants that, by reason of this special provision for the counties of one class, the uniformity of the act which is required by the constitution is destroyed, and that the entire act is void. It is not to be controverted that a statute providing for a system of county governments, which in its terms is limited to a portion of the state, would be in contravention of the provisions of the constitution which require the legislature to pass a uniform system for the entire state. But it is contended by the respondent that the special provision for one class of counties, in an act purporting to provide for all classes, may be disregarded, as being beyond the power of the legislature, and the general provision of the act sustained and made applicable to all the counties of the state. Whether a statute containing an unconstitutional provision, with others which are constitutional, will be sustained as to those which are constitutional, and held invalid merely as to those which are not, depends upon the nature of the different provisions, in view of the evident purpose of the legislature. If the provisions are so interdependent that those which are invalid are to be regarded as the condition or consideration upon which others were enacted, and it is evident that the legislature would not have enacted the statute except in its entirety, and did not intend that any part should have effect unless the whole could be made operative, the entire statute must be held invalid. On the other hand, if the different parts of the statute are severable and independent of each other, and the provisions which are within the constitutional power of the legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the statute itself that it was the intent of the legislature to enact these provisions irrespective of the others, the unconstitutional provisions will be disregarded, and the statute read as if these provisions were not there. For the purpose of statutory construction, the intention of the legislature, as shown by the general scope and purpose of the law, is to be ascertained. It is never to be assumed that the legislature intended to enact an unconstitutional statute, or that it supposed that any part of its act was beyond its constitutional power; and, if the general scope of an act is within its power, the act is not to be rendered null by reason of a subsidiary provision which was beyond its power to enact. If the manifest purpose of the legislature can be carried into effect by upholding the act and disregarding such subsidiary provisions, that purpose will not be defeated by an unconstitutional provision contained in a subordinate section in the act. The title of the present act is, "An act to establish a uniform system of county and township governments"; and this title, as well as the scope of the statute, may be considered for the purpose of determining the intention of the legislature. It must be assumed, from the language used in the title, that the legislature intended to comply with the constitutional requirements to provide for the election of county officers by a uniform law, applicable to all the counties in the state, and that the act in question should be operative throughout the state. By reason of the constitutional prohibition against the passage of a special or local law upon this subject, any separate act containing the provisions of subdivision 26 of section 170 would have been invalid, and would not have affected the uniformity of the general act. The provisions of this subdivision are none the less unconstitutional when made an integral part of a general act from which they are severable, than they would be if found in an independent act, and, being unconstitutional, may be disregarded as fully as though embodied in a separate statute. In Christy v. Board, 39 Cal. 3, the legislature had changed the time for the election of the supervisors of Sacramento county, and provided that the terms of three of the supervisors then in office should be extended for two years beyond the time for which they had been elected. To the contention that the legislature had no power to extend the term of office, and that, therefore, the entire act was invalid, it was said that the power to change the time of the election was unquestioned, and that it was perfectly plain that such was the evident purpose of the act, and that "if, in addition to the exercise of this undoubted power, they have coupled it with an attempt to perform an unconstitutional act by continuing the incumbents in office until October, 1871, the only result would be that the attempt would be abortive, and that portion of the act would be void. But this result would in no degree impair the efficiency of the act as a valid enactment changing the time of the election from 1869 to 1871." Similar principles were announced in People v. McCreery, 34 Cal. 433; Rood v. McCarger, 49 Cal. 117; and Mills v. Sargent, 36 Cal. 379. See, also, Robinson v. Bidwell, 22 Cal. 379; Miller v. Kister, 68 Cal. 142, 8 Pac. 813. Mr. Cooley, in his treatise on Constitutional Limitations (page 211), states the rule as follows: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other." We are of the opinion that the statute under consideration falls within this rule, and that, as the provisions of subdivision 26 of section 170 are invalid by reason of being without the constitutional power of the legislature to enact, they are to be disregarded, and do not affect the validity of the act itself.

3. Section 15 of the county government act of 1883 (St. 1883, p. 301) provided: "At the general election to be held in the year eighteen hundred and eighty-four a full board of supervisors must be chosen in each county. They shall so classify themselves by lot that three of them shall hold office for four years and two of them for two years. The supervisors elected at the general election in eighteen hundred and eighty-six, and every two years thereafter, shall hold office for four years. They shall take their office on the first Monday after the first day of January after their election." And section 60 of the same act, after providing that the elective county and township officers, excepting superintendents of public schools and assessors, should be elected every two years declared, "Supervisors shall be elected as hereinbefore provided," and that assessors and superintendents of schools should be elected every four years. The provisions of these sections remained in force until superseded by the county government act of 1891 (St. 1891, p. 297), of which section 15 was as follows: "The supervisors elected at the general elections held in the years eighteen hundred and eighty-eight and eighteen hundred and ninety, and every four years thereafter, shall hold office for four years. They shall take their office on the first Monday after the first day of January after their election." Section 60 of this act was identical with section 60 of the act of 1883, and contained the same provision for biennial elections, and also, "Supervisors shall be elected as hereinbefore provided," and that assessors and superintendents of schools should be elected every four years. Section 15 of the county government act of 1893 (St. 1893, p. 349) provides: "The supervisors elected at the general elections held in the years eighteen hundred and eighty-eight and eighteen hundred and ninety, and every four years thereafter, shall hold office for four years. They shall take their office on the first Monday after the first day of January after their election." Section 60, above quoted, after providing that the election of all elective county and township officers, "except otherwise provided for in this act," shall be quadrennial instead of biennial, "unless otherwise herein provided," also declares, "Supervisors shall be elected as hereinbefore provided." From these provisions it results that, with the exception of the two supervisors in each county to whom a term of two years fell by lot, as authorized by the act of 1883, the term of office of supervisors, which was originally fixed at four years, has not been changed by any subsequent act, and that the three supervisors who were elected in 1892 are entitled to hold their office for four years and no longer, and that an election for their successors must be held at the general election in 1896, while the two who were elected in 1894 will continue to hold their office until their successors are elected in 1898. Any different construction would have the effect to hold that the legislature by the act of 1893 intended to extend the office of the three supervisors elected in 1891 beyond the period for which they were elected, in disregard of section 9, art. 11, of the constitution. The provisions in the act of 1893 for quadrennial elections for county officers in the twenty-second and thirty-seventh classes of counties, "except three supervisors," evidently referring to the three supervisors who were elected in 1892, indicates that something of this nature was in the mind of the legislature.

We hold, therefore, that under the county government act of 1893 the term of office of all county and township officers is fixed at four years, and that those who were elected at the general election in 1894 hold their office for four years from the first Monday after the first day of January 1895; that the term of office of the three supervisors in each county who were elected at the general election in 1892 will expire on the first Monday after the first day of January, 1897; and that their successors are to be elected at the general election to be held in November of the present year. The superior court was therefore in error in holding that none of the county officers were to be elected at the coming election. The judgment is therefore, for this reason, reversed, and the superior court is directed to sustain the demurrer to the complaint.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.

(114 Cal. 124)

## ROHRER v. BABCOCK. (Sac. 175.)

(Supreme Court of California. Aug. 26, 1896.)

INJUNCTION—TRESPASS.

Under Code Civ. Proc. § 526, permitting an injunction when it appears during the litigation that defendant is doing, or threatens to do, some act respecting the subject of the action in violation of plaintiff's right, and tending to render the judgment ineffectual, a preliminary injunction will issue to restrain an insolvent defendant from removing hay from the land of plaintiff's testator and feeding it to his cattle.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Elizabeth J. Rohrer, executrix, against A. L. Babcock. From an order denying a motion to dissolve a preliminary injunction, defendant appeals. Affirmed.

Warren & Taylor (T. M. Osmont, of counsel), for appellant. Jas. F. Farraher, for respondent.

BRITT, C. The court below denied defendant's motion—heard on the plaintiff's complaint alone—to dissolve a preliminary injunction restraining defendant, during the pendency of the action, from "removing or molesting" certain 50 tons of hay, which same was grown and stacked, it seems, on land forming part of the estate of plaintiff's testator, and the question is whether sufficient facts are stated in the complaint to justify the issuance of the writ. It is there alleged, among other matters, that plaintiff, as executrix, is the owner of the hay, and that defendant, without right, has commenced hauling the same from the stacks, and feeding it to cattle and other live stock, and threatens to remove the whole of it and feed it to such stock, and will do so unless enjoined; that he is without means to respond in damages, and, if he is permitted to remove the hay, plaintiff will be irreparably injured. Defendant argues that plaintiff has ample remedy in the ordinary course of law, and, therefore, that no injunction lies. The complaint is meager in its detail of facts tending to show that plaintiff is remediless unless the writ of injunction is interposed in her behalf, but so much latitude is permitted to the discretion of the judge in allowing and dissolving interlocutory injunctions that the order made in this instance ought not to be reversed unless the complaint is barren of equity to such degree that this court can say there was an abuse of that discretion. It is, no doubt, true that in general an injunction does not lie to prevent trespass upon either real or personal property; and this for the reason that, commonly, purely legal remedies suffice for the plaintiff's redress. See Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703. The reason of the rule ceasing, the rule ought to cease. Here replevin is the remedy which appellant most insists was appropriate to the plaintiff's case; but she avers—and the averment must, for present purposes, be taken as true—that defendant is feeding the hay to live stock, and will continue so to do unless restrained. She could maintain no action in the nature of replevin for hay not in defendant's possession, and obviously the several portions of it hauled away by him might, and probably would, be consumed before successive writs for its redelivery could be obtained and served; and, he being insolvent, judgment for its value would be of no avail. The facts are fairly within the provision of section 526, Code Civ. Proc., permitting an injunction when it appears during the litigation that defendant is doing, or threatens to do, some act respecting the subject of the action, in violation of the plaintiff's rights, and tending to render the judgment ineffectual. The following cases, among others, tend more or less directly to support our conclusion: Hicks v. Compton, 18 Cal. 206; West v. Smith, 52 Cal. 322; McDonald v. Bayne (Sup.) 12 N. Y. Supp. 772; Wilson v. Hill, 46 N. J. Eq. 367, 19 Atl. 1097. The order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(114 Cal. 161)

## JURGENS v. NEW YORK LIFE INS. CO. (S. F. 283.)

(Supreme Court of California. Sept. 2, 1896.)

LIFE INSURANCE—RESCISSION—RELEASE BY BENEFICIARY PARTIES.

1. One who has insured his life for the benefit of another cannot, after the beneficiary has acquired a vested right by the delivery of the policy, rescind the policy and recover premiums paid, without tender of release from the beneficiary, even where rescission can be compelled and does not require consent of the insurer.

2. Though a life policy provides that it shall not be in force till the premium is actually paid the agent, and that no agent has power to extend the time for paying a premium, still, where the agent unconditionally delivers the policy on receipt of insured's note, and thereby becomes answerable to the company for so much cash, the policy is in force, so that insured cannot rescind it without a release from the beneficiary.

3. Even if insured can, on some terms, secure a rescission of a life policy where the beneficiary refuses to join in a rescission, he must make the beneficiary a party to an action for such rescission.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Charles Jurgens against the New York Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Van Ness & Redman, for appellant. E. J. McCutchen, for respondent.

TEMPLE, J. The appeal is from a judgment of nonsuit, and from an order denying a new trial. The action was brought to recover $1,462, paid as the first annual premium upon a policy of life insurance for $25,000, plaintiff claiming that the contract of insurance had been rescinded by him. He claims to have rescinded because he was induced to receive the policy and pay the first premium by the false and fraudulent representations of defendant's agent, one Eaton. The policy issued to him was precisely such a policy as he had applied for in writing; but the written application was made out by Eaton, and Eaton had assured him and induced him to believe that the policy would be an endowment policy for $25,000, which would be paid him at the end of 10 years, or, in case of his death within that period, to his wife, Katherine, whereas the policy delivered to him only entitled him to an endowment of three-tenths of the sum of $25,000, or $7,500. There was a similar misrepresentation in regard to the surrender value of the policy. In the written application of plaintiff he stated: "Inasmuch as only the officers of the home office of said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of said company, at the home office, in this application." There was also a stipulation that the policy to be issued should not be in force until the premium was actually paid to the agent of the company, and accepted, during the life and good health of the insured. The application was referred to, and made part of, the policy. The application was made September 8, 1893. Eaton was a mere solicitor for the company, Mr. Hawes being the agent of defendant for California. To pay the premium, plaintiff executed a promissory note payable to his own order, indorsed in blank, and delivered it to Eaton. Eaton sold the note to the Central Bank of Oakland, and paid the money, less his commission, to defendant's agent, who on the 6th day of October sent the policy to plaintiff by Eaton. According to plaintiff's testimony, Eaton read, or pretended to read, a portion of the policy to him, and he then signed a statement which contained the following: "I find the policy is exactly as represented; and I can recommend your company as being first-class in every respect, and can recommend you and your company to my friends." The policy itself contained a provision that "no agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium," etc. The policy was delivered on Friday. On the following Wednesday, plaintiff complained to Eaton that it did not accord with his oral representations, and, at the suggestion of Eaton, called upon Hawes, defendant's agent. There he threw down the policy, and demanded the return of his note, on the ground that he had been defrauded, stating his grievance. He was informed then or subsequently that defendant did not have, and had never had, his note, and knew nothing of the representations made by Eaton. It does not appear that prior to this time any agent of defendant, other than Eaton, was aware that a note had been given. The contract itself provides that no agent is authorized to give credit, but I see no reason why Eaton might not, as agent for plaintiff, discount his note for him, and thus raise the money. If a discount was charged by the bank, it was probably deducted from Eaton's commissions. This was a private affair between Eaton and plaintiff. Plaintiff had stipulated in writing that no oral representations of Eaton should be regarded, and that the issuance of the policy, or the refusal of the risk, were based solely upon the written application and the report of the medical examiner.

Defendant contends that a rescission was not effected, because upon the delivery of the policy Mrs. Jurgens acquired a vested right, and no release from her was tendered. The general proposition involved in this contention is not disputed by appellant, but he contends that it has no application to this case. He contends that the doctrine has no application to cases in which a rescission may be compelled, and does not require the consent of the insurer. I can discover no reason for such a distinction, and no authority is cited in its support. If plaintiff was entitled to rescind in consequence of the fraud of defendant, nevertheless it was incumbent upon him to restore to defendant everything of value which he had received, and to place defendant substantially in the position formerly occupied by it. An offer to rescind is an offer to release the opposite party from the obligations of the contract. If the obligations are not to plaintiff, he cannot make that offer. In this case plaintiff could not do so without the consent of Mrs. Jurgens. Plaintiff says, if the facts justified plaintiff in demanding a rescission, such facts would constitute a defense for the company against Mrs. Jurgens. This is not true. They could not be heard to plead their own wrong in defense. Only actual rescission could be relied upon as a defense, and the argument assumes the point at issue, that a legal rescission has been made. The obligations imposed by the contract upon the defendant were to the plaintiff and his wife, and both should join in demanding a rescission. Trabandt v. Insurance Co., 131 Mass. 167; Insurance Co. v. Wilson, 111 Mass. 542.

Plaintiff also contends that, if the consent of Mrs. Jurgens is necessary to a rescission, then defendant by its fraud got itself into the trouble, and cannot object to a rescission, because plaintiff is unable to place it in statu quo; that is to say, he can recover from defendant the premium paid, although he gets for it and retains the entire benefit of the payment. For, of course, in the event of his death within the year, Mrs. Jurgens would collect $25,000, the full amount of the policy. This would not be rescission. The contract did not oblige plaintiff to continue paying after the year, and if he did not the premium paid was only in consideration of the risk carried during the year. On the supposition made, defendant would carry that risk.

It is also contended by plaintiff that by the very terms of the contract the policy never was in force; therefore Mrs. Jurgens had no interest in it. A somewhat similar state of things existed in Griffith v. Insurance Co., 101 Cal. 627, 36 Pac. 117. The policy was issued by the same company and contained the same condition, to the effect that the policy shall not be in force until the payment of the premium during the life of the insured. There the agents, though forbidden to give credit, took the notes of the insured, as here. The court said: "It was, in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment." So, here, it does not appear that any agent of the defendant—other than the solicitor, whose agency was of a very limited character—ever knew of the note. The money was not received by Mr. Hawes for two days after plaintiff demanded its return, but, for all that appears, he may have believed that the money was in the hands of Eaton. And whether it was or not, since Eaton had no authority to take the note, he was answerable to the company for so much cash. This question is also covered by the case of Griffith v. Insurance Co., supra. It was there held that an express provision in the policy that the company shall not be liable until the premium is paid is waived by the unconditional delivery of the policy. It may be that, had Mrs. Jurgens refused to join in a rescission, plaintiff might still, on some terms, have procured a release from his contract; but, if he could, Mrs. Jurgens should have been a party to any action for that purpose. Appellant's counsel says that plaintiff cannot be compelled to bring a suit in such a manner that a judgment in his favor shall afford protection to the defendant. I understand that he is bound to do that very thing, though, if this were the only objection in this case, it might not now be available to the defendant. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(5 Cal. Unrep. 430)

## McKENZIE v. JOOST et al. (S. F. 39.) [1]

(Supreme Court of California. Sept. 1, 1896.)

EVIDENCE—CONFLICT—FINDINGS—REVIEW.

Findings of the trial court on evidence fairly conflicting will not be disturbed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by George F. McKenzie against Herman Joost and others. From a judgment allowing him only nominal damages, and from an order denying a new trial, plaintiff appeals. Affirmed.

Van Ness & Redman, for appellant. John L. Boone, for respondents.

PER CURIAM. This is an action upon an injunction bond given in an action in the United States circuit court, in which a temporary injunction was issued, enjoining the assignors of the plaintiff herein from infringing upon a certain patent right, issued originally to one Hancock for a certain dye used in dyeing broomcorn and brooms. In the suit in the United States court the injunction was finally dissolved, and this present action is upon the bond given for said temporary injunction. The court in the case at bar gave judgment for the plaintiff, but found that he was entitled to only nominal damages, and judgment in his favor to the extent of one dollar was entered. The plaintiff appeals from the judgment, and also from an order denying his motion for a new trial.

The only point made by appellant for a reversal is that the testimony does not sustain the finding that the appellant was entitled to nominal damages only. We have examined the transcript and the briefs very fully, and it is only necessary to say that the evidence clearly brings the case within the rule that, where evidence is fairly conflicting as to an issue, the finding of the court below will not be disturbed. There was certainly evidence, and considerable evidence, tending to show that the assignors of appellant were not materially injured by the injunction, and it would serve no useful purpose for us to review the evidence here in detail. The judgment and order denying a new trial are affirmed.

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[1] Rehearing denied.

114 Cal. 159

## Ex parte LONG. (Cr. 122.)

(Supreme Court of California. Sept. 2, 1896.)

HABEAS CORPUS—WHEN ISSUED.

A writ of habeas corpus for discharge from imprisonment under a judgment of conviction regular on its face, on a complaint charging a violation of a city ordinance, of which the court had jurisdiction, cannot be granted on the ground that the evidence failed to show a violation of the ordinance.

Department 1.

Application by William Long for a writ of habeas corpus. Dismissed.

Samuel B. McKee, for petitioner. Chas. E. Snook, for respondent.

VAN FLEET, J. Petitioner asks to be discharged on habeas corpus from restraint under a judgment convicting him of a misdemeanor, in selling beer without a license, in violation of section 1 of ordinance No. 1,093 of the city of Oakland, regulating the traffic in intoxicating liquors within the limits of that city. No question is made as to the jurisdiction of the court, or the sufficiency of the complaint in charging an offense under the ordinance; nor is the judgment in any way attacked as void for any reason or defect appearing upon its face. The contention of petitioner, upon which he bases his right to discharge, is, in substance, that the acts proven against him to sustain the charge made did not constitute an offense, within the meaning or intent of the ordinance, but that, if the ordinance must be construed so as to make the acts of petitioner an offense, then it is unreasonable, unjust, and oppressive, and an improper restraint upon petitioner's constitutional right to pursue a lawful business. What purports to be the evidence upon which petitioner was convicted is set forth in the petition, and we are asked by petitioner to look into this evidence, and determine as to its legal sufficiency to make a case under the ordinance, and, in the event we determine that it does not, to discharge petitioner for that reason. But, obviously, in this view, petitioner has wholly misconceived the functions of the writ of habeas corpus. The writ subserves no such purpose. Its office is in no sense that of review as upon appeal. The inquiry to be had thereunder does not extend beyond the question of jurisdiction, and the validity of the process on its face. When the complaint states facts which constitute an offense which the court has jurisdiction to try and punish, and the judgment is regular upon its face, there is no authority on habeas corpus to look beyond these, and say whether that jurisdiction has been in all respects regularly pursued. Mere error cannot be inquired into on such proceeding, and manifestly, jurisdiction to try and punish the offense being conceded, the question as to whether the evidence at the trial was sufficient to bring the case within the ordinance, and establish a breach of its provisions, was a question the improper determination of which would constitute error only, however gross the mistake thus committed. The misapplication of the law to any given state of facts does not constitute excess of jurisdiction, but error merely, which cannot be reviewed by this means. Ex parte Bird, 19 Cal. 130; Ex parte Max, 44 Cal. 579; Ex parte Cohn, 55 Cal. 193; Ex parte Lehmkuhl, 72 Cal. 53, 13 Pac. 148; Ex parte Sternes, 77 Cal. 156, 19 Pac. 275. Whether, therefore, the ordinance, when properly construed, is, as contended by petitioner, a regulation aimed only at the keepers of saloons, dramshops, bars, and tippling places, and was not intended to apply to the business as carried on by the Oakland Bottling Company and its employé, the petitioner, is a question which cannot arise on the record before us. It is conceded that, as applied to saloons and the other classes of retail places enumerated, it is a competent exercise of the police power of the state, and valid; and, this being so, the record does not show any excess of jurisdiction. Writ dismissed and petitioner remanded.

We concur: GAROUTTE, J.; HARRISON, J.

114 Cal. 136

## HELLMAN v. SHOULTERS, Treasurer, et al. (L. A. 8.)[1]

(Supreme Court of California. Sept. 1, 1896.)

SALE FOR STREET-IMPROVEMENT ASSESSMENT — INJUNCTION.

Injunction will not lie to restrain the sale of abutting property for nonpayment of a bond representing the assessment against the property for street improvements merely because the notice of sale did not state the amount of costs and penalties, even if the omission would render the sale void; at least, where plaintiff makes no offer to pay what is due.

In bank. For opinion in department, see 44 Pac. 915.

VAN FLEET, J. After a re-examination of this case by the court in bank, we are satisfied with the views expressed in the opinion of Mr. Justice TEMPLE, filed upon the hearing of the case in department 2 (44 Pac. 915); and that opinion, with the suggestions which we deem it proper here to add in response to the petition for a hearing in bank, will stand as the opinion of the court.

1. Counsel strenuously contends that the bonds in question cannot be considered as the bonds of the municipality, but that they are, in legal effect, the obligations of the several property owners, or are not the obligations of any one. We cannot see any distinction between these bonds and those considered in the case of Lent v. Tillson (Cal.) 14 Pac. 71, referred to in the opinion in department. In each case they are made payable only out of a special fund to be raised by assessment on the property benefited. It is expressly de-

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[1] Rehearing denied.

clared in each act that the city should in no event be liable upon them, and no personal liability for their payment is by either act imposed on any one. The fact that in one case the bonds are to be paid generally out of a fund raised by assessment on all the property benefited, and in the other case are to be paid severally by assessment on each particular lot, cannot affect the question of legislative power. The burden upon the property is precisely the same in either case. Liens upon property, where no person is bound to perform the obligation, are common in our law (Civ. Code, § 2890), especially in cases of taxation; and, in cases of this character, no personal liability can constitutionally be imposed upon the property owner. Taylor v. Palmer, 31 Cal. 241. But, if these bonds could not be considered municipal obligations, the result would be the same. So far as the questions in this case are concerned, the bonds really cut no figure, and might as well be eliminated from the case. The effect of the act in question is precisely the same, so far as the property owners are concerned, as if it had provided that any delinquent assessment of $50 or more should be payable in annual installments for such number of years, not exceeding 10, as the council should fix, with interest at a rate to be determined by the council, and that upon default in the payment of any installment the property should be sold to pay the assessment. Since the legislature might constitutionally have provided (as it did provide in the original Vrooman act) that the property should be sold at once to pay the entire delinquent assessment, the owner cannot complain of a provision allowing him an extension of time within which to pay any installment. The only possible question could be as to the authority of the council to fix the rate of interest. We agree with counsel for respondents that the imposition of interest may well be supported as a legitimate penalty for delinquency, from which the owner may protect himself by paying the assessment when due. As to fixing the rate of interest, that, as said in the opinion in department, is a matter of contract merely. The city council is authorized to contract for the doing of the work, and must, in its resolution of intention, fix the rate of interest. This is one of the terms upon which bids are invited, and presumably enters into the price bid. If the rate of interest, as fixed, is high, the presumption is that the price bid will be proportionally low. We can therefore see no such inequality as to affect the uniform operation of the law, or to distinguish this case from the ordinary class of municipal contracts for street work.

2. As to the publication of the ordinance or resolution of intention, it may be added that appellant's contention is practically disposed of by the case of City of Los Angeles v. Teed (Cal.) 44 Pac. 580, 582.

3. Counsel for appellant contends that the notice of sale published by the treasurer was insufficient because it did not state the amount of the costs and penalties. This point is made for the first time in the petition for rehearing, and the respondents have had no opportunity to reply to it. This fact itself would be a sufficient reason for ignoring it. Moreover, it must be remembered that this is a suit in equity for an injunction to restrain a sale for the collection of a tax; and no such injunction will lie to correct mere errors or irregularities in the proceedings, even such as would render the sale void,—certainly not where the plaintiff makes no offer to pay what is due. Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765. The judgment and order are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.

(114 Cal. 131)

## LOFTUS et ux. v. FISCHER et al.
(BEHLOW, Intervener. Sac. 6.)[1]

(Supreme Court of California. Sept. 1, 1896.)

PARTNERSHIP—ACTION FOR DISSOLUTION—INTERVENTION.

A complaint by a husband and wife alleged that the husband, defendant, B., and L. formed a co-partnership, in which their respective interests were represented by shares of stock in a corporation formed by them, and that defendant, in fraud of the husband, procured the issuance of certain stock to B. and L., and then purchased it from them, and, for relief, asked for the return of the stock so fraudulently issued to the partnership, and for an accounting and dissolution. A complaint in intervention by B. alleged that the stock was rightfully issued to himself and L., and that defendant fraudulently procured a sale thereof to himself, but the intervener had subsequently made a bona fide purchase of L.'s interest, and, for relief, asked for the rescission of the fraudulent sales to defendant, and the restoration of the stock to himself, but did not ask a dissolution of the partnership. *Held*, that the complaint in intervention should be dismissed, as being in relation to a matter not germane to the original action.

Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by E. C. Loftus and wife against Jacob A. Fischer and others for the rescission of sales of stock, and the dissolution of a partnership. Charles J. Behlow intervened. From a judgment dismissing the complaint in intervention, the intervener appeals. Affirmed.

Henry S. Foote, for appellant. James L. Crittenden, F. W. Street, J. B. Curtin, Scrivner & Schell, Wheaton, Kalloch & Kierce, Estee & Miller, Reddy, Campbell & Metson, and John F. Rooney, for respondents.

HENSHAW, J. This is an appeal by Behlow from the judgment dismissing his complaint in intervention in the above-entitled action. In the original complaint he, with others, appeared as a plaintiff. Upon appeal to this court it was held that defendants' demurrer to the complaint for misjoinder of parties, and improper joinder of causes of action, was well taken. Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509. Upon the return of the cause to the trial court an amended complaint was filed, which omitted Behlow and other parties as plaintiffs, leaving the action to be prosecuted solely in the name of Loftus and his wife. In all other respects pertinent to this consideration, the amended complaint was the same as the original. It contained the same averments of partnership, and the formation of the corporation to conduct its affairs. It averred that, by agreement among the partners, their interests in the co-partnership should be represented by certain shares of stock to them issued. Then follow the same averments of fraud practiced by Fischer upon Behlow and Long, by which, it is asserted, Fischer succeeded in purchasing from them their stock in the corporation. In short, with the omission of the parties plaintiff above noted, the amended complaint is, for all essential purposes, the same as the original, which was reviewed in the 102d volume of our Reports (36 Pac. 509). None of the matters of fraud therein contained, and charged to have injured Long and Behlow, appears in any way to concern the interests or rights of the remaining plaintiffs. Their complaint is still for a dissolution of the co-partnership. Whether or not Fischer has fraudulently acquired property of Behlow and Long is clearly of no concern to them. Upon the filing of the amended complaint, Behlow disappeared from the case as a plaintiff, but shortly after appeared again as intervener. His complaint in intervention is, for the most part, an exact transcript of the amended complaint. With the exceptions now to be noticed, it is identical with that pleading. The first point of difference is this: The amended complaint charges that Fischer, in fraud of the plaintiffs Loftus, unlawfully caused to be issued to Behlow 19,200 shares of the stock, which afterwards, and as a part of his design, Fischer fraudulently obtained from Behlow. The complaint in intervention is silent upon this; for Behlow's contention is that the stock was rightfully issued to him, but fraudulently obtained from him by Fischer. The complaint in intervention charges, as does the amended complaint, that Fischer purchased Long's 5,000 shares through fraud, and still holds them. But the complaint in intervention in this regard goes further than the amended complaint. Behlow pleads additionally that Long, for a valuable consideration, has sold to him "the said part of his interest in said co-partnership represented by 5,000 shares so fraudulently purchased as aforesaid by Jacob A. Fischer." This allegation seems to have been designed to afford Behlow some standing as a partner. It is, of course, insufficient for that purpose; for, admittedly, the title to the stock is in Fischer, and Behlow's action is for rescission and recovery of it. Behlow does not ask for a dissolution of the partnership, since his status as a partner was lost by the sale of his stock, as decided on the former appeal. His prayer is for a decree of rescission, and a restoration to him of the stock, which he alleges he was induced to part with through fraud. In short, as this court had decided that his cause of action could not be considered and decided in the bill for a dissolution of co-partnership, as he was no longer a partner, he undertakes, by intervening, to have the same causes of action passed upon. The complaint is still an action for a dissolution of a co-partnership. The intervention is nothing but an action for rescission of executed contracts of sale, and for a recovery of the stock sold. Whether or not, after a decree of rescission, Behlow would be re-established as a "partner," it is not necessary here to consider. As the term "partnership" is understood in the law, it is certainly novel to consider a co-partnership wherein one's interest is much or little, as he buys or sells stock of a corporation; where one ceases to be a partner by selling all his stock, and immediately takes on the character again if he purchases new shares; where, with 60,000 shares, there may be 60,000 partners one day and 2 the next. But these considerations need not be discussed; for, whether Behlow parted with his partnership interest advisedly or not, by his own pleading he did part with it, and cannot join in an action for the dissolution of a co-partnership of which he has ceased to be a member. Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509. His complaint in intervention was therefore properly dismissed. He neither joins the plaintiff in claiming what is sought by the complaint, nor the defendant in resisting the demands of the complaint, nor is he opposed to both. He merely pleads an individual cause of action in his own right against defendant Fischer. If, as to the 19,200 shares issued to him, and by him to Fischer, he should intervene against the demand of the complaint that this stock belongs to the partnership, and join with Fischer in asserting the legality of its issue, he would, as to this matter, and to this extent, at least, unite with defendant in resisting the claim of plaintiffs. This he does not do. His claim in that regard is to recover the property from Fischer, not for the partnership, but for himself,—a matter with which the plaintiffs have no concern. For the reasons given in Loftus v. Fischer (S. F. 34) 45 Pac. 328, the motion to allow the costs of the clerk's certification is denied. The judgment appealed from is affirmed.

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[1] Rehearing denied.

We concur: McFARLAND, J.; TEMPLE, J.

114 Cal. 168

## PEOPLE ex rel. LYNCH v. BUDD, Governor. (S. F. 600.)

(Supreme Court of California. Sept. 3, 1896.)

LIEUTENANT GOVERNOR—APPOINTMENT TO VACANCY—TENURE.

Under Const. art. 5, § 15, providing that a lieutenant governor shall be elected at the same time and places as the governor, and Const. art. 5, § 8, authorizing the governor, when a vacancy occurs in any office for the filling of which no provision is made by the constitution, to fill such vacancy by granting a commission, which shall expire at the end of the next legislature, or at the "next election by the people," one appointed by the governor to fill a vacancy in the office of lieutenant governor for the filling of a vacancy in which there is no special constitutional provision will hold office till the next gubernatorial election.

In bank. Application on relation of John C. Lynch against James H. Budd, governor, for a writ of mandate. Denied.

J. J. De Haven, for petitioner. W. W. Foote and Garret W. McEnerney, for respondent.

TEMPLE, J. This is an application for a writ of mandate to compel the governor to include in his proclamation for the coming election a call to fill the office of lieutenant governor for the unexpired term of Spencer G. Millard, deceased. Respondent has filled the vacancy caused by the death of the lieutenant governor by the appointment of William T. Jeter, who has duly qualified.

In this case both parties concede—as, indeed, the exigencies of each require him to do—that the vacancy caused by the death of Millard was one which the governor had the power to fill. If there can be question of the power of the governor in this respect, therefore, we have not considered it. And no question has been made, nor have we considered, whether a mandate will issue to compel the chief executive to perform an act which, if it be his duty to perform, is enjoined upon him by the constitution as the executive, nor whether he can be compelled to perform any public duty at the instance of one who has no vested right to have it performed, nor any interest special to himself, or other than that which every citizen has in its performance; or, rather, we have not considered whether to issue the mandate asked for would trench upon the province of the executive.

The constitution provides (section 3, art. 4) that members of the assembly shall be elected in 1880 and biennially thereafter. Section 2, art. 5, provides that the governor shall be elected "at the time and places of voting for members of assembly, and shall hold his office for four years from and after the first day of January subsequent to his election." Section 15, art. 5, is as follows: "A lieutenant-governor shall be elected at the same time and places, and in the same manner, as the governor; and his term of office and his qualifications of eligibility shall also be the same. He shall be president of the senate, but shall have only a casting vote therein. If, during a vacancy of the office of governor, the lieutenant-governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president pro tempore of the senate shall act as governor until the vacancy be filled or the disability shall cease. The lieutenant-governor shall be disqualified from holding any other office, except as specially provided in this constitution, during the term for which he shall have been elected." And in the following section it is provided that in case of the death, resignation, impeachment, absence from the state, or inability to act of the governor, "the powers and duties of his office shall devolve upon the lieutenant-governor for the residue of the term, or until the disability shall cease." It will be seen that in case of a vacancy in the office of governor the vacancy is not to be filled, but the powers and duties devolve upon the lieutenant governor, who does not cease to be lieutenant governor. Under such circumstances it would hardly be contended that when the powers and duties of the governor devolve upon the lieutenant governor the latter thereby becomes governor, and can appoint a lieutenant governor. Nor do I think it could be contended that when the president pro tempore of the senate acts as governor he could appoint a person to fill the vacancy in the office of lieutenant governor. If he could, he would then appoint himself out of office, and it would be his duty to do so.

But it is conceded by the parties that upon the death of the lieutenant governor the governor may fill the vacancy by appointment. This is unmistakably within the language of section 8, art. 5, which reads as follows: "When any office shall from any cause become vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature or at the next election by the people." An office has become vacant, and there is no other mode provided by the constitution or laws to fill it. "The next election by the people" does not mean the next general election or the next election held by the people, but it must mean that the appointee shall hold until some one has been elected to fill that office. But there is nothing in this provision which indicates when this election shall be held, but only that until some one has been elected to fill the vacancy the appointee shall hold. This section does not direct that such election shall be at the next general election. It provides simply for filling vacancies by appointment, and that such appointees shall hold until the office is filled in the manner provided by law; but does not itself provide for such election or direct when it shall be. If, however, the phrase "the next election by the people" is equivalent to the phrase "the next election," and we assume that it was intended thereby to indicate the election at which such vacancy would be filled, we would feel compelled to hold that the next election is that which the constitution has provided for filling that particular office; that is, the next gubernatorial election. Many authorities may be cited in support of this proposition. In Matthews v. Shawnee Co., 34 Kan. 606, 9 Pac. 765, the governor appointed a judge to fill a vacancy. The constitution provided for an appointment to fill the vacancy until the next regular election. Upon a contest the supreme court said: "The words 'regular election' do not necessarily mean general election, or township election, or any state, county, city, or district election. They simply mean the regular election prescribed by law for the election of the particular officer to be elected." State v. Philips, 30 Fla. 579, 11 South. 925, involved a municipal office. The court said: "When it is declared that the city council shall fill vacancies until the next regular election, it means until the next regular election provided by the charter for electing the officer whose term has become vacant." To the same effect are State v. Gardner, 3 S. D. 553, 54 N. W. 606; Sawyer v. Haydon, 1 Nev. 75; People v. Wilson, 72 N. C. 155; State v. Cobb, 2 Kan. 32; and People v. Mathewson, 47 Cal. 442. The effect of these decisions is that the term "next election" means the next election for a lieutenant governor, and that the language used in section 8 cannot be understood as itself directing that at the next succeeding general election the vacancy shall be filled.

Is an election at that time authorized by any law? The constitution contains no provision for holding an election for filling this vacancy, and is silent as to whether the appointee shall hold for the residue of the term. And this is more noticeable because as to some other officers there are explicit directions upon the subject. In regard to justices of this court and judges of the superior court, it is expressly provided that in case of a vacancy the appointee shall hold until the election and qualification of a successor, "Which election shall take place at the next general election." Sections 3, 5, art. 6. In regard to railroad commissioners, the provision is that the appointee shall hold office for the residue of the unexpired term. The constitution is equally silent in regard to filling vacancies in other executive offices. A similar state of things existed under the constitution of 1849, and the legislature passed a law for filling such vacancies ("An act concerning offices;" April 28, 1851; St. 1851, p. 415). This act did not provide for the election of a lieutenant governor. Like the governor, he was required, in case of resignation, to resign to the legislature if that body was in session; if not in session, to the secretary of state. Such is also the requirement of the present code. Pol. Code, § 995. Like the old statute, the present code contains no provision in regard to an election to fill a vacancy in the office of lieutenant governor. As to other state officers, the provision is that they shall hold for the balance of the unexpired term. There has never been in the laws a provision for an election to fill a vacancy occasioned by the death or resignation of a lieutenant governor. Perhaps it was not supposed that such vacancy would ever be filled, even by appointment. At all events, there is no law, either constitutional or statutory, for such an election. In such case there can be no election. People v. Weller, 11 Cal. 49; People v. Mathewson, 47 Cal. 442; Kenfield v. Irwin, 52 Cal. 164. In Sawyer v. Haydon, 1 Nev. 75, it was said: "We think no court or judge has gone so far as to hold that the people might hold an election or vote for any particular officer at a general election, unless some special provision was made for electing such officer for the particular term for which he is seeking to be elected, either in the constitution or some statutory enactment." This was also said in People v. Mathewson, 47 Cal. 442. The efficacy of an election depends upon the law in pursuance of which it is held, and the fact that an office is elective does not of itself, without some law authorizing and regulating the election, render valid any attempted election. The writ is therefore denied.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.

GAROUTTE, J. I concur in the judgment. The constitution provides that the powers and duties of the office of governor, in case of vacancy, shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease. The constitution further provides that in case of a vacancy in both the office of governor and lieutenant governor the president pro tempore of the senate shall act as governor until the vacancy be filled. The constitution does not provide that the president pro tempore of the senate shall perform the duties of the office of lieutenant governor in case a vacancy exists in that office. And this omission to so provide is, to my mind, an unintentional lapse on the part of the framers of the constitution. Such appears to be plain when we consider that there is an express provision of that instrument casting upon the president pro tempore of the senate authority to perform the duties of the office of governor if there be no lieutenant governor, taken in connection with the many other provisions of that instrument which all point to that conclusion. But no authority is found in the constitution vesting the president pro tempore of the senate with the duties of the lieutenant governor when a vacancy occurs in that office, and hence any such question is foreclosed.

The foregoing conditions being present, a vacancy occurred in the office of lieutenant governor upon the death of the incumbent, and the governor had the power to fill such vacancy by virtue of section 8, art. 5, of the constitution. That section reads as follows: "When any office shall from any cause become vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature or at the next election by the people." It follows that the result of this litigation in part rests upon the true construction of the words "the next election by the people." It is conceded by the present incumbent of the office that the next election by the people since his appointment will be the coming presidential election to be held in November, but he claims the words should be construed to mean "the next election by the people at which a lieutenant governor is regularly to be elected." If the framers of an instrument of the dignity and importance of a state constitution had intended such to be the law, it was easy for them to have said so, and they should have so declared in terms. And, in the absence of a declaration of that kind, I do not consider myself authorized to so interpret a phrase of that instrument; certainly not unless the intent of its authors to that effect is plainly apparent; and we look in vain for such intent. Upon a question of statutory construction it was said in Blythe v. Ayres, 96 Cal. 582, 31 Pac. 924: "We are not here to construct a statute, but to construe a statute. We can neither interpolate nor eliminate, and we are bound to assume that the legislature enacted the law as it now stands with a due comprehension of the meaning of words, and of the rules of statutory construction, and that they incorporated into the act all that was intended, and that they intended that effect should be given to all that was found therein." And that principle of construction applies with full force here. If any layman of ordinary intelligence, be he merchant, doctor, or mechanic, should have the question submitted to him as to the proper signification of the words here under consideration, to wit, the officer's commission shall expire "at the next election by the people," he would say without hesitation that the commission expired at the next general election. Such is the fair and legitimate construction of the language. There are some decisions of courts of other states which in a measure look in an opposite direction from the views here expressed. But these decisions are largely based upon provisions of law not identical with the one here involved. Many of those provisions use the term "regular election," and in such cases stress by the court is laid upon the word "regular" as a most material element in arriving at the true construction of the language. Notwithstanding the foregoing construction of the constitutional provision is favorable to the petitioner, still the relief he asks must be denied. For, though the appointee's commission expire at "the next election by the people," still, in the absence of some law authorizing the election of a lieutenant governor at that time, no election can be held, and I find no such law. A provision of constitution or statute declaring a certain day upon which the commission of an officer shall expire is in no sense a provision that an election shall be held upon that day to fill the office. Under these conditions the present appointee of the governor will hold until his successor is elected and qualified, regardless of the day upon which his commission may expire; and his successor can only be elected at a time fixed by law, which time will be at the regular state election in the year 1898.

(113 Cal. 577)

## In re PEARSONS' ESTATE.

(Supreme Court of California. Aug. 29, 1896.)

In bank. Motion for rehearing. Denied. Former opinion, 45 Pac. 849.

PER CURIAM. A rehearing in bank is denied. The judgment heretofore entered herein is modified by striking therefrom the final clause, which reads: "The cause is remanded, and the probate court is directed to modify the decree in accordance with this opinion," and insert in lieu thereof the following direction: "The decree is reversed, and the cause remanded for a new trial."

(114 Cal. 196)

## RALPHS v. HENSLER et al. (L. A. 83.)

(Supreme Court of California. Sept. 8, 1896.)

PLEADING—EFFECT OF AMENDMENT.

Admissions in an original answer cannot be used against defendant after the filing of an amended answer omitting them.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by George A. Ralphs against L. E. Hensler and another. Judgment for plaintiff. Defendants appeal. Reversed.

McKeeby & Appel, for appellants. Jones & Weller, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The nature of this action is sufficiently indicated in the opinion rendered upon the first appeal. Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243. The second trial of the action was entered upon by the respective parties under the same pleadings which were considered upon the first appeal. Plaintiff, after making his formal proofs, introduced the power of attorney, and exhibited to the court defendants' answer. That answer was then a subsisting, operative pleading, and contained the averments and admissions which, in the opinion of this court as declared in the ninety-seventh volume of our Reports, amounted to a ratification by defendant Hensler of the acts of her attorney, performed under the insufficient power given to him. At the conclusion of the taking of plaintiff's evidence, defendant moved for a nonsuit, and among the grounds urged was the one that the amended complaint upon which the action was being tried failed to state a cause of action. The particular in which the amended complaint was insufficient will be found designated and discussed in the concurring opinion of Mr. Justice De Haven rendered upon the former appeal. The trial court held properly that the complaint was radically defective, but granted plaintiff's attorney leave to amend. The amendment which plaintiff's attorney thus made was a very simple, though important, one. It consisted in embodying in his amended complaint a true copy of the mortgage. Defendants' attorney made no objection to the allowance of this amendment, merely insisting that in case it was made he should be permitted to file an amended answer. He obtained this general leave to file an amended answer without disclosing the form which his amendment would take, and, indeed, by practicing what amounts to concealment upon the court of the nature of it. As plaintiff's attorney pointed out to the court in the discussion which was had upon the matter, there was nothing in the amendment which he proposed to make upon behalf of the plaintiff by attaching to the complaint a copy of the mortgage, which called for or necessitated any amendment to the answer, and he asked of defendant's attorney, "What is there to answer to?" The only enlightenment which court or counsel was given upon the matter is found in the evasive reply, "There is something." What that something was in due time appeared. The case was continued to allow the filing of the amended pleadings. The amended answer of defendant filed in pursuance of the leave of court thus obtained was an answer which omitted all of the averments which the defendant had theretofore solemnly made, and which this court had held to amount to a ratification. The court took further evidence, none of it, however, bearing upon the question of ratification, and rendered its judgment in favor of plaintiff.

The principal contention upon this appeal is that at the time when the judgment was rendered there was no evidence before the court of a ratification; that the pleading in which acts constituting a ratification had been set up by defendant, and which pleading amounted to a binding admission against her, was no longer subsisting and operative; that it had been superseded for all purposes by the amended answer which was before the court when the cause was determined; that the record discloses that the pleading containing the admission was never introduced in evidence; that it was merely exhibited to the court, and that, if introduced in evidence, when the pleadings were changed and the admission withdrawn, it ceased to be evidence in the case, and could not, therefore, have been properly considered by the judge. This contention of appellant must be sustained. It was early held in the case of Mecham v. McKay, 37 Cal. 154, that an original pleading containing an admission against interest, which original pleading had been superseded by an amended pleading, could not be admitted in evidence against the pleader, and it was said: "If the party amends his pleading, stating the facts differently, he would reap no benefit from his amendment if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading." This case has frequently been followed. Ponce v. McElvy, 51 Cal. 222; Pfister v. Wade, 69 Cal. 133, 10 Pac. 369; Wheeler v. West, 71 Cal. 126, 11 Pac. 871. Under the rule as thus laid down defendants' answer containing the admissions amounting to a ratification was superseded, and ceased to be a subsisting pleading. Its declarations could not have been received or considered by the court. But, in the absence of those declarations, there is no other evidence in the case tending to show ratification, nor is it even contended by respondent's attorney that the power of attorney executed by Mrs. Hensler to McCarthy contains sufficient authority for the execution in Mrs. Hensler's name of the note and mortgage in suit. It follows that the judgment and order must be reversed, and the cause remanded; and it is ordered accordingly.

We concur: TEMPLE, J.; McFARLAND, J.

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(114 Cal. 186)

## In re WINTER'S ESTATE. (Sac. 103.)

(Supreme Court of California. Sept. 8, 1896.)

WILL—CONSTRUCTIONS.

Testator gave property to his wife "for the remainder of her life. Then it is to be sold, and the proceeds divided between my surviving brothers and sisters." *Held*, that the division was to be, not among the brothers and sisters surviving at the death of testator, but at the time for distribution.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

In the matter of the estate of Daniel Winter, deceased. Appeal from decree of distribution. Affirmed.

J. A. Louttit, for appellant. Elliott & Elliott, for respondent Winter. Baldwin & Thompson, for respondent administrator.

VANCLIEF, C. The will of Daniel Winter, among other things, contained the following paragraph: "Thirdly. I will and bequeath to my wife, Annie Winter, all of my estate, that I die possessed of, excepting the ranch I am living on, on Union Island, San Joaquin county, California, which I will and bequeath to my wife, Annie Winter, for the remainder of her life. Then it is to be sold, and the proceeds to be divided between my surviving brothers and sisters." Four brothers and one sister survived the testator; but two of the brothers died during the life of Annie Winter, the widow of the testator, leaving next of kin, respectively, their heirs at law. The other two of the brothers and one sister survived the widow of the testator, Annie Winter, who was executrix of the will. After the death of said executrix an administrator of the estate of the testator with the will annexed converted the ranch into money, and applied to the court for distribution thereof in accordance with the will; and thereupon the court decreed that all the money proceeds of the ranch be distributed equally to the sister and the two surviving brothers, allowing no part of the money to go to the heirs of either of the two deceased brothers. The appellant, who is the assignee of the heirs of the deceased brothers, contends that two-fifths of the money should have been distributed to him, as assignee of the heirs of the deceased brothers. The solution of the question depends upon whether the survivorship mentioned in the will relates to the time of the death of the testator, or to the time when the ranch was to be sold, after the death of the widow, Annie Winter. If to the former, then each of the brothers, upon the death of the testator, took a vested interest in the bequest, which, upon his death at any time thereafter, passed to his heirs, and became assignable by them. If, on the other hand, the survivorship relates to the time the land was to be sold, then only the brothers and sisters of the testator surviving at the time the sale of the land should have been made could take any interest whatever. In other words, if the survivorship relates to a point of time after the death of the life tenant, each brother took only a contingent interest in the bequest of money, dependent upon his surviving the life tenant, which might not happen. The question to what period survivorship is to relate must depend rather upon the apparent intention of the testator in each case, than upon any rigid rule, or any technical words. And this intention is to be collected either from the particular disposition, or the general context of the will. Newton v. Ayscough, 19 Ves. 536; Denny v. Kettell, 135 Mass. 139. The meaning of that clause of the will now under consideration seems to be plain. The widow took a life estate; at her death the ranch to be sold, and the proceeds to be divided among the surviving brothers and sisters, i. e. to the brothers and sisters then surviving. The exact wording of the clause is: "To my wife, Annie Winter, for the remainder of her life. Then it is to be sold, and the proceeds to be divided between my surviving brothers and sisters." I do not think that can be construed to mean the brothers and sisters surviving at the time of the testator's death. In Brograve v. Winder, 2 Ves. Jr. 638, the testator having directed that certain real estate should be converted into money at a stated period, and the proceeds then distributed, Lord Chancellor Loughborough said: "In this will, the penning of which is very particular, when once you fix his intention, that they shall take it in money, which is clearly the sense of this will, there is no gift till the distribution. The object of the distribution is pointed out to be among the persons named, or the survivors or survivor. That excluded the possibility of taking in, as objects of the distribution, persons who are dead." In Olney v. Hull, 21 Pick. 313, the court said: "In this will it is perfectly clear that the testator intended to give to his wife the improvement of his farm during her life or widowhood. And, having carved out this estate for her, he gave the remainder to his surviving sons, to be equally divided between them. Had he given generally to his sons, all who happened to be alive at his decease, viz. all who survived him, would have taken. * * * The time when the estate was to be divided among the sons is certain and definite. It was when the intermediate estate terminated by the death or marriage of the tenant. Among whom was it to be divided? Not those who survived any prior event, not those who survived the father, but those who survived that particular event,—those surviving the death or marriage of the widow." As a general rule, if a legacy be given to two or more, to be equally divided between them, or to the survivor or survivors of them, the survivorship must be referred to the period of division. Russell v. Long, 4 Ves. 551; Elwin v. Elwin, 8 Ves. 547; Cripps v. Wolcott, 4 Madd. 15. If a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at that time take the whole. Daniell v. Daniell, 6 Ves. 300; Jenour v. Jenour, 10 Ves. 566; Browne v. Lord Kenyon, 3 Madd. 416; Denny v. Kettrell, 135 Mass. 139; 3 Jarm. Wills, 585–589; Rop. Leg. 563.

Section 1336 of the Civil Code provides: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession." Whatever may be the meaning of the latter clause of this section, it is enough for the purposes of this appeal to say that it is not in conflict with any of the authorities above cited. Taken literally, it would seem to remove all doubt in this case that the words in the will referring to survivorship relate to the time of the sale of the ranch, since possession of the legacies (in money) to the brothers and sisters was actually postponed until such sale. Moreover, the will does not purport to devise to the brothers or sisters any interest in the land, but legacies in money to be raised by a sale of the land, although, no doubt, a court of equity would consider the land personal from and after the time when it should have been converted into money according to terms of the will. In this respect the case is like that of Brograve v.

Winder, supra, in which it was held there was no gift till the distribution of the money. I think it reasonably clear the intention of the testator was to bequeath the money proceeds of the ranch only to those of his brothers and sisters living at the time appointed in the will for the distribution of the money, and that the lower court did not err in so deciding. It follows, I think, that the judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

114 Cal. 191

## WARD, Sheriff, v. HEALY (ASHER, Intervener. Sac. 89).

(Supreme Court of California. Sept. 8, 1896.)

INSOLVENCY—EFFECT ON EXECUTION LIENS—INTERVENTION BY ASSIGNEE—PLEADING AND PROOF.

1. Where property is in the sheriff's custody under execution levy at the time of the adjudication of insolvency of the execution debtor and the appointment of a receiver, the lien thereon of the execution creditor, and his right to compel a sale thereof in satisfaction of his judgment, are not affected by the insolvency proceeding.

2. One intervening as assignee in insolvency must aver and prove the assignment to him.

3. While an assignee in insolvency may intervene in an action by the receiver in insolvency, and join in seeking a recovery against defendant, his prayer that plaintiff, as receiver, may be compelled to account to him, as assignee, for any recovery, is at least superfluous, as the assignee, without resorting to a separate action, may call the receiver to account before the court in insolvency.

Department 2. Appeal from the superior court, Lassen county; W. T. Masten, Judge.

Action by F. G. Ward, Sheriff of Lassen county, against Matt Healy. M. Asher intervened. Judgment against defendant, and he appeals. Reversed.

Spencer & Raker and F. E. Spencer, for appellant. Shinn & Shinn, for respondent. Goodwin & Goodwin, for assignee.

HENSHAW, J. These appeals are from the judgment, and from the order denying defendant a new trial. Plaintiff for cause of action set forth that upon May 25, 1893, one James M. Smith was by the superior court adjudged to be an insolvent debtor, and on said day plaintiff, sheriff of the county, was appointed receiver of his property. Upon the 8th day of June, 1893, plaintiff "gave the bond required by said order, and entered upon the discharge of his duties as receiver, and, acting as such receiver, took possession of sixty head of horses belonging to the insolvent." Thereafter he gave due and legal notice that upon June 24, 1893, he would, as receiver, sell said horses at public auction. Defendant claimed some interest in or lien upon the horses, and sought an order from the court prohibiting the sale. Thereupon such proceedings were had in the matter that the following stipulation was entered into between defendant and the receiver, and spread upon the minutes of the court: "Counsel now agree that the sheriff now proceed to sell the property now in his keeping, and advertised to be sold this day, belonging to the said insolvent; the proceeds of said sale to be held by him subject to the decision of this court as to its disposal." In pursuance of this stipulation, plaintiff proceeded to sell, and did sell, the horses at public auction, to defendant, for the sum of $658.50, and delivered them to defendant upon the day of the sale. Plaintiff has demanded payment of said sum, which defendant refuses to pay. Defendant, for answer, denied that plaintiff was the receiver in insolvency; denied that plaintiff sold the horses as receiver, but admitted and averred that he sold them as sheriff. He admitted also his purchase of the horses at the sale, and likewise admitted that he had failed to pay the purchase price. But in this regard he alleged that, before the appointment of plaintiff as receiver, he was a judgment creditor of said James M. Smith, and had caused to be issued and placed in plaintiff's hands, as sheriff for levy, a writ of execution. Plaintiff, as sheriff, levied upon, took into and retained in possession the said horses, under and by virtue of the writ of execution, before the insolvency proceedings of said Smith were commenced. This possession continued until after the sale. It was the lawful duty of plaintiff, as sheriff, to sell the horses under the writ for the benefit of defendant, and it was defendant's right to become a purchaser at the sale, and have the proceeds of the sale applied as a payment upon his judgment. M. Asher intervened as assignee in insolvency, asking that defendant be compelled to pay the purchase price to plaintiff, and that plaintiff be directed to account to him for the same.

There were thus presented three different claims: The plaintiff, who sued as sheriff, contends that he did not sell as receiver, nor under execution, but under the stipulation, and is therefore entitled to recover the money, and hold it until directed by the court to turn it over either to the assignee, or to the judgment creditor; the intervener demands the money as part of the insolvent's property; while the defendant insists that the purchase price should be applied in reduction of his judgment.

As to plaintiff's contention that he did not sell either as receiver, or under the execution, but under the stipulation, it need but be said that unless he sold either as receiver, or as sheriff under execution levy, he had no legal right to sell Smith's property at all. He could not sell in both capacities. He had no authority to sell except in one or the other. Smith was not a party to the agreement, and the only legal effect of the stipulation was that the rival claimants agreed to permit the sale, leaving for future determination the question whether the sale should be legally regarded as made in the insolvency proceedings, or under the execution. By this action a decision upon that question is sought. It is undisputed that if the execution levy was made before the insolvency proceedings were commenced, and the levy was not released at the time of, or before, the sale, the judgment creditor's rights are prior and superior to those of the receiver, and the sale should be treated as made under the execution. The court found that the sheriff did not levy upon the horses under the execution, and did not take the horses into his possession until after the adjudication of insolvency. These findings are attacked, and, we think, successfully. It is uncontradicted that the writ of execution was placed in the sheriff's hands, and receipted for by him, upon May 15, 1893. The order of adjudication of insolvency was made May 25, 1893. The evidence upon the subject is that of Frank Strong, a deputy sheriff. He is asked: "Q. Did you make a levy on the property under that execution? A. Not that day. I had previous to that, some time about the 15th of May. Q. You brought the execution to us last night, and showed us you had found it, and you found it in the sheriff's office? A. Yes, sir; but I don't recollect ever seeing that execution after I went out to levy on the execution. I left the writ at home, and only took copies with me." He further testified that on about the 15th day of June he went out to Madeline Plains, and took the horses from the charge of the sheriff's keeper into his own immediate custody; that he attended to all matters connected with the taking and sale of the horses; that the sheriff personally had nothing to do with them; and that the sole official position which he held was that of deputy sheriff. It is also in evidence, without conflict, that defendant's attorneys instructed the sheriff not to release his levy under the writ, and to sell the property levied upon.

The only answer which respondent's counsel make to this evidence of a levy upon May 15th is that appellant's counsel knew that it "had reference to a levy upon real estate, and had no relation to any matter in question in this suit." To which appellant's counsel retort that "they know the witness meant what he said, and that his statement did not have reference to a levy on real estate." With this wide divergence of knowledge upon their part, we are left to draw our own information from the record itself. In that no intimation appears of any levy upon real estate, or that the evidence is not addressed to the taking of the horses; and it may also be suggested that, if the evidence had no relation to any matter in question, it was the plain duty of respondent's counsel to see that it was eliminated from the bill of exceptions. If, then, as appears from the foregoing, the property was in the sheriff's custody, under execution levy, at the time of the adjudication of insolvency and the appointment of the receiver, defendant's lien thereon, and his right to compel a sale thereof in satisfaction of his judgment, was in no way affected by those proceedings. Vermont Marble Co. v. Superior Court, 99 Cal. 579, 34 Pac. 326.

From what has been said, it necessarily results that a new trial must be ordered, in view of which it becomes pertinent to consider some of the other contentions of appellant.

The complaint in intervention nowhere averred that an assignment had been made to Asher, the intervener. Upon the trial no evidence was offered to show any assignment to him. It is the assignment which vests title in the assignee. The averment of such assignment was necessary in pleading, and essential in proof; otherwise the assignee has no standing in the case, and neither pleads nor establishes in himself a cause of action. Defendant's demurrer to the complaint in intervention should have been sustained, and his motion for a nonsuit against the intervener for failure to prove the assignment should have been granted. Insolvency Act 1880, §§ 17, 18; King v. Felton, 63 Cal. 67.

So far as the complaint in intervention joins with the plaintiff in seeking a recovery against the defendant, it is within the rules permitting an intervention; but its demand that the plaintiff, as receiver, be compelled to account with the intervener as assignee is at least superfluous. If plaintiff recovers the moneys at all, he recovers them as receiver. As receiver, he is an officer of the court in insolvency. The assignee, without resorting to a separate action, may call him to account before the court in insolvency, and there have his accounts adjusted and settled without resort to a separate action in equity. The judgment and order are reversed, with directions to the trial court to sustain defendant's demurrer to the complaint in intervention, with leave to the intervener to amend.

We concur: McFARLAND, J.; TEMPLE, J.

(114 Cal. 199)

## HUGHES v. DOE. (S. F. 397.)[1]

(Supreme Court of California. Sept. 8, 1896.)

DEED TO ONE LIVING AS WIFE OF GRANTOR—SUIT TO SET ASIDE.

In a suit by the wife of a grantor against the grantee to set aside deeds executed by him to one stated in the deeds to be his wife, and reciting that they were made in consideration of love and affection, and for the better maintenance, support, and protection of the grantee, which deeds were executed, the one three years, the other one year, before the grantor's death, and filed a few hours after his decease. the court found that defendant, in the lifetime of deceased, rendered to him such services as ordinarily devolve on a wife, which she erroneously believed herself to be, and that she at divers times paid him money arising from her business ventures, and that such services and payments were sufficient consideration for a half interest only in the property conveyed; and as conclusion of law found that plaintiff since the death of her husband had been entitled to possession of an undivided half of the property as tenant in common with defendant, and decreed cancellation of the deed to that extent. *Held*, that defendant could not complain thereof, it not appearing how much she paid deceased.

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[1] Rehearing denied.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by John C. Hughes, as special administrator of Elizabeth L. Moxley, deceased, against Elizabeth W. H. Doe, sometimes called Elizabeth W. H. Moxley. From the judgment, defendant appeals. Affirmed.

Edward R. Taylor and A. Comte, Jr., for appellant. John C. Hughes and L. T. Hatfield, for respondent.

BELCHER, C. Elizabeth L. Moxley commenced this action to have two deeds of lands in the city of San Francisco, made by John S. Moxley to the defendant, vacated and set aside. The court below found the facts, and adjudged that each of the said deeds "be, and the same is hereby, canceled, annulled, and for naught held to the extent of an undivided one-half interest in the said real estate in said deed described." After the entry of the judgment the plaintiff, Elizabeth L. Moxley, died, and thereupon the present plaintiff, as administrator of her estate, was substituted in her place. From the judgment entered, and from an order denying her motion for a new trial, the defendant appeals.

The only points made for a reversal are that the findings were not justified by the evidence, and that the decision was against law. The evidence introduced covers about 250 pages of the printed transcript, and it is very elaborately discussed by counsel in their briefs. No useful purpose would, however, be subserved by setting it out at length, and we shall therefore confine ourselves to a statement of a few of the more important matters disclosed by it. It appears that John S. Moxley and Elizabeth L. Moxley were married in the city of Baltimore on the 15th day of May, 1849, and that they continued to be husband and wife so long as they both lived. Three weeks after the marriage Moxley started for California, leaving his wife in Baltimore with her mother and sister, where she continued to reside until she died. Moxley arrived in California in due time, and thereafter made his home in San Francisco most of the time until he died, on the 10th day of September, 1892. In 1868 he was in Virginia City, in the state of Nevada, and became acquainted with the defendant, who was engaged in carrying on a millinery business there. In the month of August in that year she became sick and confined to her bed, and while so confined he and she entered into a contract of marriage. Shortly thereafter she sold out her millinery business, and was removed to San Francisco, where she recovered from her illness, and where, in November following, he and she assumed marital relations with each other. In the winter of 1869, defendant, with some goods, went to Salem, Or., and opened a millinery store there. Thereafter she carried on the millinery business in Salem until the spring of 1878, when she closed it out, and went to Portland, Or., where she engaged in a like business, and carried it on for about a year and a half. She then sold out her interest in the business for $8,000, and returned to San Francisco, where Moxley and she thereafter lived together as husband and wife. While defendant was living in Salem and Portland she sent all her earnings to Moxley, and he bought goods as she needed them, and forwarded them to her. She also visited Moxley a few times at San Francisco, and he visited her a few times at her place of business. During the last 25 years of his life Moxley had many real-estate transactions in the city of San Francisco. He bought, mortgaged, and sold sundry pieces of real property. Among such transactions were the following: On March 9, 1867, there was conveyed to him a lot of land 120 feet by 109 feet in extent, situate at the northeasterly corner of McAllister street and Van Ness avenue, for the expressed consideration of $6,000. On August 1, 1891, there was conveyed to him a block of land bounded by Silver avenue, Silliman, College, and University streets, and known as "block sixty-nine of the University Mound survey," for the expressed consideration of $3,500. On November 29, 1878, Moxley conveyed to Elizabeth W. Harrington—that being defendant's maiden name—the lot situate at the corner of McAllister street and Van Ness avenue, and other property, for the expressed consideration of $8,000, and on May 1, 1880, he conveyed to her by the same name another piece of property for the expressed consideration of $1,000. The first of these deeds to defendant was recorded April 24, 1880, and the last on the day of its date. On May 17, 1880, Elizabeth W. Harrington reconveyed to Moxley the lot at the corner of McAllister street and Van Ness avenue, and also that described in the last-named deed, for the expressed consideration of $2,500. On August 15, 1889, Moxley executed to Elizabeth W. Moxley a deed of the lot situate at the corner of McAllister street and Van Ness avenue, and on August 1, 1891, he also executed to her a deed of the block bounded by Silver avenue, Silliman, College, and University streets. These deeds were acknowledged on the days of their dates, and in each of them the grantee was named as the wife of the grantor, and both purported to be made "for and in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, as also for the better maintenance, support, and protection of the said party of the second part." The said deeds were not recorded until about 10 hours after Moxley died, when they were filed for record by defendant; and they are the deeds sought to be canceled and set aside in this action.

When Moxley died, he left no property other than that in controversy here, but defendant had other property. The plaintiff claimed that she was the lawful wife of Moxley, that the property in controversy was their community property, and that the said deeds were made to fraudulently deprive her of her community rights. On the other hand, the defendant claimed that from the time Moxley and she assumed marital relations in November, 1868, she believed she was his lawful wife; that she thereafter lived with him, and cared for him as a true and faithful wife; that she worked and made money which was used in making improvements on the McAllister street property and in paying street assessments, taxes, and other expenses thereon; that the Silver avenue property was bought and paid for solely with money made by her in her business; and that the said deeds were executed in good faith, and without any fraudulent intent, on the part of Moxley or herself, to deprive the plaintiff of any rights whatever. The court, among other things, found that the plaintiff was the widow of John S. Moxley; that the defendant was not the widow of said Moxley; that she was never married to him, and that her true name was Elizabeth W. Harrington; "that the defendant, in the lifetime of said John Smith Moxley, rendered to him such services and performed such duties as ordinarily devolve upon a wife, which she believed herself to be, and she at divers times paid to decedent sums of money arising from her efforts in business ventures; that all of the services so rendered, and the total sum of such payments, were sufficient to constitute a valuable consideration for the purchase of an undivided one-half interest in the property above described as conveyed to her, but no more." And as conclusions of law the court, among other things, found: "That plaintiff is now, and at all times since the 10th day of September, 1892, has been, entitled to the possession of an undivided one-half of the property hereinbefore described as the tenant in common with defendant." Without stating the case more fully, it seems enough to say that, in our opinion, the judgment cannot be reversed for want of evidence to justify the findings. It is true, there is nothing in the record to show how much money was paid to Moxley by defendant, and perhaps it would have been impossible to make such showing. Still the burden was upon the defendant to show an adequate consideration for the deeds, and it was the province of the court to weigh the evidence, and determine its effect. It attempted to do so, and we cannot say that its conclusions were wrong. We see no valid ground to support the contention that the decision was against law. The findings are very complete, and they cover all of the material issues raised by the pleadings. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(114 Cal. 126)

## McARTHUR v. MAGEE. (L. A. 99.) [1]

(Supreme Court of California. Aug. 27, 1896.)

PLEDGE OF MORTGAGE—FORECLOSURE.

1. A pledgee of mortgage notes as collateral security, under an assignment which gives him the right, on default, to realize on the same by sale, but does not restrict him to that method, may either sell them, or, under Civ. Code, § 3006, which gives a pledgee of any evidence of debt the right to realize on it only by collection, he may realize on them by foreclosing the mortgage securing them, which, incidentally with them, passed into pledge.

2. An action by a mortgagee to foreclose a mortgage securing notes assigned as collateral security for the principal mortgage debt is not an action for the recovery of the principal debt, within Code Civ. Proc. § 726, which allows but one action for the recovery of any mortgage debt, so as to render a foreclosure of the principal mortgage a waiver of the mortgagee's right to foreclose the collateral mortgage to satisfy a deficiency judgment obtained in the foreclosure of the principal mortgage.

Appeal from superior court, Los Angeles county; J. M. McKinley, Judge.

Action by Charles H. McArthur against H. W. Magee for conversion. From a judgment for defendant, plaintiff appeals. Affirmed.

Will D. Gould, Wm. E. Cox, and Chapman & Hendrick, for appellant. D. P. Hatch, for respondent.

HENSHAW, J. Defendant's demurrer to plaintiff's complaint having been sustained, and plaintiff having elected to stand upon his pleading, judgment passed for defendant, and plaintiff appeals. The following are the facts pleaded and claimed to constitute a cause of action in conversion: On October 15, 1891, defendant, Magee, loaned to plaintiff $10,500, payable one year from date, with interest at the rate of 11 per cent. per annum. On the same day, McArthur and wife executed to Magee a mortgage on certain realty to secure this debt. At the same time, and as collateral security, they assigned to defendant four promissory notes secured by mortgage executed by Mrs. McCormick to McArthur. The notes were for $5,000 each. After McArthur's debt became due, Magee brought his action in foreclosure, obtained judgment, caused the mortgaged property to be sold, and himself became the purchaser thereof for the sum of $3,150. He caused a deficiency judgment to be entered against McArthur for the balance of the debt, amounting to $9,468.90. The McCormick notes falling due and remaining unpaid, Magee likewise brought suit in foreclosure upon them, and obtained judgment for the full amount due. The property was sold, and purchased by Magee, who subsequently obtained the sheriff's deed therefor. The written assignment to Magee of the McCormick notes and mortgage contained the following provision: "In case default be made in the payment of said ten thousand five hundred dollar ($10,500) note, then said Magee may maintain immediately an action against the assignors of this mortgage for the purpose of procuring, and may procure, a judgment fixing the amount due to him under said note, and directing that said McCormick notes and mortgage be sold by the sheriff for the purpose of satisfying the amount due to said Magee." It is averred that, in foreclosing and merging the McCormick notes and mortgage into a judgment, Magee converted plaintiff's property to his own use, to plaintiff's damage in the sum of $20,000. It is also averred that defendant, Magee, has paid no part of the sum, nor has in any way accounted to plaintiff for said notes and mortgage. The prayer of plaintiff is that defendant be required to pay him $20,000, and to satisfy the deficiency judgment of $9,468.90 entered in the foreclosure suit of Magee v. McArthur. The demand, therefore, is for the face value of the McCormick notes thus alleged to have been converted, and for a satisfaction of the deficiency judgment.

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[1] Rehearing denied.

Appellant argues in support of the sufficiency of his complaint that defendant held the McCormick notes and mortgages in pledge as collateral security, which may at once be conceded. He claims that as under section 726 of the Code of Civil Procedure there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, by bringing suit against McArthur on his $10,500 note, without mention of the McCormick notes as collateral security, and by taking a personal judgment for the deficiency against McArthur, Magee waived his security in the McCormick notes and mortgage. These last-named notes thereby became the property of McArthur, freed from any lien, and Magee's subsequent dealings with them amounted to a conversion. Appellant further contends that the above-quoted provision in the contract of assignment and pledge restricted Magee to a sale of the McCormick notes, and that his foreclosure and merger of them into a judgment was therefore a conversion. In disposing of the last contention, it need only be pointed out that by section 3006 of the Civil Code a pledgee is forbidden to sell any evidence of debt pledged to him, but his right is limited to collecting the same when due. This limitation, being designed for the benefit of the pledgor, may be waived by him, as was done in this case. But the effect of the contract is not to restrict the pledgee to the mode indicated, but is merely a permission added to his statutory right; i. e. under the contract he may either collect or sell, whereas by the Code he could only collect. Jones, Pledges, §§ 645–651. So far, then, as the contract affects the question, Magee was perfectly justified in collecting the McCormick notes, after default in the payment, by foreclosure proceedings.

Reverting to the first contention of appellant, it may be briefly said that Magee's right to foreclose the McArthur mortgage cannot be disputed. It was not incumbent upon him in that suit to make mention of the additional collateral security which he held, since the decree in the action of foreclosure could not have dealt with that security. Bank v. Middlekauff, 45 Pac. 840. When the mortgaged property, the primary source of payment of the McArthur debt, had been exhausted by sale, Magee was entitled to have entered, as he did, a personal judgment for the unpaid portion of the debt. Appellant seems to hold that, because the McCormick notes secured by mortgage were themselves security for the McArthur debt, the McCormick mortgage is to be regarded as a mortgage given primarily to secure the McArthur note; that Magee should have foreclosed the two mortgages in the one action; and that, having failed to do so, he waived the lien of the McCormick securities. But this is manifestly an untenable position. The land covered by the McCormick mortgage was not subjected to any lien to secure the McArthur note. It had been mortgaged to secure the McCormick notes, which notes having been pledged as collateral security the mortgage, as an incident, passed likewise into pledge. As is said in Bank v. Casaccia, 103 Cal. 641, 37 Pac. 648, "An action to foreclose a mortgage which has been assigned as collateral security for the principal debt is not an action for the recovery of the principal debt, but to preserve and enforce the security, which is a duty imposed upon the creditor by the contract of hypothecation, and the principal debt need not be enforced in such action." Magee was thus entitled, if, indeed, it was not his duty, to do exactly as he did,—foreclose the McArthur mortgage, obtain a personal deficiency judgment, and collect by foreclosure the proceeds of the pledged notes and mortgage. And, in doing any or all of these things, he was not chargeable with conversion. He was also entitled to purchase at the McCormick sale, as it is pleaded he did; and, in the absence of fraud, he took a free and absolute title, and was required only to account to McArthur for the proceeds. Kelly v. Matlock, 85 Cal. 122, 24 Pac. 642. Under these circumstances, McArthur's rights are to demand an accounting, under which the proceeds of the McCormick foreclosure would be applied to reduce or extinguish Magee's personal judgment against McArthur, and Magee would be required to pay over any surplus in funds, or to assign over, after reimbursing himself, whatever personal judgment for deficiency he might still hold against McCormick. But this is not what plaintiff sues for. He has not put defendant in default by demanding such an accounting. He does not plead a refusal so to account, or any facts from which such a refusal might be inferred. For all that appears in the complaint, defendant may have done for and given to plaintiff all that he was entitled to demand. In any event, it is certain that no cause of action for conversion is set out in the complaint. The general demurrer to it was therefore properly sustained. The judgment is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

# CALIFORNIA REPORTER

## 46 PACIFIC REPORTER

# CALIFORNIA REPORTER

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114 Cal. 238

### ERTLE v. LEARY et al. (Sac. 148.)

(Supreme Court of California. Sept. 16, 1896.)

COUNTIES—CONTRACTS FOR ERECTION OF PUBLIC BUILDINGS—STATUTORY REQUIREMENTS—JAIL.

1. The cells of a jail are a part of the building, and under the county government act of 1893, § 25, subd. 9, giving boards of supervisors authority to contract for the erection of public buildings, contracts for such cells must be let as therein provided.

2. Under the provisions of the county government act of 1893, § 25, subd. 9, that none of the public buildings therein authorized to be erected by a board of supervisors "shall be erected or constructed until the plans and specifications shall have been made therefor and adopted by the board," and "that all such buildings must be erected by contract let to the lowest responsible bidder after notice by publication in a newspaper of general circulation published in such county for at least 60 days," the letting of a contract for the construction of the cells in a new jail, on bids in which each bidder furnishes his own plans and specifications, is illegal, as it not only prevents the competition which it is the object of the statute to secure, but furnishes no standard by which the board can determine the lowest bid, and gives an opportunity for favoritism in awarding the contract.

Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by John Ertle against D. M. Leary and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. P. Tuttle, for appellants. John M. Fulweiler and Ben P. Tabor, for respondent.

PER CURIAM. The demurrer of defendants to the complaint in this action having been overruled, they declined to answer, and plaintiff obtained judgment enjoining defendants—who are the county of Placer, the persons composing the board of supervisors of said county, and D. M. Leary and J. H. Van Dorn—from proceeding under a certain contract, of date November 28, 1894, whereby said Van Dorn undertook to construct parts of a new jail for the use of the county. The judgment also declared the contract to be void. Leary, it seems, represented Van Dorn in the negotiation and execution of the contract. He and his said principal appeal, and contend that the complaint stated no cause of action. It is to be gathered from that pleading that about February 21, 1894, the board of supervisors adopted plans and specifications for the erection of a county courthouse and jail, which jail was to contain cells in number and dimension as there designated, and in accordance therewith the first story of the courthouse and the outer walls of the jail were duly constructed by contract with one McCann. In August, following, the board advertised for bids for the construction of 12 jail cells, and required bidders to furnish complete specifications. Six bids were received, each upon plans and specifications submitted by the bidder, and not upon any previously adopted by the board. The bid presented by Leary, with accompanying plans and specifications, was accepted by unanimous vote of the supervisors, and a contract founded thereon was made with Van Dorn, by which the latter agreed to construct and deliver to the county "the jail of the size and dimensions set forth in the plans, specifications, and detail drawings adopted by said board," and made part of the contract, and the county agreed to pay him therefor the sum of $10,750. The work contracted for included steel cells, with floors, doors, prisoners' corridors, locking devices, and certain plumbing. If said work is done, the moneys of Placer county will be paid therefor, the cost of the county government will be increased, and the property of plaintiff, a resident taxpayer of the county, will, he says, be unjustly taxed.

Boards of supervisors, in their respective counties, have jurisdiction and power to cause to be erected and furnished, by contract let to the lowest responsible bidder, a courthouse, jail, and other public buildings, "provided, that none of the aforesaid buildings shall be erected or constructed until the plans and specifications shall have been made therefor and adopted by the board." County Government Act 1893, § 25, subd. 9. The jail in this case is a new edifice, and we agree with plaintiff that the cells are an integral part of the same, not "furniture," merely, as said by appellants. In the contract the structures to be completed and delivered by Van Dorn are themselves called "the jail," and they probably are the most essential part of the prison. They are therefore within the statute prohibiting the board from causing the same to be constructed until plans, etc., have been made and adopted. But the power given by the act to build the jail carries with it, as an incident, the right to determine the plan and mode, restricted only by such limitations as some statute imposes. 1 Dill. Mun. Corp. § 140; Peterson v. Mayor, etc., 17 N. Y. 449. The provision of the statute above quoted requires that plans and specifications shall be adopted before the building is erected or constructed. Giving to this provision a literal construction would cause it to mean that the board should not construct a building until it had determined the mode and plan in which it should be constructed; but the requirement that before its construction the board shall first adopt certain plans and specifications, taken in connection with the provision immediately following in the same section, that "all such buildings must be erected by contract let to the lowest responsible bidder, after notice by publication in a newspaper of general circulation, published in such county, for at least sixty days," shows that the legislature has clearly restricted the board from entering into a contract for the construction of a building until after an opportunity has been given to bidders to bid for its construction according to plans and specifications which the board may have adopted at least 60 days before awarding the contract. In the present case it appears from the complaint that, in its invitation for bids, the board authorized bidders to furnish the specifications in accordance with which they would construct the jail, and that they were not required to bid for its construction according to the plans and specifications that had been adopted by the board in the previous February. Under this call, six bids were received by the board, and, in the language of the complaint, "each of said bids was and were upon plans and specifications drafted and submitted by each individual bidder, and none of said bids were made under or according to the plans and specifications theretofore adopted by said board of supervisors for the construction of said jail, cells, or interior part of said jail." One of these bids was by Van Dorn, and the contract was awarded to him. Thereafter certain changes were made in the plans presented by him, increasing the contract price, and the contract was entered into with him for the construction of the jail. It is only necessary to compare this transaction with the requirements of the statute, to perceive the invalidity of the contract. To permit each bidder to propose the plans and specifications according to which he will construct the building not only prevents competition in bidding for the work, but gives to the board an opportunity for the exercise of favoritism in awarding the contract, instead of being required to let it to the lowest responsible bidder; for, since neither of the bidders can know of the plans and specifications under which others are making their bids, there is no standard by which the board can determine which is the lowest bidder. Whether these plans and specifications increased the cost of the building above those previously adopted by the board, or not, is immaterial. There was no opportunity for competition in bidding to do the work according to the plans, and the board, by its own act, prevented itself from complying with the requirements of the statute, to let the contract to the lowest responsible bidder. The judgment is affirmed.

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114 Cal. 295

## SANCHEZ v. GRACE METHODIST EPISCOPAL CHURCH. (L. A. 51.)

(Supreme Court of California. Sept. 16, 1896.)

SEPARATE PROPERTY OF WIFE—VACATION OF HIGHWAY—CONVEYANCE—RELIGIOUS CORPORATION—POSSESSION OF CHURCH EDIFICE.

1. A conveyance of property to a married woman by deed, reciting that it is conveyed "as the separate estate of the grantee," prima facie makes it her separate property.

2. Land deeded to a married woman in exchange for other land owned by her becomes her separate property.

3. A deed of lots in a certain tract, as per map thereof, does not carry any part of what was at the date of the map a highway, on which the tract and lots abutted, though in the meantime the highway had been vacated, and the land conveyed to the grantor of the lots; he not having owned the fee in any part of the highway before its vacation.

4. Land deeded to trustees of a church society will, on the society becoming incorporated, and a church edifice being erected thereon, and used for religious services, be presumed to be in the possession of the corporation, though control is not assumed by any formal act or resolution.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Maria S. Sanchez against the Grace Methodist Episcopal Church. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

W. Pollard, Henry Bleecker, and Cochran & Williams, for appellant. S. M. White, R. H. F. Variel, Henry T. Gage, and George D. Blake, for respondent.

BRITT, C. Action of ejectment, begun March 11, 1886, for a parcel of land in the city of Los Angeles. Judgment was for plaintiff. Appellant contends that plaintiff never had title in the disputed premises; that, if she did acquire such title, yet it was lost by her conveyance thereof, or by adverse user; and, lastly, that it (the defendant) never ousted the plaintiff or had possession of the premises.

1. In April, 1872, the city council of Los Angeles passed an ordinance vacating portions of a highway in said city commonly known as "Messer's Lane" (styled in the ordinance "Old First Street"), and establishing instead thereof a new street, called "First Street." Plaintiff then owned a number of lots including those designated as lots 23 and 24 (the latter a fractional lot),

in block 4 of the "Sanchez Tract," which lots and block abutted on the north side of Messer's Lane. The Sanchez tract extended thence northerly, having an area of 14 acres, intersected by other streets, and bounded on the east by Alameda street. The land on the south side of Messer's Lane, opposite plaintiff's tract, was owned by T. D. Mott and Albert Johnson. The new street established by said ordinance was laid out a little to the south of said lane, so that there intervened between the south line of plaintiff's said lots and the north line of First street thus fixed a piece of land which included the whole of the former lane in that part of its course, and also a narrow, wedgelike strip off the Mott & Johnson tract. April 26, 1872, said Mott & Johnson executed a deed to plaintiff, conveying, "as the separate estate of the grantee," their interest in the whole of such intervening parcel; and on May 3, 1872, the city conveyed to plaintiff its "right, title, claim, and demand" in and to the same premises. The deed of the city recited a consideration of one dollar paid with the grantee's "separate funds and for her separate use," though it was really the result of exchange for other land of plaintiff, contained in the new street, conveyed to the city about the same time by her deed, in which her husband, Tomas Sanchez, joined. The premises in controversy on this appeal are included in the calls of said deeds of the city and Mott & Johnson to plaintiff, and are bounded north by said lots 23 and 24, south by First street, and on the other sides, respectively, by the west line of lot 23 and the east line of lot 24 if those lines were produced to First street.

It is argued that the title became vested in plaintiff's husband as community property. Prima facie, the deed of Mott & Johnson to Mrs. Sanchez, which conveyed, at least, that part of their tract between the new street and the vacated lane, made the estate granted her separate property (Swain v. Duane, 48 Cal. 358); and no attempt was made to rebut the presumption. Whether the deed from the city, reciting a consideration "paid with her own separate funds, and for her separate use," is attended with the like presumption, need not be inquired. It is conceded that the title to all the lands mentioned was originally in the city of Los Angeles, as successor of the Mexican pueblo of that name, and confirmed to it by patent of the United States; and if, as appellant contends and respondent virtually concedes, the title in the soil of Messer's Lane vested in the owners of the abutting lands upon the vacation of that street, or if it then reverted to the city, in either case the title accruing to plaintiff, whether as abutting owner or as grantee of the city, was received in exchange for other land owned by her and conveyed to the city, and unquestionably became her separate estate.

2. On March 29, 1875, plaintiff made a deed to one Leonis, and appellant claims that by this deed she divested herself of title in the demanded premises. Its descriptive portion was as follows: "All those certain lots of land * * * being parts of that tract of land situate on the east side of Alameda street, in said city, known as the 'Sanchez Tract,' and lots 11, 12, 13, 14, 21, 22, 23, 24, in block 4 of said tract, as per subdivision map of said tract made * * * in April, 1871." The map referred to did not exhibit the land in suit as part of the Sanchez tract. Said lots 11, 12, 13, 14, fronted north on Banning street, and abutted south on the other four lots. Admitting that, after the lane was vacated, the land in it was considered by plaintiff as part of the Sanchez tract, yet it was certainly an unsurveyed and unplatted part, and there is no language in the foregoing description apparently designed or sufficiently definite to carry any land not delineated on the map. A more serious question is whether the land in Messer's Lane, to the middle of it, did not become, when the lane was vacated, by a sort of accretion, parcel of the abutting lots, so as to pass with them by the deed to Leonis without further designation. See Challiss v. Railroad Co., 45 Kan. 398, 25 Pac. 894; Railroad Co. v. Patch, 28 Kan. 470,—cases turning upon a peculiar statute. We think no such rule can obtain in this case. The conveyance of land bounded by a highway is presumed to carry title to the median line of the way, but there is no reason in a like presumption to include land which has formed, but forms no longer, part of a highway. In 1875, when the deed was made to Leonis, the soil of the former lane, together with the strip off the Mott & Johnson tract, formed a body of land some 70 feet in width, lying between lots 23, 24, and First street, and wholly free from the legal incidents which pertain to the soil of a highway. There is therefore no more reason to say that any part thereof passed under the designation of those lots in the deed than for extending the scope of that description to adjacent land (if such there had been) which never was impressed with the highway use; more especially since neither party claims that plaintiff owned the fee in any part of said lane before its vacation as a highway. Harris v. Elliott, 10 Pet. 25, 54.

Defendant pleaded certain provisions of the statute of limitations,—sections 325 and 326, Code Civ. Proc. We have been unable to find in the record any sufficient evidence that the land sued for, whether alone or with other land, was for any period of five years before the commencement of the action protected by a substantial inclosure, or was usually cultivated or improved; so that those sections are not available as a defense.

3. In 1882, J. A. Forthman and W. B. Bergin, successors in interest of said Leonis, made a deed to seven named persons, called in the deed "Trustees of the Grace M. E. Church,"

of premises described thus: "Lot numbered 23 and fractional lot 24 in block 4 of the Sanchez tract, * * * with its continuance up to the line of First street added thereto by the city council of Los Angeles by straightening First street," etc. In 1883, the church—that is, as we understand the evidence, the professed Christian society composed of pastor and lay members called the "Grace Methodist Episcopal Church," governed locally by a quarterly conference consisting of official members, and acting as regards fiscal matters through a board of stewards—erected an edifice for public worship on the land described in this deed, including the premises now in dispute. Subsequently, in December, 1885, the corporation (appellant here) was formed under sections 593–603 of the Civil Code. Its constating instruments show that it was created, among other purposes, to take charge of the building, property, and temporalities of the church; that its principal place of business was to be in the church building; that the trustees to have the management of its affairs were seven in number, and were the same persons styled "trustees" in said deed of Forthman and Bergin; and that such trustees were elected for the purpose of forming the corporation at a meeting of the members of the quarterly conference of said church. Such title as passed by the deed of Forthman and Bergin has never been conveyed to the corporation. It is provided in section 595, Civ. Code, that such a corporation may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto. Appellant claims that it has never acted under this provision of the statute; that the seven persons named as grantees of Forthman and Bergin hold whatever title passed by that deed, and were in possession of the premises when the action was commenced; that the corporation "had nothing to do with either the purchase or occupation of said land."

We are concerned only to determine who was the actual occupant of the premises when the suit was brought. It must be conceded that no avowed taking of possession, nor assumption of control of the property by formal act or resolution of the corporation, is shown in the record. But we do not think this was necessary. It was the ecclesiastical society constituting the church, not the seven persons who signed the articles of incorporation, that became a legal entity, with power to transact all business relative to the church property. The trustees or directors were but its agents in that behalf. Civ. Code, §§ 593, 595, 603; Robertson v. Bullions, 11 N. Y. 243; People's Bank v. St. Anthony's Church, 109 N. Y. 512, 17 N. E. 408. It does appear that the church had a pastor to whom it paid a salary; that it collected funds, and furnished the building, and kept it in order. It is fair to infer that it was conducting the ordinary ministrations of the church in the ordinary way, by its pastor, board of stewards, sexton, etc., and for these purposes used the land in question as a place of worship. The society that was doing these things had become incorporated for the express purpose of having the property in charge, and no longer existed as a noncorporate association. We must therefore attribute such acts of possession to the corporate body which had legal power to permit and authorize them, rather than to a concourse of trespassers, none of whom individually had any right to direct the functions of the church in the utilization of the property. That the church permitted its taxes to be paid and its temporal affairs to be managed by a board of stewards, instead of the board of directors or trustees mentioned in the statute and the articles of incorporation, cannot affect the matter. It was the corporation which was created to control the temporalities of the church, not the board of trustees; and it is not important by what name it called its agents for that purpose. We do not mean to hold that the fact of incorporation of a religious or benevolent body necessarily estops a denial that the property enjoyed and used by it is possessed by the corporation, but only that the presumption of such possession is so strong as not to be rebutted by evidence of mere organic corporate inactivity, such as appears in this instance. It was said by a respectable court that a church edifice occupied for the purpose of religious worship by a society which had become incorporated, and not used in any other way, or by any particular individual, must, "from the very nature and necessity of the case, be adjudged to be in actual occupancy of the corporation." Lucas v. Johnson, 8 Barb. 249. It is not necessary in the present case to press the doctrine so far. The order denying a new trial should be affirmed,—a result to occasion, under the circumstances appearing, some degree of regret; but it serves to accentuate the propriety of ascertaining the title to realty before rather than after, undertaking its improvement.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

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5 Cal. Unrep. 452

## CURRY v. HOLLAND. (No. 15,744.)

(Supreme Court of California. Sept. 16, 1896.)

APPEAL—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where the only point in dispute on an appeal relates to the value of the services sued for, on which the evidence is conflicting, the verdict of the jury will not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Edward J. Curry against Patrick Holland. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

M. E. Babb and A. F. Low, for appellant. Sullivan & Sullivan, for respondent.

PER CURIAM. Action to recover the reasonable value of work and labor performed by plaintiff for the defendant at the request of the latter, between September 14, 1888, and September 14, 1889, in cutting and fitting clothing in the tailoring establishment of the defendant, in the city of San Francisco. The plaintiff alleged in his complaint that his services thus rendered were reasonably worth the sum of $3,400, that he had been paid on account thereof only the sum of $2,260, and prayed judgment for the balance of $1,140. The defendant denied that the reasonable value of plaintiff's services exceeded $2,260, which had been paid him. The cause was tried by a jury, whose verdict was in favor of plaintiff for $1,140, the sum demanded. The defendant made a motion for a new trial, which was denied, and his appeal is from the order denying his motion for a new trial.

The only point in dispute relates to the value of plaintiff's services, as to which appellant contends that the verdict is excessive and not justified by the evidence. Upon this issue, however, there was a substantial conflict of evidence, and for this reason the verdict of the jury should not be disturbed. The order denying a new trial is affirmed.

114 Cal. 210

### DUNN et al. v. DUNN et al. (S. F. 153.)

(Supreme Court of California. Sept. 15, 1896.)

JUDGMENT—VALIDITY AGAINST INSANE PERSON—COLLATERAL ATTACK—INNOCENT PURCHASERS.

1. A judgment of foreclosure entered against an insane person having no guardian, without the appointment of a guardian ad litem, is irregular, but not void.

2. Where land sold under a foreclosure has passed into the hands of third persons, who are bona fide purchasers for value, the judgment under which the sale was made, if regular on its face, though voidable in direct proceedings, or as between the parties, cannot be collaterally attacked.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Lizzie F. Dunn and others against Catherine Dunn and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. W. Lawler and Henry K. Mitchell, for appellants. Smith & Murasky, for respondents.

TEMPLE, J. February 26, 1878, one Mary A. Kingman owned the premises here in question. It was found that she was then, and long prior thereto had been, insane, incompetent to transact business or to understand the nature of her acts, and entirely without understanding, and continued to be in such mental condition up to the time of her death, in 1886. She had not been judicially declared of unsound mind, and had no guardian. On the date first mentioned, one Garwood loaned to Mary A. Kingman $400, and took from her a mortgage upon the property mentioned to secure the same. On the 11th day of September, 1878, Garwood commenced an action to foreclose the mortgage against said Mary A. Kingman. Personal service of summons was made upon Mary A. Kingman. She suffered default, and a decree of foreclosure was entered. A sale was had under the decree, Garwood being the purchaser for the sum of $555. No redemption was made, and Garwood obtained a deed from the sheriff, and in September, 1879, sold and conveyed the premises to the defendant Catherine Dunn for $3,500, paid by said defendant. It was found that defendant Catherine Dunn had no knowledge of the insanity of Mary A. Kingman before the commencement of this action, and that she purchased the property in good faith, and for a valuable consideration. The plaintiffs are heirs at law of Mary A. Kingman, and bring this suit to annul the mortgage, and the judgment of foreclosure. This cannot now be done. The defendant Catherine Dunn is a purchaser in good faith, and for a valuable consideration. Insane persons may be sued, and jurisdiction over them acquired, as of other persons. True, guardians should be appointed to represent them. It was, no doubt, the duty of the plaintiff to cause it to be done. But the judgment entered without the appointment of a guardian, though irregular, is not void. Undoubtedly it may be vacated in a direct proceeding, if no innocent purchaser has acquired rights under it. But public policy forbids that as to such persons the validity of the judgment shall be questioned. The judgment was regular on its face. The court had jurisdiction of the subject-matter, and of the person of the defendant. The judgment itself was an adjudication that the court had jurisdiction, and, on collateral attack, was conclusive, except as to infirmities shown in the judgment roll. There may be exceptions to this rule, but this is not one. It is a hardship upon plaintiffs, and it is possible that the mortgage and judgment were obtained by unfair means. But of these defendant had no knowledge, and the wrong cannot be righted at her expense. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

114 Cal. 204

### DIXON v. RISLEY, Judge. (S. F. 514.)

(Supreme Court of California. Sept. 11, 1896.)

APPEAL—MANDATE AND PROCEEDINGS BELOW—AMENDMENT OF PLEADING—PETITION FOR MANDATE.

1. Where the judgment for plaintiff is reversed on appeal, with leave to him to amend his complaint in certain specified respects, the trial court cannot impose payment of costs, as a condition to permission to file the amended complaint.

2. Even in a case where the trial court has a right to impose payment of costs, as a condition to permission to file an amended complaint, it should not order proceedings stayed for an indefinite period, till such costs are paid; but, if plaintiff refused to comply with the condition, it should proceed with the trial as the pleadings are, and then, if plaintiff is defeated, he can, on appeal, present the question whether, in refusing the amendment, the court abused its discretion.

3. A petition for mandate to require the trial court to allow filing of amended complaint, in accordance with the judgment of the appellate court granting leave to plaintiff to amend his complaint in certain specified respects, need not set out in detail the facts constituting the cause of action, or show what were the allegations of the amended complaint.

Department 2. Application by H. S. Dixon, an insane person, by his guardian, J. R. Dixon, for writ of mandate to E. W. Risley, judge of the superior court of Fresno county. Granted.

Minor & Ashley, for petitioner. Horace Hawes, for respondent.

TEMPLE, J. This is an application for a writ of mandate to require the superior court of the county of Fresno to allow plaintiff in a certain action there pending to amend his complaint, and to proceed with the trial. H. S. Dixon in April, 1891, commenced an action in the superior court of Fresno county to foreclose a mortgage. After the commencement of the action, plaintiff became insane, and J. R. Dixon was appointed guardian for him. An amended complaint was then filed, in which J. R. Dixon, as guardian of H. S. Dixon, was plaintiff. The defendants appeared and answered, and the case was tried, with the result that plaintiff recovered judgment. This judgment, on appeal to this court, was reversed and remanded, with leave to plaintiff to amend his complaint in certain respects specified. 39 Pac. 857. After the remittitur had been filed in the superior court, an order was made, by stipulation of the respective parties in open court, that in all further proceedings plaintiff be represented by his guardian, and have leave to file an amended and supplemental complaint. The amended and supplemental complaint was filed in pursuance of the order. Afterwards, upon defendants' motion, and upon notice, the court modified the order allowing an amended complaint to be filed, by requiring plaintiff, as a condition for permission to file the amended complaint, to pay the costs of the appeal, together with accruing costs, and ordered that all proceedings in the cause be stayed until such costs were paid; and the court further ordered that defendants' time to answer the amended complaint be extended until 10 days after compliance with the order on the part of plaintiff, and after notice of such compliance had been given. Plaintiff has not paid such costs, but, after the making of said last-mentioned order, he asked the court to vacate the same, and to set the cause for trial. This the court refused to do, and still refuses to proceed with the trial of said cause unless plaintiff first pays said costs.

The respondent demurs to the petition on the ground that it does not state sufficient facts, and as uncertain. The point of the demurrer, in regard to uncertainty, is that it does not set out the facts constituting the cause of action in detail, or show what were the allegations or contents of the amended complaint. This was not necessary. The court was directed to permit plaintiff to amend his complaint in certain respects, which were specified. He had an absolute right to make those amendments. Undoubtedly, it was within the power of the superior court to interpret the judgment rendered here, and to restrict the plaintiff to those amendments. If the court erred in its construction of the judgment rendered by this court, or abused its discretion in refusing other amendments, such error or abuse of discretion could not be corrected by mandate. Plaintiff would be forced simply to take his exceptions, and seek his remedy upon an appeal from the judgment. But when the court refuses to allow the amendments which were ordered by this court, even as understood by the trial court, it refuses to obey the direction of this court, and obedience may be compelled. It is not the province of that court to affix conditions to the exercise of privileges granted by this, unless, as is sometimes done, this court directs that the amendment may be made on terms to be fixed by the trial court. It is conceded that the learned judge of the superior court acted in making the order in no contumacious spirit, but conscientiously, in the discharge of his duty; but there has sometimes been friction, and, if the judge could impose conditions upon the exercise of rights granted by this court, a litigant could in some cases be deprived of the benefit of a judgment in his favor here.

In no event, however, was the court justified in making an order which is equivalent to a refusal, for an indefinite period, to try the case. If the court had the right to impose the conditions, and the plaintiff refused to comply with them, the court should proceed with the trial on the pleadings as they now are. Then, if the plaintiff were defeated, he could, on appeal, present the question whether, in refusing the amendment, the court abused its discretion. Under the order the plaintiff must pay the costs, or leave his case forever untried. Let the writ issue as prayed for.

We concur: McFARLAND, J.; HENSHAW, J.

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114 Cal. 207

## POWER v. MAY, Treasurer. (Sac. 100.)

(Supreme Court of California. Sept. 14, 1896.)

COUNTIES—OFFICERS—CONTRACTS FOR ATTORNEY'S SERVICES.

1. The board of county supervisors has power to employ an attorney to collect a claim due the

county from the state. Lassen Co. v. Shinn, 26 Pac. 365, 88 Cal. 510, followed.

2. Where services have been rendered for the benefit of the county in a manner authorized by law, the board of county supervisors, having had original power in the premises, may cure informalities in procedure by a subsequent ratification and recognition of its liability.

3. A contract by the board of county supervisors with its clerk, under regular salary as such, to pay him a commission for collecting moneys from the state, he and the county attorney having agreed that the former should get the contract and the latter do the work, and the two divide the compensation, is void, as an attempt to increase the compensation of a public official during his term of office.

Department 2. Appeal from superior court, Tulare county.

Action by Maurice E. Power against E. A. May, treasurer of Tulare county. Judgment for plaintiff, and defendant appeals. Reversed.

F. B. Howard and T. E. Clark, for appellant. Lamberson & Middlecoff, for respondent.

HENSHAW, J. This is an appeal from a judgment given on the pleadings. Plaintiff applied for a writ of mandate against defendant, treasurer of Tulare county. In his complaint he averred simply that the auditor of the county had issued to him a warrant, payable out of the hospital fund, which warrant recited that it was "for commissions on moneys collected from the state on indigents." The warrant was presented to the treasurer, who refused to pay it, although there was and is sufficient unappropriated money in the fund for that purpose. After the filing of defendant's answer the court rendered the judgment appealed from.

Respondent contends that the only questions presented by the appeal are two questions of law: (1) Has the board of supervisors the power to employ an attorney for the purpose of collecting a claim due the county from the state? This question is completely answered by the case of Lassen Co. v. Shinn, 88 Cal. 510, 26 Pac. 365. (2) Can the board of supervisors legally allow a claim for the beneficial use of money, labor, or property, although the formalities necessary to bind the county have not been employed? Without entering into an elaborate consideration of this question, it is sufficient to say that this may at times and under certain circumstances be done, provided the power to do so be not withheld in the grant of powers to the board, and provided, further, that the service has been bestowed or the money expended for the benefit of the county in a manner authorized by law. Under such circumstances, if the board had original power in the premises, it may cure informalities or irregularities in procedure by a subsequent ratification and recognition of its liability. Waitz v. Ormsby Co., 1 Nev. 370; Pimental v. City of San Francisco, 21 Cal. 352.

But, while both of these questions may thus be resolved in favor of respondent, their answers do not, as respondent claims, remove all difficulties. The pleading of defendant is far from being a model. Indeed, it is an extremely bad pleading. It denies matters not averred in the complaint. It "alleges that defendant has been informed, and has reason to believe, and does believe" certain facts, but does not aver the existence of these facts. It expressly admits in one paragraph that there is money in the hospital fund sufficient to pay the amount claimed, after payment of all other sums legally chargeable against that fund, and elsewhere seems to aver that the moneys of the fund had all been exhausted before presentation of the demand. Imperfect and inartistic as the answer undoubtedly is, nevertheless it sufficiently sets forth certain matters in defense. If these matters constitute a defense, then it would be good against demurrer, and the court erred in rendering judgment upon the pleadings. The complaint discloses nothing of the nature or origin of the demand of plaintiff for which the warrant was ordered drawn. If the demand was illegal, then, indubitably, the treasurer was authorized to refuse payment of it, and to show this in his answer. It is the illegality of the claim which he seeks to show, and to do this he pleads that the board of supervisors, upon December 8, 1894, by resolution, ordered that John Broder be employed and authorized to collect from the state moneys due for the care of indigents, orphans, and half orphans, said Broder to receive as compensation 15 per cent. of all moneys so collected. At the date of this employment, and thereafter, Broder was clerk of the board of supervisors, under regular salary, paid by the county of Tulare. Maurice E. Power, the plaintiff, at that time and thereafter, was the district attorney of the county, and the agreement between the two was that Broder should secure the employment, Power should perform the service, and the two should divide the compensation. Plaintiff's claim, presented to the board, was "for commissions on $3,926.25 allowed by the state to Tulare county as per contract with John Broder," etc. Defendant also averred that the contract is nonassignable, and that it is void. There is enough here, if the allegations are true, to have entitled the defendant to a judgment. The averments, then, constitute a defense. Plaintiff's claim is expressly based upon the Broder contract. If by this contract the supervisors attempted to increase the compensation of a public official during his term of office, the contract is void, and cannot be made the basis of a recovery in the hands of any person. If Broder, as clerk of the board, colluded with Power, the then district attorney, to procure for themselves a contract, it was not only void as an attempt to increase their compensation, but void as against public policy, which sternly discountenances any personal interest upon the part of public officers in public contracts. The judgment is reversed, and the cause remanded, with directions to the trial court to deny plaintiff's motion for judgment.

We concur: McFARLAND, J.; TEMPLE, J.

5 Cal. Unrep. 433

## KELLY et al. v. LEMBERGER et al. (S. F. 160.)

(Supreme Court of California. Sept. 15, 1896.)

MECHANIC'S LIEN—REPUTED OWNER OF PREMISES.

1. A claim of lien sufficient in form is properly admitted, as against objection that it does not correctly state the names of either the owners or reputed owners of the premises, there being at the time no evidence before the court to contradict its terms.

2. Though one states, in his claim of lien, that a certain person is owner and reputed owner of the premises, his lien is not impaired by proof that such person was the reputed owner only.

3. A finding that one was the reputed owner of premises, as alleged in a claim of mechanic's lien, is not impaired by the fact that conveyances to other persons were on record.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Kelly and others against Lemberger and others. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

Morrison, Stratton & Foerster, for appellants. C. L. Colvin, T. F. Graber, and Charles F. Hanlon, for respondents.

PER CURIAM. Four actions having been brought against the defendants to foreclose mechanics' liens upon certain land in Berkeley, they were consolidated and tried together under the above title. One of these actions was brought by H. W. Taylor, and judgment was rendered in his favor, giving him a personal judgment against Lemberger, and making the same a lien upon the land. Certain of the defendants moved for a new trial as against the claim of Taylor, and the present appeal is taken from the judgment and from the order denying their motion for a new trial.

The question presented by the appellants is the sufficiency of the claim of lien filed by Taylor, and the error relied upon by them in their motion for a new trial was the admission in evidence of this claim of lien and the insufficiency of the evidence to sustain certain findings. For the purpose of stating "the name of the owner or reputed owner, if known," of the land upon which the improvements were made, the claim of lien offered in evidence was as follows: "That Charles A. Bailey and Frank Lemberger are the names of the owners, and they are the reputed owners, of said premises, and caused said buildings and structures to be erected and constructed." The defendants objected to its introduction, upon the ground that it did not correctly state the names of either the owner or owners, or reputed owner or owners, of the premises, and excepted to the ruling of the court in admitting it in evidence. The claim of lien was, however, sufficient in form to comply with the requirements of the statute, and at the time it was offered it does not appear that there was any evidence before the court to contradict its terms. It was not error, therefore, to admit it in evidence.

From the findings of the court it appears that at the time the claim of lien was filed the appellant Bailey was the actual owner of the northerly 12 feet of the land, and that the wife of Lemberger owned the 24 feet adjoining, and the defendant Claims the southerly 36 feet. In the bill of exceptions the defendants specify, as one of the particulars wherein the evidence is insufficient to justify the decision, "that part of finding 1 which finds that at the time of the filing of the lien the defendant Frank Lemberger was the owner of all the land in said finding described." This exception, however, misconceives the language of the finding. The court did not find that he was the "owner," but that he was the "reputed owner," and the appellants have not excepted to the sufficiency of the evidence to sustain this finding. The statute does not require the claimant to state the name of the actual owner, at the risk of losing his lien, but makes his statement of the name of the reputed owner as effective as that of the true owner. Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873. The statement of the same name as owner and as reputed owner does not deprive the claimant of his lien. Arata v. Mining Co., 65 Cal. 340, 4 Pac. 195. And, as he is only required to state the name of the owner or reputed owner, "if known," he may, if he does not know the name, perfect his lien without naming any owner. Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231. In the absence of any exception to this finding, we must assume that there was ample evidence to show that Lemberger was the reputed owner of the premises, and, if so, the statement of ownership in the claim of lien was sufficient. Its sufficiency was not impaired by the further statement that Bailey was also the reputed owner. The court does not find that Bailey was not a reputed owner at the date of Taylor's contract with Lemberger, or thereafter, but is silent in reference thereto, and its finding that he was the reputed owner prior thereto is immaterial. It appears from the findings that Bailey was the actual owner of a portion of the land, and no exception is made to the findings of the court that the buildings were constructed with the knowledge and consent of the actual owners of the entire land. The fact that conveyances to these owners had been placed on record does not impair the finding that Lemberger was the reputed owner, and the dates of such record were an immaterial fact, and not an issue in the case, and it was not necessary for the court to make any finding thereof. The judgment and order are affirmed.

114 Cal. 242

## VENTURA COUNTY v. CLAY et al. (L. A. 159.)

(Supreme Court of California. Sept. 16, 1896.)

ACTION AGAINST COUNTY TREASURER—PLEADING—JURISDICTION OF SUPERIOR COURT.

1. A complaint on a bond by a county against its treasurer and his bondsmen to recover sums alleged to have been illegally paid out by him is not demurrable as being ambiguous because in the prayer a penalty is asked for which is not authorized in such action.

2. A complaint by a county against a county treasurer, to recover money alleged to have been paid out by him on a warrant issued for a claim on which the county was not liable, is not demurrable because it does not set out the contents of the warrant, where from the facts alleged its illegality must have been apparent on its face, if drawn in compliance with the statute (County Government Act, § 114), which provides that "all warrants must distinctly specify the liability for which they are drawn and when it accrued."

3. The superior court is not deprived of jurisdiction of an action because the separate sums sued for are less than $300 each, where the aggregate for which judgment is asked is greater than that sum.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Ventura county against Henry Clay and others. From a judgment for defendants on a demurrer to the complaint, plaintiff appeals. Reversed.

H. L. Poplin, for appellant. Orestes Orr, Barnes & Selby, and Blackstock & Ewing, for respondents.

VANCLIEF, C. This appeal is from a judgment in favor of defendants on demurrer to the complaint, and whether or not the lower court erred in sustaining the demurrer is the only matter in controversy. The defendant Clay was elected to the office of treasurer of said county for the term commencing on the first Monday in January, 1893, and the other defendants are sureties on his official bond for that term; and this action is upon that official bond, to recover money alleged to have been unlawfully paid out from the treasury of said county by Clay during said term of office. The complaint consists of 38 counts, each charging the payment of a distinct sum of money from the treasury without authority of law, the sums charged to have been so paid out aggregating nearly $4,000. The only substantial differences in the counts are that the several payments are alleged to have been made at different times, and that all were not made to the same person, but a portion thereof to different persons and for different kinds of service. That part of the first count to which alone the demurrer applies is substantially a sample of that part of each of the other counts to which the demurrer is applicable, excepting the aforesaid differences, which are not material to the merits of the demurrer, and is as follows: "That on or about the 8th day of March, 1894, F. E. Smith filed a claim against the county for three-fifths of a month's service during the month of February, 1894, for the sum of $60, which services were performed, as plaintiff is informed and believes, and so alleges the fact to be, in assisting the recorder and auditor of said county in the performance of the duties of his office; and the board of supervisors of said county, on or about the said 8th day of March, 1894, without any authority of law, and when the said claim was not a legal charge against the said county, allowed said claim, and thereupon the auditor of said county drew a warrant in favor of said F. E. Smith for said sum of $60 on the treasury of said county without any authority of law, and the said F. E. Smith presented the same to the said Henry Clay as treasurer of said county, which warrant the said treasurer then paid out of the general fund of said county, while and when the said warrant and claim was not a legal charge against said county, to the damage of said county, plaintiff, in the sum of $60, which sum is due and unpaid from said defendants to said plaintiff." The official bond is in form and substance such as is required by law, and is fully set out in the complaint. The prayer of the complaint is: "Wherefore plaintiff demands judgment against said defendants for the sum of three thousand nine hundred and thirty dollars, the money so paid out by said treasurer without authority of law as aforesaid, together with twenty per cent. damages for the use of said sum of money." The grounds of the demurrer are: That each count is uncertain and ambiguous in several specified particulars; that there is a misjoinder of causes of action; that some of the alleged causes of action appear to be barred by the statutes of limitations; that the court had no jurisdiction of the subject-matter of the action; and that the complaint does not state facts sufficient to constitute a cause of action. Two of the sureties on the bond demurred separately, but all the grounds of their demurrer are embraced in the above statement.

1. The so-called specifications of uncertainty are hardly intelligible, and merit no consideration, except to say that, however defective the complaint may be in other respects, it is not subject to the objection that it is uncertain.

2. The demurrer specifies that each count is ambiguous for the same reasons that it is uncertain. In their brief, however, counsel for respondents contend that the complaint is ambiguous for a reason not specified in the demurrer, namely, that it appears doubtful whether the action is for a breach of the official bond, or for the enforcement of a statutory penalty; that, while the body of the complaint indicates that the cause of action is a breach of the bond, the prayer for "twenty per cent. damages for the use of the money" indicates that the action is based upon

section 8 of the county government act, which authorizes the recovery of 20 per cent. damages in actions founded thereon. It is unnecessary to follow and answer in detail the futile arguments of counsel to sustain this point. It is enough to say that there is nothing in the body of the complaint indicating that the action is based upon section 8 of the county government act, nor that it is not wholly based upon the official bond set out in the complaint; and, conceding that the prayer asks for more damages or interest than is warranted by the facts alleged in the complaint, yet the complaint is not subject to demurrer on that ground. Bailey v. Dale, 71 Cal. 35, 11 Pac. 804; Althof v. Conheim, 38 Cal. 230.

3. It is contended that the complaint is ambiguous and uncertain as to the terms and contents of the auditor's warrants alleged to have been paid by the treasurer; and, for aught that is alleged, those warrants may have appeared to be for the payment of claims legally chargeable to the county. Assuming, as we must, that the treasurer knew the law, and especially the law prescribing his official duties, he must have known, for example, that an auditor's warrant, directing him to pay F. E. Smith $60 for services "in assisting the recorder and auditor of said county in the performance of the duties of his office," was an order to pay a claim which was not legally chargeable to the county; and that his payment of such order with money belonging to the county was a breach of his official bond; and, since such was the alleged purport and substance of the warrant, it must have appeared upon its face that the claim for which it was drawn was not legally chargeable to the county, and was therefore void. In this respect the case differs materially from the case of Los Angeles Co. v. Lankershim, 100 Cal. 525, 35 Pac. 153, 556. In that case it was held that the treasurer was excusable for having paid what purported to be an auditor's warrant on the school fund without notice that it was not based upon a requisition of the superintendent of schools, nor otherwise invalid. The decision rested upon a finding by the trial court that the payment by the treasurer "was made upon what purported to be a county auditor's warrant made payable to one C. H. Delevan," and it was held that, without any showing to the contrary, it must be presumed that the warrant was regular in form and substance. But in the case at bar the substance of the warrant is alleged to have been such that its illegality must have been apparent on its face. It is alleged that the warrant was drawn for the payment of a claim for services in assisting the recorder and auditor (a salaried officer) "in the performance of the duties of his office." This implies that the warrant stated the services for the payment of which the warrant was drawn. In addition to this, the county government act (section 114) prescribes that "all warrants must distinctly specify the liability for which they are drawn, and when it accrued." This provision, according to the rule in Los Angeles Co. v. Lankershim, supra, authorizes the presumption, nothing appearing to the contrary, that the auditor's warrants in question distinctly specified the liability for which they are alleged to have been drawn. If the complaint misstated the liability for which any warrant was drawn, to the prejudice of the defendants, such misstatement was matter of defense, and could have been corrected by answer.

4. There is no merit in the point that the cause, or any cause, of action appears to be barred by any statute of limitation. The complaint shows that all the warrants were paid by the treasurer during his said term of office, and within three years next preceding the commencement of the action; and, as above shown, the action is upon a written contract, and not upon a penal statute.

5. Nor is there anything worthy of special consideration in the point that the superior court had no jurisdiction of the subject-matter of the action. Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349.

6. It seems difficult to understand why counsel claim there is a misjoinder of causes of action, unless it may be that the prayer for 20 per cent. damages had the effect to characterize all the alleged causes of action as being merely penal. But it is too clear for argument that such prayer did not change the alleged breaches of the official bond into causes of action of a penal nature.

7. The only ground upon which it is claimed that the complaint is deficient in facts necessary to constitute a cause of action is that it does not show that the treasurer had notice that the claims for the payment of which the warrants were drawn were not legally chargeable to the county. This point has been considered, but the following cases relating to the duty and responsibility of the treasurer may be added: Merriam v. Supervisors, 72 Cal. 517, 14 Pac. 137; Linden v. Case, 46 Cal. 171; Trinity Co. v. McCammon, 25 Cal. 121. The complaint fully complies with the rule announced in the case of Hedges v. Dam, 72 Cal. 520, 14 Pac. 133, cited by respondent. I think the judgment should be reversed, and the cause remanded, with instruction to the lower court to overrule the demurrers.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with instruction to the lower court to overrule the demurrers.

5 Cal. Unrep. 453

## GOODRICH v. LOUPE et al. (S. F. 417.)

(Supreme Court of California. Sept. 16, 1896.)

APPEAL—VACATION OF DEFAULT—DISCRETION.

An order setting aside a judgment by default is largely discretionary, and, where moved for at once and granted upon terms, will not be disturbed on appeal, though the showing made is not strong.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by one Goodrich against one Loupe and others. Plaintiff appeals from an order setting aside a default judgment in his favor. Affirmed.

Will A. Coulter and C. D. Wright, for appellant. John J. Roche, for respondents.

PER CURIAM. This is an appeal from an order setting aside a default judgment. The motion to set aside was based upon the grounds of inadvertence and excusable neglect. The showing made by affidavit is very weak, and, if the lower court had denied the motion to vacate, its action upon appeal probably would not have been disturbed. But in matters of this kind the superior court is vested with large discretion; and in view of the fact that the motion to set aside was made promptly, and also in view of the further fact that the motion was granted upon terms, when taken into consideration with the showing made by affidavit, we have concluded to affirm the action of the trial court. The order appealed from is affirmed.

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114 Cal. 307

## JENNINGS v. BROWN. (S. F. 181.)

(Supreme Court of California. Sept. 18, 1896.)

AUSTRALIAN BALLOT LAW—BALLOTS.

The writing by a voter, on his ballot, of the party designation of a candidate, after the name, which he has also written in, does not constitute a distinguishing mark which invalidates the ballot.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Contest by J. T. Jennings of the election of J. J. Brown to the office of county supervisor. Judgment for respondent, and contestant appeals. Affirmed.

Geo. C. Ross and Knight & Heggerty, for appellant. Sullivan & Sullivan, for respondent.

TEMPLE, J. This is a contest for the office of supervisor in the county of San Mateo. The judgment appealed from confirms the election of defendant. The appeal is from the judgment, with a bill of exceptions.

In precinct No. 1 the record shows that 118 votes were counted without objection for contestant, and 11 votes were objected to and reserved by counsel for respondent; 134 votes were counted without objection for respondent, and 19 votes were objected to by contestant. It subsequently appears that all ballots were counted, and as counted the tally stood for Brown 154 votes, for Jennings 128. It is not expressly stated that the ballots objected to by respondent's attorney were ballots for contestant, or that those objected to by contestant were cast for respondent, but it would naturally be supposed that such was the case; and, if so, then the tally clerks must have made a wrong addition. It should have been, on that hypothesis, 153 for Brown, and 129 for Jennings. This would have changed the result as finally declared. The court was requested by the contestant to recount the votes, but declined to do so. There were also 4 ballots which had not been counted by the precinct officers. The bill of exceptions fails to show error in this respect. It surely does not show all that occurred at the trial; for, while it appears that some 30 ballots were objected to, it is impossible to find from the record how the court ruled upon one-half that many. There were two tally clerks, and the court reporter also kept tally. All agreed, and the court was satisfied that no mistake had been made.

We have carefully examined the ballots which were brought here for our inspection under a previous order. We find nothing upon any of these worthy of notice, unless it is the ballot upon which the voter has written, under the head "State Printer," the name "W. D. Craig, Independent Democrat." It is objected that the voter was only authorized to write the name of the person voted for, and that the addition "Independent Democrat" is unauthorized, and may constitute a distinguishing mark. Section 1191, Pol. Code, provides that after a candidate's name shall be printed his party designation, and they were so printed on the ballot. It would be quite natural, then, that one writing in the name of a candidate not in the list should add such designation. Perhaps the statute should be construed as requiring or permitting the name to be written in the same manner as the others are printed. The designation would then be a descriptio personæ, and a part of the designation of the person voted for, and authorized by the statute. This state of things existed in Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454. Upon all the ballots cast at one precinct there appeared, written under the head of "Justice of the Peace," "C. G. Brown, Republican." It was shown that the writing was all in the same hand, and that but one person voting at the precinct was lawfully assisted. This court sanctioned the counting of the vote for the person lawfully assisted. There the word "Republican" was, or might have been, a distinguishing mark, just as "Independent Democrat" is here. The fact was disregarded as of no consequence. I am not inclined to hold that any of the requirements of the election law are directory only, but, while all of its provisions are mandatory, they should be liberally construed. The so-called "Australian Ballot System" only secures secrecy in voting when the elector desires it, and has sufficient independence to insist upon it. But a voter can—and, by one who has sufficient power over him, be forced to—so mark his ballot that it can be identified. Many ways could be suggested in which this could be done without destroying the legality of the ballot. It is quite manifest in this case that the words were not intended as a distinguishing mark, and, as the law may be construed as permitting it, I see no reason for changing the rule followed in Tebbe v. Smith. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.

114 Cal. 212

PEYCKE et al. v. KEEFE et al. (S. F. 115.)

(Supreme Court of California. Sept. 15, 1896.)

APPEAL—STAY OF PROCEEDINGS IN COURT BELOW.

Under Code Civ. Proc. § 946, which provides that whenever an appeal is perfected "it stays all further proceedings in the court below upon the judgment or order appealed from," where a party has perfected his appeal to the supreme court from the judgment against him, and from the order of the superior court made on his motion to set aside such judgment, the court below so far loses jurisdiction of the cause that it cannot, pending such appeal, set aside the judgment of its own motion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Ernest Peycke and Julius Peycke against D. Keefe and others. From a judgment in favor of plaintiffs, and an order refusing to set the same aside, defendant Keefe appealed. Pending the appeal, the trial court of its own motion set aside the judgment as against defendant Keefe, and plaintiffs appeal. Keefe's appeal dismissed. Order appealed from by plaintiffs reversed.

T. M. Osmont and Peri E. Allen, for appellants. A. D. Splivalo and Jos. M. Nougues, for respondents.

SEARLS, C. This is an action to recover from the defendants, as co-partners under the firm name of D. Keefe & Co., the sum of $443.87 as a balance for money advanced by plaintiffs to defendants. Defendant Keefe answered, averring that he was the sole member of the firm of D. Keefe & Co., denied the indebtedness to plaintiffs, and by way of cross complaint, upon the facts therein stated, demanded a judgment against the plaintiffs for $136.35. Pending the case, and before a trial on the merits, such proceedings were had that, on the 4th day of April, 1893, the court below, on motion of counsel for plaintiffs, struck out the answer and cross complaint of defendant Keefe, and entered judgment in favor of plaintiffs as prayed for in their complaint. Defendant Keefe moved the court, on affidavit, and upon the papers on file, to set aside the judgment entered against him, and to restore his answer and cross complaint. This motion was denied by the court June 20, 1893. On June 26, 1893, defendant Keefe took and perfected an appeal to this court from the judgment and order refusing to set the same aside, etc. Thereafter, and on the 30th day of October, 1893, the court, upon its own motion, and without any application therefor or notice thereof, set aside the judgment against defendant and restored his answer and cross complaint. Plaintiffs in due time appealed from this last order, and, as defendant Keefe has never filed his transcript on appeal in this court, plaintiffs also move to dismiss this appeal. The motion to dismiss the appeal of Keefe should be granted.

Touching the appeal of plaintiffs from the order setting aside the judgment and restoring the answer, etc., we are of opinion, from the showing made by the bill of exceptions, (1) that the court was justified in making the order striking out the defendant's answer and rendering judgment against him, upon the ground that he willfully refused to give his deposition in the cause; (2) but these matters are so far within the discretion of the trial court that, inasmuch as it is the policy of the law to favor a fair and impartial trial of every cause upon its merits, we are not at liberty, under the circumstances of this case, to reverse the action of the court looking to that end, provided, always, the court below possessed the power to make the order at the time and in the manner pursued by the court. Addressing, then, our attention to the question of the authority of the court to make the order setting aside the judgment, etc., appealed from, the objections urged thereto are: (1) The judgment set aside had been appealed from, and (as is claimed) the court had lost all jurisdiction in relation thereto. (2) The judgment was entered more than six months prior to the order of October 30, 1893, setting it aside; hence, the court had no authority in the premises. (3) That the court had no authority to act in the premises on its own motion, and without a showing as to the justice thereof.

Touching the first proposition, section 946 of the Code of Civil Procedure provides that, "whenever an appeal is perfected, as provided in the preceding sections of this chapter (chapter 1, tit. 13, pt. 2), it stays all further proceedings in the court below upon the judgment or order appealed from or upon the matters embraced therein, * * * but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." In Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119, it was held that, pending an appeal, the trial court has no jurisdiction to allow an amendment to any pleading. In Bryan v. Berry, 8 Cal. 130, it was held that, where a judgment is rendered and an appeal taken to this court, the court below loses control over the judgment, and an order amending the judgment is erroneous. In Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480, it was held that, after a case has been appealed, the trial court has no power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by a bill of exceptions. In Savings Union v. Myers, 72 Cal. 161, 13 Pac. 403, it was held that the superior court cannot deprive the supreme court of jurisdiction of an appeal from a judgment by amending it while the appeal is pending. In Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605, it was held that, pending an appeal from an order denying a motion for a new trial, the lower court has no authority to vacate or set aside the same. Upon the authority of these cases we are of opinion that, when the defendant Keefe perfected his appeal to this court from the judgment against him, and from the order of the superior court made upon his motion to set aside such judgment, the court below so far lost jurisdiction of the cause that it could not, pending such appeal, set aside the judgment on its own motion, and that to do so was error, for which the order setting aside the judgment should be reversed.

These views render an examination of the other points unnecessary. We recommend (1) that the order appealed from by plaintiffs be reversed; (2) that the appeal of defendant D. Keefe be dismissed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from by plaintiffs is reversed, and the appeal of defendant D. Keefe is dismissed.

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114 Cal. 275

## ROBINSON v. THORNTON. (S. F. 29.)[1]

(Supreme Court of California. Sept. 17, 1896.)

APPEAL—DECISION—CONSTRUCTION.

Where a judgment is reversed on appeal, and remanded for a new trial, the holding of the appellate court on a question of fact, based on the evidence in the record, is not conclusive as to such question on a subsequent trial on new evidence; hence it is error for the trial court to take it from the jury, and determine it as a matter of law.

Department 2. Appeal from superior court, San Mateo county; A. A. Sanderson, Judge.

Action by C. P. Robinson against R. S. Thornton. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

[1] Rehearing denied.

T. M. Osmont, for appellant. E. F. Fitzpatrick, B. B. Newman, and Fox, Kellogg & Gray, for respondent.

PER CURIAM. This case has been here before, and is reported in 102 Cal., commencing at page 675 (34 Pac. 120). In the opinion then delivered, the history of the case is fully stated, and for the purpose of this present decision it is not necessary to restate it. At the retrial, out of which this present appeal arises, the court, when the evidence had all been offered, instructed the jury as follows: "The court instructs you, as a matter of law, to wit, the law in this case as declared by the supreme court of this state in this case, that the title claimed by the plaintiff in this case has been shown to be extinguished; and that, as a matter of law aforesaid, the plaintiff has no title to the lands in dispute in this action, and your verdict must be for the defendant. The court instructs you as a matter of law, to wit, the law of this case, declared so by the supreme court in this case, that the plaintiff is not entitled to recover herein; and you are hereby directed to bring in a verdict in favor of the defendant, Thornton." In accordance with these instructions, the jury returned a verdict for the defendant. These instructions were erroneous, and were given, no doubt, through a misunderstanding of what this court decided on the former appeal. It was there decided that, by the foreclosure sale under the Wilson and Jordan mortgage, the interest of the Greens in the disputed premises became extinguished, and therefore no title to said premises was acquired by the plaintiff, Robinson, under the attachment or execution sale set forth in the record. It was decided further, however, that the Greens, who were in possession at the time of the execution sale, and also Thornton, who was a vendee of the Greens, were estopped to show that the Greens had no title at the time of such execution sale. But it was further decided that Thornton was not estopped to set up an adverse possession and title by prescription, by establishing an adverse possession for the statutory period of limitation; and, further, that the evidence taken at the former trial was sufficient to warrant the finding that Thornton did have such possession for said statutory period; and the judgment was reversed on account of said adverse possession of Thornton. But the question of such adverse possession is one of fact, and upon a subsequent trial the jury were not estopped by the decision of this court from finding the issue of such adverse possession differently from the finding at the former trial. They might have found that issue differently, even though the testimony was the same as at the former trial; but, as a matter of fact, there was at the latter trial additional testimony on that point. It was for the jury, therefore, to determine whether or not there was such adverse possession; and the court erred in taking that question away from the jury. The questions of law arising out of the documentary evidence which established undisputed facts, of course, were determined by the former decision; but that decision is not final as to the question of Thornton's adverse possession for the statutory period, which is purely a question of fact to be determined by a court or jury upon the evidence brought before it upon a subsequent trial. Benson v. Shotwell, 103 Cal. 165, 37 Pac. 147; Mahan v. Wood, 79 Cal. 259, 21 Pac. 757; Wallace v. Sisson (Cal.) 45 Pac. 1000. The verdict of the jury upon this question of adverse possession for the statutory period might have been the same as the finding at the former trial, but we cannot say as a matter of law that such should have been the verdict. For these reasons, the judgment must be reversed, and a new trial ordered. Judgment and order denying a new trial reversed.

114 Cal. 346

## AMADOR GOLD MINE, Limited, v. AMADOR GOLD MINE et al. (S. F. 95.)

(Supreme Court of California. Sept. 19, 1896.)

FORCIBLE ENTRY AND DETAINER — VARIANCE — FINDING—JUDGMENT.

1. In an action for forcible entry and detainer, where the complaint alleged that defendants entered on the premises July 14th, and the proof was that they entered June 26th, there was no material variance.

2. A finding that defendants "took possession on June 26, 1893," negatives the allegation that they were in continuous possession from May 1, 1893.

3. Error in the admission and exclusion of evidence under one count is without prejudice where the judgment for plaintiff may stand on another count.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by the Amador Gold Mine, Limited, against the Amador Gold Mine, J. H. Tibbits, and Edward Tibbits. From a judgment in favor of plaintiff, and an order denying their motion for a new trial, defendants appeal. Affirmed.

Lindley & Eickhoff, for appellants. Vincent Neale, for respondent.

VANCLIEF, C. The plaintiff, an English corporation, brought this action against the defendants, a California corporation, for a forcible detainer (as defined by section 1160 of the Code of Civil Procedure) of a certain tract of mineral land on which is a quartz lode, a 60-stamp quartz mill, and other improvements, situate in the county of Amador. The complaint consists of two counts, —the first, under the second division of section 1160, alleging an unlawful entry upon said premises on July 14, 1893, in the absence of plaintiff, and a refusal to surrender possession for the period of five days after demand by plaintiff for such surrender; and the second, under the first division of said section, alleging that the defendants, by force and with strong hand and threats of violence, unlawfully hold and keep possession of said land and appurtenances. The answer of defendants to the first count denies that plaintiff was ever entitled to the possession of any part of the premises described in the complaint, and denies that on July 14, 1893, or at any time within five days previous thereto, plaintiff was in peaceable or actual possesssion or occupation of any part of said premises, as alleged in the complaint. In answer to the second count, defendants deny that the corporation defendant has ever unlawfully, or with force or threats of violence, held or kept possession of said premises, or any part thereof, at any time since July 14, 1893, "contrary to the form of the statute." After the close of the evidence, and by leave of the court, defendants amended their answer to each count of the complaint by inserting the following: "That on the first day of May, 1893, said defendant Amador Gold Mine, as was its right, did peaceably and quietly enter upon said pieces and parcels of land, and all thereof, and thence hitherto has continued to be, and now is, in the peaceable and quiet possession of said pieces and parcels of land, and all thereof." The cause, having been tried without a jury, the court found for plaintiff on both counts of the complaint, and rendered judgment for restitution of possession, and for treble damages, amounting to $450. The court denied defendants' motion for a new trial on the condition that plaintiff would remit the damages, and plaintiff performed this condition according to the order of the court. The defendants have appealed from the judgment of restitution, and from the order denying their motion for a new trial.

1. Counsel for appellants contend that the finding of the court that the defendants entered upon and took possession of the premises on the 26th day of June is a fatal variance from the complaint, in which it is alleged that defendants entered on July 14, 1893. But, since such variance could not have misled defendants to their prejudice, it is immaterial. Code Civ. Proc. § 469. The only suggestion of its materiality is that the finding brings the date of defendants' entry within one year next before the commencement of the action, and thus defeats the defense pleaded after the close of the evidence, to the effect that defendants had entered and peaceably held possession more than one year next before the action was commenced. Code Civ. Proc. § 1172. But, surely, the plaintiff, under the allegation that defendants entered July 14, 1893, was entitled to prove that they entered at any time within one year next before the commencement of the action. Within that period no variation from the date alleged in the complaint was material. Norris v. Elliott, 39 Cal. 72; Davis v. Baugh, 59 Cal. 568; Kidder v. Stevens, 60 Cal. 420; Biven v. Bostwick, 70 Cal. 639, 11 Pac. 790. The action was commenced May 7, 1894, and the finding is that defendants entered June 26, 1893. Counsel for appellants are mistaken in saying "the complaint says defendants did not take the premises until July 14, 1893."

2. Appellants contend that there is no sufficient finding on the issue tendered by the aforesaid amendment of the answer, namely, that defendants took possession of the premises on May 1, 1893, and continuously thereafter held such possession. The plaintiff alleged the date of defendants' entry to have been July 14, 1893. Defendants alleged, it to have been May 1, 1893. The court found it to have been June 26, 1893. Conceding that the finding does not necessarily negative defendants' allegation that they entered on May 1, 1893, yet it does negative the continuance of such possession until June 26th; for, unless the defendants had abandoned or lost the alleged possession taken on May 1st, they could not have taken possession on June 26th; and if, as found by the court, they took the possession complained of on June 26th, they must have abandoned or lost any possession taken by them prior to June 26th. Such prior possession, if it existed, was entirely distinct from that initiated on June 26th, and, having been interrupted between May 1st and June 26th, could not have been counted as a part of that quiet possession "for the space of one whole year together next before the commencement of the proceedings," which is required by section 1172 of the Code of Civil Procedure to constitute a defense to the action. It was therefore immaterial whether or not the defendants had taken or held possession for a period of time prior to June 26th distinct from and disconnected with that which the court found to have been initiated on the 26th day of June, 1893; and, since the defendants could not have been injured by the failure of the court to find upon that issue, the judgment should not be reversed for such failure. Robarts v. Haley, 65 Cal. 397, 4 Pac. 385; Johnson v. Vance, 86 Cal. 128, 24 Pac. 863; Miller v. Hicken, 92 Cal. 229, 28 Pac. 339.

3. The finding that defendants entered on June 26, 1893, and thence forcibly withheld the possession until the commencement of the proceeding, is justified by a great preponderance of the evidence. Nor is there any evidence substantially tending to support the contention of appellants that plaintiff abandoned the premises in question, or was not in actual possession up to and at the time defendants entered, and within five days before, though plaintiff's agents were absent from the premises at the time defendants entered.

4. In the bill of exceptions are specified 35 alleged errors in law occurring at the

trial, as to which counsel for appellants say: "Under this head, appellants respectfully direct the attention of this court to the various rulings made during the trial to which defendants duly excepted, because these show quite clearly how the mind of the trial court was moved during the proceedings before it. Some of the rulings, standing alone, would perhaps be of little consequence one way or another; but the development of the court's view of the case in the direction indicated by its line of rulings we believe to have been wrong and to the prejudice of defendants." Although having read the record carefully, I have discovered no valid or even plausible ground upon which any of these specified errors can be maintained, except that perhaps it may be questionable whether the court ruled correctly in admitting and excluding evidence as to the force, menaces, and threats of violence necessary to constitute the cause of action alleged in the second count; but errors in such rulings could not have affected the finding of the forcible detainer necessary to support a judgment for plaintiff on the first count, upon which alone the judgment may stand. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

114 Cal. 258

## McCULLY v. COOPER. (L. A. 144.)

(Supreme Court of California. Sept. 16, 1896.)

ANCILLARY ADMINISTRATORS—RIGHT TO COLLECT LOCAL DEBTS.

Where the domiciliary administration of a decedent is in another state, but an ancillary administratrix has been duly appointed in California, the latter may recover from the general administrator possession of a certificate of deposit in a California bank, belonging to the estate, of which payment has been refused, on which the general administrator cannot maintain suit in California, it being a paramount object of an ancillary administration to collect local debts due the estate.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Jane Mason McCully, administratrix of the estate of James L. Mason, deceased, against George H. Cooper. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Trippet & Neale, for appellant. J. W. Hughes, for respondent.

SEARLS, C. This is an action to recover possession from George H. Cooper, the defendant, of a certificate of deposit, issued by the Consolidated National Bank of San Diego, located in San Diego, Cal., for $8,000, dated April 2, 1892, payable to the order of James L. Mason, and upon which certificate there is indorsed a credit of $2,200. Defendant had judgment, from which judgment, and from an order denying her motion for a new trial, plaintiff appeals.

James L. Mason, the holder and owner of the certificate of deposit, was a resident of the county of Hancock, in the state of Indiana, at which place he died on the 2d day of January, 1894, leaving a large amount of property, real and personal, situate and being in said county and state. On the 20th day of January, 1894, George H. Cooper was, by an order of the circuit court in and for said county of Hancock, state of Indiana, duly appointed administrator of the estate of said James L. Mason, deceased, duly qualified as such administrator, and letters of administration were duly issued to him, and he is still such administrator. At the time of his death the said James L. Mason was the owner of, and in possession of, said certificate of deposit, in said county and state; and the same came into the possession of said Cooper, as his administrator, on the 20th day of January, 1894. In June, 1893, the Consolidated National Bank of San Diego became insolvent, closed its doors, and refused to pay its depositors; and thereafter, in said year 1893, Andrew J. O'Connor was duly appointed and qualified as receiver of said bank, and is still acting as such receiver. On the 24th day of January, 1894, defendant, Cooper, as such administrator, sent by mail the said certificate of deposit to said Andrew J. O'Connor, receiver, at San Diego, Cal., for the purpose of proving up his claim as said administrator of said Mason, deceased, against said insolvent bank; and thereupon the receiver of the bank declined either to permit Cooper to prove up the claim, or to return the certificate of deposit to him upon demand. On the 9th day of March, 1895, the said receiver, upon a second demand, returned the certificate of deposit to Cooper, as administrator, at the county of San Diego, Cal., where it was retained when this action was brought, and for 20 days thereafter, and then was returned to the state of Indiana, where it has since been held by said Cooper, as administrator of said Mason, deceased. Under the laws of the state of Indiana, administrators appointed therein may, by order of the circuit court of said state, sell and dispose of all certificates of deposit in the state of Indiana, lawfully in their possession as such administrators. The status of Jane Mason McCully, the plaintiff herein, may be thus stated: On the 20th day of March, 1894, said plaintiff was duly appointed, by order of the superior court in and for the county of San Diego, state of California, the administratrix of the estate of said James L. Mason, and thereupon duly qualified as such administratrix, and letters of administration were duly issued to her; and she ever since has been, and still is, the administratrix of the estate of said Mason. The estate of said James L. Mason had not, so far as appears in this action, any property or assets in the county of San Diego, or state of California, save and except the demand hereinbefore mentioned against the Consolidated National Bank of San Diego, evidenced by the certificate of deposit hereinbefore mentioned. Before this action was brought, plaintiff demanded possession of said certificate of deposit from defendant Cooper, but defendant refused, and still does refuse, to deliver the same to her. Plaintiff sought judgment for possession of the certificate, if such possession could be had, and, if not, for $5,800, the value thereof, and for damages and costs.

The question involved is this: Can the California administratrix recover from the domiciliary administrator, appointed in the state of Indiana, who is temporarily in this jurisdiction, with the evidence of a simple contract debt, which contract debt is due and owing here, the certificate of deposit which is the evidence of such debt? There are a number of propositions bearing more or less upon the question, which are either universally conceded, or established by such a preponderance of authority as not to call for comment. Among these are:

1. Save as otherwise provided by statute, the proper jurisdiction in which to obtain letters testamentary or of administration is in the state and place of the decedent's domicile at the time of his death. Williams, Ex'rs (6th Am. Ed.) 495 et seq.; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641; Crosby v. Leavitt, 4 Allen, 410.

2. The authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which he is invested with his authority. Code Civ. Proc. § 1913; Story, Confl. Laws, § 512, and cases there cited.

3. Where there are no debts owing by the estate in the jurisdiction where the foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign state, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be subsequently appointed. Klein v. French, 57 Miss. 662; Wilkins v. Ellett, supra; Schluter v. Bank, 117 N. Y. 125, 22 N. E. 572; Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41; Appeal of Gray, 116 Pa. St. 256, 11 Atl. 66, 70.

4. So an administrator who has, within the jurisdiction of his appointment, obtained a judgment against a debtor of a foreign state, or has reduced the personal property of the estate to possession, so as to acquire the legal title thereto, and it is wrongfully taken from him and carried to a foreign state, he may in such foreign state maintain an action, not officially, but in his individual capacity, upon such judgment, or to recover such personal property so wrongfully taken from him. Talmage v. Chapel, 16 Mass. 71; Biddle v. Wilkins, 1 Pet. 686; Greasons v. Davis, 9 Iowa, 219; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833; Fox v. Tay, 89 Cal. 339, 24 Pac. 855, and 26 Pac. 897; Low v. Burrows, 12 Cal. 188; Story, Confl. Laws, § 516.

5. If there be assets in another state or states than that in which the principal letters are granted, an administration may be obtained there, and such administration will be regarded as ancillary to the administration of the domicile; and, as a general rule, the excess of the assets resulting from such ancillary administration, after the payment of local debts, expenses of administering, and local legacies, if any, in the jurisdiction of the ancillary administration, will be transmitted to the administrator of the domicile, to be there distributed according to the law of the vicinage. In re Apple's Estate, 66 Cal. 432, 6 Pac. 7.

6. A certificate of deposit is a negotiable security, and to that extent is upon the same footing with promissory notes. Welton v. Adams, 4 Cal. 37; Brummagim v. Tallant, 29 Cal. 503; Mills v. Barney, 22 Cal. 240; Poorman v. Mills, 35 Cal. 118.

7. An executor or administrator duly qualified to act as such may assign negotiable securities due and owing to his decedent at the time of his death, which have come to him by virtue of his office; and his assignee may sue the maker thereof in another state without the necessity of letters testamentary or of administration being had in such latter state, if by the law of the forum actions are maintainable by the assignees of negotiable securities. Harper v. Butler, 2 Pet. 239; Sanford v. McCreedy, 28 Wis. 102; Robinson v. Crandall, 9 Wend. 425; Patchen v. Wilson, 4 Hill (N. Y.) 57. There are some authorities in opposition to the proposition last enunciated, but it is thought that the cases cited, and others to like effect, are, upon principle, correct.

8. For the purpose of founding administration, a simple-contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found payable. Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417.

Under this state of the law, and upon the facts of the case as demonstrated in the bill of exceptions and findings, what was the duty of the defendant when plaintiff was appointed administratrix in California? He had not indorsed or assigned the certificate. The receiver had refused to allow it as a valid claim against the bank. Defendant could not maintain an action to establish it as a claim in this state. The very object of the ancillary administration in this state is to collect assets of the estate here, and it is the bounden duty of plaintiff to so collect them. A paramount object of the local or ancillary administration is to collect the assets locally situated, and to pay therefrom the demand of local creditors, if any there be. Whether there are any such creditors can only be determined by giving the notice to creditors required by our law. It would seem that, upon principle, it became the duty of defendant, when plaintiff was appointed and qualified, to surrender to the latter the evidence of the debt in question, which is upon simple contract, the payment of which can only be enforced here. We concur in the views of the supreme court of the state of Mississippi, as expressed in Klein v. French, 57 Miss., at pages 670, 671, where, after discussing cognate questions, and enunciating the general principles applicable, it is said of the domiciliary administrator: "He has the title and the possession. He has the right to receive voluntary payment. He has the right to apply for and receive the appointment of ancillary administration, or to secure it to his nominee. He cannot, therefore, hold the evidence of debt, and do nothing, for this would be most unjust to the distributees, and would result in a loss of the debt to them," etc.; and after pointing out his duty to secure his own appointment, if practicable, and, if not, it is said, "He should then take proper steps to have another appointed, and turn over to him the collection of the debt." We conclude that when, after her appointment, plaintiff demanded from defendant possession of the certificate of deposit, it was the duty of the latter to have delivered the same to her, and that upon his refusal so to do, as against plaintiff, he was the wrongful holder thereof. It follows that the findings of the court that plaintiff at the time of the filing of the complaint was not, never has been, and is not now the owner of, or entitled to the possession of, the certificate of deposit, and that defendant was and is the owner of, and lawfully entitled to the possession of, said certificate of deposit, are not supported by the evidence. We recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

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(114 Cal. 283)

## EBERHARDT v. COYNE. (Sac. 44.)

(Supreme Court of California. Sept. 17, 1896.)

ADVERSE POSSESSION—PAYMENT OF TAXES—SUFFICIENCY OF FINDINGS.

Under Code Civ. Proc. § 325, making the payment of taxes by an adverse holder an essential element to establish title by adverse possession, where a complaint alleged title by adverse possession to a strip of ground in dispute between the owners of adjoining lots, a judgment for plaintiff is not supported by a finding that plaintiff paid taxes on her lot, in the absence of a finding that the strip in dispute was a part of such lot. McFarland, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Delia Eberhardt against M. J. Coyne. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Frank D. Ryan and James B. Devine, for appellant. Armstrong & Bruner and R. Platnauer, for respondent.

BRITT, C. Ejectment for a piece of land about 80 feet long and 4 feet wide in a certain block in the city of Sacramento. It is admitted that plaintiff has the paper title to the "west 32 feet" of lot 2 in said block, and that she has paid the taxes thereon since the year 1871; also, that defendant has like title to the south half of lot 1 in the same block, and that he and his predecessors in interest have paid the taxes thereon since that year. The west line of plaintiff's land and the east line of defendant's are coincident for the length of the parcel in dispute, which lies along such common boundary. In her complaint, filed December 23, 1892, plaintiff alleged herself to be the owner of the demanded premises, describing the same by reference to monuments, courses, and distances; that she and those under whom she claims have been in the adverse possession thereof, claiming title, for more than 20 years, and until she was ousted by defendant in December, 1892; that by reason of such possession "the plaintiff became and is the owner of said premises by prescription." These allegations, excepting that of ouster, were denied by defendant. At the trial defendant produced evidence tending to show that the land sued for is within the boundaries of the south half of said lot 1. The court found that plaintiff was, at the time of the commencement of the action, "and for many years prior thereto," the owner of the premises described as "commencing at the north end of a fence constructed by the defendant on lot 2," etc., the line of such fence being the east boundary of the parcel described, and no further reference being made to the lines of either lot 1 or lot 2; also, that plaintiff was in the adverse possession of such premises for 10 years next before the entry of defendant in December, 1892.

The complaint proceeds and the trial was had, apparently, on the theory that plaintiff's right to the land depends upon adverse possession thereof for the prescriptive period of five years. Since the amendment to section 325, Code Civ. Proc., which took effect May 31, 1878, the payment of the taxes by the adverse holder, if any are assessed against the land, is a necessary element in the establishment of title by means of adverse possession. The finding here has no relation to the time before May 31, 1878, when payment of taxes was not required in order to make out such possession, for it is limited to the space of 10 years next before defendant's entry; and as to such period of 10 years it is not sustained by the evidence, for the admission at the trial was that the taxes paid by plaintiff have been those assessed upon the "west 32 feet of said lot 2." This was not effectual to complete the prescriptive right to land not included within that designation. McDonald v. Drew, 97 Cal. 266, 32 Pac. 173; Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008. Respondent contends here that the land in suit is really parcel of the said west portion of lot 2, to which she admittedly has paper title. Allowing that she may thus assert an origin of her title different from that set forth in the complaint (as to which question see Eagan v. Delaney, 16 Cal. 85), then, if the assertion is sustained by the record, of course the matter of adverse possession is of no moment in the case; but it was not so alleged in the complaint, or proved at the trial, or found by the court. The respondent's argument in this particular rests on the reference in the finding to the "fence constructed by the defendant on lot 2," but plainly the land described, lying west of the fence, may be wholly within lot 1. The judgment and order denying defendant's motion for a new trial should be reversed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying defendant's motion for new trial are reversed.

McFARLAND, J. I dissent. The action is ejectment to recover a small strip of land, about 4 feet wide, lying along the line between lots 1 and 2 in a certain block in the city of Sacramento. The court found that at the commencement of the action plaintiff was entitled to the possession of the disputed premises, and had been in the actual, exclusive, and adverse possession thereof for 10 years (and it might justly have been 20 years) next before December, 1892, at which last-mentioned time defendant took possession thereof, and rendered judgment in favor of plaintiff for the possession of said premises. I see no reason for disturbing the judgment. The record shows that the regular paper title to the west 32 feet of lot 2 was conveyed to plaintiff in 1872; and the evidence is amply sufficient to show that, within a year or two thereafter, she inclosed by a fence the land thus conveyed to her; that the fence included the strip now here in contest; that since 1872 she continuously had a barn on her land which extended entirely over said strip; and that for a period much longer than 10 years next preceding December, 1892, she was thus in the actual, exclusive, and adverse possession of said strip of land, openly and notoriously claiming it as her own. Defendant owns a part of lot 1 lying to the west of plaintiff's land. In 1892 a storm blew down a part of plaintiff's fence between her land and that of defendant, whereupon defendant pulled down the rest of said fence, and built a new fence about 4 or 4½ feet to the east of the old one, thus taking possession of the strip in contest. This new fence takes in the west part of plaintiff's barn, some of the boards of which defendant took off. (From the diagram in evidence it seems that the new line also runs through plaintiff's house.) The facts leave to the defendant only the defense that plaintiff has not complied with the provisions of section 325, Code Civ. Proc., relating to the payment of taxes. Payment of taxes has no natural relation whatever to the matter of actual adverse possession of land, and therefore the provision of said section should not be applied as a mere technical defense founded on an alleged slight defect in the description of land. In the present case this defense is highly technical, for it is based upon the strict letter, and not upon the spirit and intent, of the law. There is no pretense that plaintiff tried to evade the payment of her taxes, or that she did not believe that she had paid all the taxes upon her land as inclosed and claimed by her. She did actually pay all the taxes on her lot from 1872 to the present time; but the assessments for taxes on it were made in the form of the "west 32 feet of lot 2"; and it is contended that therefore she did not pay taxes upon the small strip within her inclosure which is now in contest. But, if we should concede that if the strip were actually not a part of lot 2, this would be such a want of compliance with section 325 as to be fatal, still the whole theory of the appellant on this point is based upon the assumption that the strip in contest is not a part of lot 2, but is a part of lot 1. That assumption, however, is entirely unwarranted. On the contrary, it is alleged in the complaint that the new fence built by defendant was "on the land of the plaintiff claimed by her to be a part of lot 2," and in the finding of the court the said fence is described as "constructed by defendant in December, 1892, on lot 2." It may be said that this finding is rather in the form of recital, and not direct; but there is no exception to it. Moreover, there is no averment in the answer that the strip is on lot 1, or that it is not on lot 2; and there is no exception to the findings on the ground that they do not fully enough find that the strip is a part of lot 2. It is expressly admitted by stipulation that plaintiff paid taxes as hereinbefore stated, and there was no need of a finding on that subject. These views make it unnecessary to discuss other points made by respondent in support of the judgment. In my opinion the judgment should be affirmed.

Indeed, as appears from appellant's witness, the surveyor, it is impracticable to determine with any accuracy where the true line between the two lots is, if it can be said that there is any such true line; and, in the case at bar, I cannot see any stronger evidence of the correct location of that line than is afforded by the fact that a fence on what respondent claimed to be the true line has stood for a period several times longer than the statutory period of limitation, without any objection by the coterminous owners. And, for the purpose of the payment of taxes, this fence, in my opinion, establishes the western line of lot 2.

114 Cal. 278

## Ex parte STEPHEN. (Cr. 160.)

(Supreme Court of California. Sept. 17, 1896.)

JUDGMENT — CONCLUSIVENESS — HABEAS CORPUS — INTOXICATING LIQUORS.

1. Where, in a criminal action in the superior court, which is a court of general jurisdiction, a question of fact upon which the court's jurisdiction depended was litigated, and decided in favor of the prosecution, the question is judicially decided as between the parties, and the decision cannot be attacked in habeas corpus proceedings brought by defendant in another court.

2. In an ordinance by a county board fixing saloon licenses, a discrimination between those doing business in incorporated cities and those without their limits is not unlawful.

3. A provision of a county ordinance, which undertakes to prescribe the punishment of a person conducting a saloon without a license, and which is void as being in contravention of Pen. Code, §§ 19, 435, which fix such punishment, does not invalidate the other provisions of the ordinance; hence, on a conviction thereunder, the punishment fixed by the statute may be imposed.

In bank. Petition by Leo Stephen for a writ of habeas corpus. Writ denied.

McKelvey & Bowes, for petitioner. J. W. Ballard, for respondent.

VAN FLEET, J. Petitioner, convicted in the superior court of the county of Orange of a misdemeanor in carrying on a saloon and selling liquor without procuring a license therefor, as required by Ordinance No. 35 of the board of supervisors of said county, asks to be discharged on habeas corpus, on the ground, principally, that the ordinance is void for various alleged reasons. Several of the grounds of invalidity assigned may be passed over without further notice than to say that they relate to special features of the ordinance not here involved, and upon the sufficiency of which the validity of the particular provision under which petitioner was prosecuted and convicted in no way depends. One or more features of an ordinance may be void, and yet those parts not subject to the vice, and which are not dependent upon the provisions which are, will stand unaffected. Ex parte Mansfield, 106 Cal. 405, 39 Pac. 775; Ex parte Haskell (Cal.) 44 Pac. 725. We shall therefore confine ourselves to a consideration of those objections only which affect either the ordinance as a whole or section 1 thereof,—for a violation of which petitioner is held,—and certain objections made to the sufficiency of the judgment.

1. The first and main objection urged is that the ordinance was not passed at a regular meeting of the board of supervisors, as required by law, and is therefore wholly void. This claim is based upon the alleged fact that the board has never established by ordinance a time for its regular meetings; and it is argued that, no such time having been fixed, there could be, in legal contemplation, no such thing as a regular meeting of the board. But, assuming that such omission on the part of the board, if shown, would render void the ordinance here involved, the inquiry is one which does not competently arise. The question whether Ordinance No. 35 was regularly passed is dependent upon certain facts as to the existence of which it was within the province of the superior court, at the trial of petitioner, to inquire. One of those facts was whether the ordinance was passed at a regular meeting, and this fact involved the further one as to whether the time for such meeting had been competently established. The jurisdiction of the court to punish petitioner for the alleged infraction of the ordinance depended upon the existence of these facts, and, this being so, the judgment of conviction must be taken, upon this collateral view, as conclusively establishing such facts. We are bound to presume, in support of that judgment, that the fact about which question is really made—whether Ordinance No. 1, found in the records of the board of supervisors, fixing the time of regular meetings, was published, so as to take effect—was established to the satisfaction of the court by competent evidence. Unlike a court of limited jurisdiction, every intendment is to be indulged in favor of the regularity of the proceedings and judgment of the superior court, acting within its jurisdiction, and this whether the jurisdiction exercised be original, or, as in this instance, appellate. "After its appellate jurisdiction has once been acquired, its action within the limits of that jurisdiction, unless in direct contravention of some positive statute, is entitled to all the presumptions of regularity that attach to the exercise of its original jurisdiction." Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716. The judgment of the superior court is, as was said of the judgment in Ex parte Sternes, 77 Cal. 156, 162, 19 Pac. 275, 276, in considering a similar objection, "the record of the court, acting within its legitimate powers, and that record must be considered as speaking the truth, and as conclusive, until it has been in some way set aside or vacated. No evidence can be received to contradict it. Freem. Judg'n. §§ 619, 126; Lewis v. Dutton, 8 How. Prac. 103; Cooley, Const. Lim. p. 407. 'When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence

of jurisdiction until set aside or reversed by a direct proceeding.' Bloom v. Burdick, 1 Hill, 138." And see Ex parte Cottrell, 59 Cal. 421. Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon the judgment, and so long as the judgment is regular upon its face, and was given in an action or proceeding of which the superior court had jurisdiction, no extrinsic evidence is admissible here to show its invalidity.

2. It is contended that the ordinance discriminates unlawfully between those engaged in the liquor business in Orange county, in that it imposes a much heavier license tax upon those conducting such business outside of incorporated cities and towns than upon those within such municipalities, and is for this reason void. But, while this discrimination exists, it is not unlawful. It is no doubt based upon the fact that those carrying on the business within incorporated cities and towns are compelled to pay a municipal license tax, while those without are not, or for other good reason affecting the business. Such discrimination the board has a right to make. Amador Co. v. Kennedy, 70 Cal. 458, 11 Pac. 757; Ex parte Haskell (Cal.) 44 Pac. 725. Nor can the ordinance be said to be unreasonable or oppressive. Ex parte Haskell, supra.

3. Section 1 of the ordinance provides that any person opening, keeping, or carrying on, etc., such liquor business, without first procuring a license, shall be guilty of a misdemeanor, and makes such misdemeanor punishable by a fine of not less than $50 nor more than $200, or by imprisonment for not less than 100 days, or by both such fine and imprisonment, and also provides that any judgment that defendant pay a fine shall direct that, in default of payment, he shall be imprisoned in the county jail until the fine is satisfied, not to exceed 1 day's imprisonment for every $2 of the fine. The judgment in this instance imposed a fine upon petitioner of $250, or, in default of payment, confinement in the county jail at the rate of 1 day for every $2 of the fine. Petitioner contends that this punishment, being greater than that prescribed by the ordinance, was in excess of the power of the court, and renders the judgment void ab initio. The punishment is undoubtedly in excess of the maximum prescribed by the ordinance, and the only question is, therefore, what effect has this upon the judgment? It is unnecessary to determine what its effect would be if the penal clause of section 1 were valid,—whether it would render the judgment void in toto, or only to the extent to which the maximum limit is exceeded,—for that portion of section 1 prescribing the punishment must be held void as in contravention of the general law of the state. It undertakes to punish the same act—carrying on a business without having a license therefor—which is punishable under section 435 of the Penal Code. That section provides: "Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." The last section does not itself fix the punishment for such misdemeanor, but section 19 of the same Code declares: "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding five hundred dollars, or by both." In Ex parte Sic, 73 Cal. 142, 14 Pac. 405, it is held that a provision in an ordinance undertaking to punish precisely the same acts which are punishable under the general law of the state is to be deemed in conflict with such general law, and for that reason void. And this principle was affirmed in the recent case of Ex parte Mansfield, 106 Cal. 400, 405, 39 Pac. 775. But the invalidity of the penal clause of section 1 of the ordinance did not affect the other portions of that section, being wholly severable therefrom; and defendant, having been convicted of the misdemeanor therein provided against, was punishable therefor under the general statute. Ex parte Mansfield, supra. The judgment is not in excess of the punishment prescribed by the latter, and is consequently valid. Of course, what is here said has no reference to the other penal clauses to be found in the ordinance, as they are not involved.

4. There is nothing in the objection that the judgment does not show of what offense petitioner was convicted. The recital in the judgment is: "That whereas, the said Leo Stephen having been duly convicted in this court of the crime of establishing and carrying on a saloon, and there selling and giving away malt liquor without a license," etc. This is quite sufficient to designate the general nature of the offense. Ex parte Murray, 43 Cal. 455; Ex parte Turner, 75 Cal. 226, 16 Pac. 898; Church, Hab. Corp. § 365. We discover nothing in the objections entitling petitioner to his discharge, and the writ is accordingly dismissed, and the petitioner remanded.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

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114 Cal. 316

## KAHN v. SUTRO et al. (S. F. 534.)

(Supreme Court of California. Sept. 16, 1896.)

COUNTY GOVERNMENT ACT—APPLICATION TO CITY AND COUNTY OF SAN FRANCISCO.

1. Under the consolidation act (St. 1856, p. 145), which provided that the corporation known as the "City of San Francisco" "shall remain and continue to be a body politic and corporate in name and in fact, by the name of the City and County of San Francisco," such corpora-

tion, in matters of government, must be regarded as a city.

2. The territory within which a municipal government is exercised is still a part of the state, and, for all purposes other than municipal government, is subject to the state's control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws, or to perform such functions, disconnected with the municipal government, as may pertain to the government of the state; hence, as to such officers, the city and county of San Francisco is within the provisions of the county government act of 1893, declaring what county officers shall be elected, prescribing their duties, and fixing their tenure of office at four years. Beatty, C. J., and Temple J., dissenting.

3. Officers whose election is authorized in the corporation of the city and county of San Francisco by the county government act of 1893, and who are the same in name, and are given the same or similar functions, as are officers authorized by the consolidation act (St. 1856, p. 145) to be elected in San Francisco, do not cease to be municipal officers, since the legislature cannot abridge the constitutional right given by its charter to said corporation to change its officers every two years if it shall so elect.

4. The city and county of San Francisco being under a municipal government, there is no authority for its division into townships; hence the provisions in the county government act of 1893, fixing the term of office of justices of the peace for the townships into which the several counties are divided at four years, do not apply to the justices of the peace elected for the city and county of San Francisco.

5. Act March 18, 1885, creating a police court for the city and county of San Francisco, confers upon that court certain jurisdiction, which is elsewhere exercised by justices' courts; hence its judges' terms of office were not changed by the county government act of 1893, since that act does not apply to justices of the peace in San Francisco.

In bank. Appeal from the superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Julius Kahn against Adolph Sutro and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. H. L. Barnes, W. W. Foote, T. C. Coogan, and Rodgers & Paterson, for appellant. F. Adams, for county clerk. Garrett W. McEnerney, for other respondents. Reddy, Campbell & Metson, amici curiæ.

HARRISON, J. The plaintiff brought this action to restrain the board of election commissioners of San Francisco from calling an election for city and county officers at the coming general election, and from incurring the expenses attendant thereon; claiming that under the provisions of the county government act of 1893, as construed in the case of Hale v. McGettigan (recently decided) 45 Pac. 1049, there can be no election for such officers until the general election in 1898. Judgment was rendered in favor of the defendants upon a demurrer to the complaint, and the plaintiff has appealed therefrom.

The question presented for determination is whether the above act of 1893 applies to the city and county of San Francisco, and the determination of this question depends upon the character of that body corporate in its relation to the other portions of the state,—whether it is to be regarded as a city or as a county. One feature by which a city is distinguished from a county, in this state, is the source from which its authority is derived. The powers to be exercised under a county government are conferred by the legislature, irrespective of the will of the inhabitants of the county, whereas the inhabitants of a city are authorized to determine whether they will accept the corporate powers offered them, to be exercised by officers of their own selection. In Hamilton Co. v. Mighels, 7 Ohio St. 109, the distinction between these two bodies was given in these words: "Municipal corporations proper are called into existence through the direct solicitation, or by the free consent, of the people who compose them. Counties are legal subdivisions of a state, created by the sovereign power of a state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces. The latter is superimposed by a sovereign and paramount authority." While the corporate name of this body politic is "The City and County of San Francisco," it is recognized by the constitution as having the attributes of both a city and a county, and also as having attributes distinguishing it from either. Geographically, it is one of the legal subdivisions of the state, and in that respect is recognized in section 1 of article 11 of the constitution, as one of the counties of the state. Politically, it is regarded in that instrument as a municipal corporation. It was held in People v. McFadden, 81 Cal. 489, 22 Pac. 851, that a county is not a corporation for municipal purposes, within the meaning of section 7 of article 11 of the constitution. The provision in this section that "city and county governments may be merged and consolidated into one municipal government, with one set of officers, and may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes," implies that such political body is a municipal corporatin, and that its government is a municipal, and not a county, government. At its first session after the adoption of the constitution, the legislature passed an act known as the "McClure Charter," purporting to provide for the government of San Francisco, and to be carried into effect irrespective of any action by the inhabitants of the city. St. 1880, p. 137. In Desmond v. Dunn, 55 Cal. 242, it was held that under the constitution the act could not have any effect, except with the consent of a majority of the electors of San Francisco. If it had been considered that the government for San Francisco was a county government, this argument would have been inapplicable, and the court would have regarded the provisions of section 4 of article 11 as sufficient to sustain the validity of the act, but the act was held invalid on the ground that the charter of the city then existing should remain in force until superseded or changed in the mode prescribed by the constitution. The charter of San Francisco is made up of the consolidation act and the various amendments thereto, together with such other statutes relating to the government of the city and county, or conferring powers upon its officers, as were in force at the adoption of the present constitution. It was urged by counsel in the case last cited that the "cities" mentioned in section 6 were corporations other than consolidated cities and counties, and, therefore, that the clause was not applicable to San Francisco; but it was held that the clause in section 7, "the provisions of this constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated government," meant that such consolidated governments are to be regarded as cities, and that "all the provisions of the constitution which are applicable to cities are likewise applicable to consolidated governments."

The city of San Francisco was created, and its limits defined, by the act of April 15, 1850 (St. 1850, p. 223); and section 2 of that act declared that "the inhabitants of the city of San Francisco, within the limits above described, shall be, and they are hereby constituted, a body politic and corporate in fact and in law, by the name and style of the 'City of San Francisco.'" Section 1 of the act of April 19, 1856 (St. 1856, p. 145), commonly known as the "Consolidation Act," by virtue of which the present corporate character of San Francisco exists, declares, "The corporation or body politic and corporate now existing and known as the City of San Francisco shall remain and continue to be a body politic and corporate in name and in fact, by the name of the City and County of San Francisco," etc. The effect of this legislative action was merely to continue, with extended boundaries and additional powers, the city of San Francisco, which had been incorporated in 1850; and, although the provisions of the charter were in many respects appropriate for a county, the corporation thus created remained a city, under a different name, but the inhabitants of the territory thus brought under the provisions of the city charter were not invested with county government. People v. Supervisors, 21 Cal. 668; Wood v. Election Com'rs, 58 Cal. 561. Section 8 of article 11, of the constitution, as originally adopted, provided that any "city" containing a population of more than 100,000 inhabitants might cause a freeholders' charter to be framed for its own government. Under this provision of the constitution the inhabitants of San Francisco elected a board of freeholders in 1880; and the validity of this election, and the power of the board to frame a charter, were upheld in People v. Hoge, 55 Cal. 612, upon the ground that, under this section of the constitution, San Francisco was a city. In Staude v. Election Com'rs, 61 Cal. 313, it was held that the provisions of section 4109 of the Political Code, as amended in 1881, by which the time for the election of city and county, as well as other officers throughout the state, was changed, were applicable to San Francisco, by virtue of the clause in section 6 of article 11, that "cities or towns heretofore organized shall be subject to and controlled by general laws." It may therefore be regarded as settled by the decisions of this court that the city and county of San Francisco is a municipal corporation, and, in matters of government, is to be regarded as a city. But, while the people of San Francisco are thus to be regarded as under a municipal government, with the right to select officers to execute the powers of that government according to the terms of its charter, the territory over which that government is exercised is at the same time a county; and for those purposes for which county officers exercise authority not derived from the charter, and disconnected with municipal government, its officers are properly termed "county officers." Considered in its political and judicial relations to other portions of the state, the officers elected by its voters, to the extent that they exercise only such powers as are given by laws relating merely to counties, and who do not derive any of their authority from the charter, are to be regarded as county officers, as distinguished from city officers.

It is not possible to make a harmonious construction of the terms "county," "city," and "city and county," as they are used in the constitution. The term "county" is sometimes used therein as a geographical subdivision of the state; sometimes as a political division for the exercise of governmental functions, and in the latter use it is sometimes employed as the equivalent of "city and county," and sometimes as distinguished therefrom; and the term "city and county" is sometimes used as the equivalent of "city." San Francisco is distinctly recognized therein as the geographical equivalent of a county, as in the provision for the election of judges of the superior court, and for the formation of a district for the election of a railroad commissioner; and to hold that it is not a county for any purpose would render inoperative many provisions of the constitution, and of the statutes of the state which have heretofore been recognized as applicable to it, with the result that unsuspected difficulties and perplexities would arise in the administration of justice. Without enumerating many instances, it is sufficient to call attention to the fact that there would be in that city no provision for a grand jury, or for a board of equalization, or for the exercise of any appellate jurisdiction by the superior court, or for the exercise of eminent domain, or for creating the lien of a judgment upon real estate, or for the probate of wills, or for filing articles of incorporation; and the practitioner will readily perceive the confusion that would result in criminal jurisprudence, as well as in civil practice, if the city and county of San Francisco is to be excluded wherever the term "county" is used.

The constitution of Missouri provided for the extension of the limits of the city of St. Louis, and its incorporation into a separate and distinct body politic, under a charter to be framed by a board of freeholders, and that it should be independent of the county of St. Louis. After its organization under a charter thus framed, the governor appointed a sheriff for it, upon the ground that by its organization it became a new county, or political subdivision of the state. The right of this appointee to exercise the office was presented in State v. Finn, 4 Mo. App. 347, and in discussing the character of the new body politic the court said: "The question in this case is not whether the city of St. Louis, as now organized under the scheme and charter, is a county, in the sense in which that word is used in the constitution to describe the normal county of the state. It is not such a county. It has not, nor was it intended to have, a county court, and it has a chief executive and two houses of legislation. In spite of these and other features which distinguish it from the normal county, it may be a county so far as to keep up a relation as such to the rest of the state. It may be a part of the general county system, and it is so unless the framers of the constitution intended to segregate it, and to dissever in the case of St. Louis that county relation which every other portion of the state bears to the state. Because the organization of this body as a city is pronounced, and its features strongly marked, and because they thus reduce its attributes as a county into comparative insignificance, it does not follow that the latter do not exist; and it cannot be denied that it is a county, in the sense in which that term is used, when, if not a definition, at least the nearest approach to a definition which the constitution affords, is attempted, —'a legal subdivision of the state.' Unless the words are plain, it cannot be held that the convention intended to create a political body which should be outside of that county system which prevails, not only in this state, but throughout the country. The researches of the counsel for the relator have not enabled them to find any instance in the United States of a municipal corporation which is not either within some county, or which does not itself bear a county relation to the state. Much of the reasoning of the relator implies that the city of St. Louis cannot be a county because it is a city, but it will readily be admitted that the framers of the constitution could have made it a city, and also have made it a county. That they have not done so must be shown by the provisions of the constitution, not by arguing that it cannot be a county because it is a city. The fact that a county essentially differs from a city does not prove that a city may not contain the features of a county organization. Cities and counties may be distinct organizations in the state generally, but the constitution may by special provisions establish a body which shall have the peculiar powers and obligations of a municipal corporation, properly so called, and yet shall bear those relations to the sovereign power which constitute a county."

Prior to the enactment of the consolidation act the county of San Francisco extended to San Francisquito creek on the south, but by that act the boundaries of the city were enlarged to their present extent; and section 9 of the schedule annexed to the act provided that "there shall be formed out of the southern portion of the county of San Francisco a new county, to be called San Mateo." There was no express declaration that the remaining territory which was placed under municipal government should cease to be the county of San Francisco, nor was there any further designation by the legislature of the county boundaries until the adoption of the Political Code in 1872, but the limitation of the new county to the "southern portion" of the county of San Francisco implies that the other portion continued to remain the county of San Francisco as before. Section 3901 of the Political Code defines a county as "the largest division of the state having corporate powers," and section 3902 declares, "This state is divided into counties, named, bounded and constituted as provided in this title," and the names and boundaries of the several counties are given in section 3909, and the succeeding sections. Section 3950 gives the boundaries of the territory which remained of the county of San Francisco after its inhabitants had been incorporated into a municipal corporation under the consolidation act, and the name given to this territory is "San Francisco (City and County)." By these sections this territory was declared to be one of the counties of the state, and continued to be such county until the adoption of the present constitution, in which (article 11, § 1) it is declared, "The several counties as they now exist are hereby recognized as legal subdivisions of the state." Title 2 of part 4 of the Political Code is devoted to "the government of counties," and in chapter 3 of that title are found provisions designating the officers of a county, and prescribing their powers and duties. Until this portion of the Political Code was superseded by the county government act, it was the only statute of the state which defined the powers and duties of certain officers elected by the voters of San Francisco, and upon the enactment of the county government act that statute alone became the source from which these officers have derived their powers. San Francisco is therefore both a city and a county, and, although the boundaries of the two bodies corporate are coincident, the electors within this territory vote for officers whose authority and functions are derived exclusively from the charter of the city, and also for officers whose powers and duties are prescribed by general laws, and upon which the charter is silent. It must follow from this that some of its officers are city officers, and others are county officers. There is nothing unusual or inconsistent in this. The "government" of the city is municipal, and the officers who are to exercise that government are municipal officers; but the territory in which that government is exercised is still a part of the state, and, for all purposes other than municipal government, is subject to its control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws, or to perform such functions disconnected with the municipal government as may pertain to the government of the state. It would not be contended, if the city was only a portion of the county, or if a county should be composed entirely of incorporated cities, that the state would be precluded from authorizing the election by the voters of the county of officers to carry out those provisions of its laws which pertain to the state at large, and which have no connection with municipal affairs, and this rule is not changed where the county consists of a single city instead of several. Although the same body of voters choose the different officers, the functions of the officers chosen by them are distinct in their nature, and the character of the officers must be determined by the source of their authority and the functions they are to exercise.

Section 5 of article 11 of the constitution declares, "The legislature by general and uniform laws shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township and municipal officers as public convenience may require." In obedience to this direction the legislature passed the county government act of 1893, declaring what county officers shall be elected, in which are included those designated in the above section, prescribing their duties, and fixing their term of office at four years. Some of the officers whose election is thus authorized are the same in name, and are given the same or similar functions, as are officers authorized by the consolidation act to be elected in San Francisco, while others whose election is authorized by each of these statutes have no authority except that which is given in the county government act. On the other hand, the consolidation act authorizes the election of several officers whose election is not authorized by the county government act, and who are not named therein as county officers. Those officers whose election is authorized by each of these statutes, but who are required by the consolidation act to perform the duties therein prescribed, do not cease to be municipal officers because, under the county government act, similar duties are prescribed for county officers of the same name. To the extent that these officers are a component part of the municipal government, they are municipal officers, and do not cease to be such by reason of the fact that other functions which pertain to county officers are imposed upon them. The guaranty given to the city and county of San Francisco by the constitution, of the right to continue its government under the charter which it held at the adoption of that instrument until it shall adopt another, including the right given by that charter to change its officers every two years if it shall so elect, cannot be taken away by the legislature under the form of imposing upon these officers certain functions exercised by county officers in other counties of the state, and fixing the term of such county officers at four years. But, as the territory thus placed under municipal government still remains a county, and is not taken out of the control of the state for all purposes not embraced within the scope of municipal government, the authorization by the legislature of an election by the voters of that territory for officers to carry out these laws does not make the persons so elected city officers. The constitution has declared that certain officers shall be elected within each county, and, if San Francisco is a county, the legislature is authorized to provide for the election of these officers by its voters, and is not precluded therefrom by the fact that they are voted for by the electors of the municipality at the same time with the election of its municipal officers. Prior to 1876 the voters of San Francisco elected one of the members of the board of state harbor commissioners, but that fact did not constitute him a city officer.

The officers of the city and county of San Francisco are designated in the act of April 2, 1866 (St. 1865–66, p. 718), as follows: "There shall be elected hereafter for the city and county of San Francisco, by the qualified electors thereof, at the times hereinafter mentioned, and in the manner prescribed by law for the election of state and county officers, one mayor, who shall be ex officio president of the board of supervisors, a county judge, police judge, an attorney and counsellor, probate judge, district attorney, sheriff, county clerk, recorder, treasurer, auditor, tax collector, assessor, coroner, public administrator, surveyor, superintendent of common schools, superintendent of public streets, highways and squares, chief of police, harbor master and state harbor commissioner. There shall be elected in each of the twelve present election districts of said city and county, which shall hereafter constitute municipal districts, and be designated and known in law as wards, by the qualified electors thereof, one supervisor and one school director." The term of office for these officers was fixed by the act at two years. The time for their election was subsequently changed, and is now fixed by section 4109 of the Political Code. The offices of county judge and probate judge were abolished by the constitution, and that of harbor master by statute. The police judge has been superseded by the judges of the police court, and certain changes have been made in the mode of electing supervisors. The chief of police and the state harbor commissioner have ceased to be elective officers. It will be observed that this statute does not declare that these are city officers, or are officers of the city and county, but merely that these officers "shall be elected for the city and county of San Francisco, by the qualified electors thereof"; leaving the character of the officer, whether he is to be denominated a county officer or a municipal officer, to be determined by the nature of the duties he is to perform, and the source from which he derives his authority. Of the officers above enumerated, the mayor, attorney, and counselor, sometimes styled "City and County Attorney" (see St. 1871–72, p. 232), superintendent of public streets, highways, and squares, and school directors, are not named in the county government act as county officers, and consequently cannot be subject to the provisions of that statute. Judges of the police court are not named in the county government act either as county or township officers, and no provision is found therein relative to their duties or term of office. This court has its existence by virtue of section 1 of article 6 of the constitution, which authorizes the legislature to establish inferior courts in any incorporated city, town, or city and county; and the act establishing it in the city and county of San Francisco (St. 1893, p. 9) declares that the court "shall consist of four judges, who shall be elected at the general election held according to law, each of whom shall hold office for the term of two years." The treasurer, auditor, tax collector, and surveyor are designated in the consolidation act as officers of the municipality, and are required to perform certain municipal duties which are not required from county officers who are elected for these offices in their respective counties. In addition to these duties the treasurer is constituted a part of the appointing power for the license collector (St. 1871–72, p. 736); the auditor is made a member of the board of new city hall commissioners (St. 1875–76, p. 461); and the auditor, the tax collector, and the city and county surveyor are members of the board of election commissioners for the city and county (St. 1877–78, p. 299). If it should be held that these are merely the officers designated by those names in the county government act, it would follow that their functions would be solely those given in that act, and not those given in the consolidation act; otherwise the county government act would cease to be uniform in its application to these officers in all the counties of the state, and would have the effect to repeal the provisions of the charter requiring them to exercise these municipal functions. The supervisors authorized by the consolidation act to be elected do not constitute the same body as that authorized by the county government act, although they bear the same name. The board of supervisors authorized by the consolidation act is for the government of the city and county, and consists of 12 members, while the board of supervisors authorized for a county consists of only 5 members, and exercises functions peculiarly appropriate to a county, but has not the authority required for providing for the wants of a city.

Section 11 of article 6 of the constitution vests in justices of the peace a part of the judicial power of the state, and makes them a part of the judicial department of the state (People v. Ransom, 58 Cal. 558); and section 11 of the same article declares, "The legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties and responsibilities of justices of the peace." Section 3 of article 22 declares, "All courts now existing, save justices' and police courts, are hereby abolished"; and section 11 of the same article declares: "All laws relative to the present judicial system of the state shall be applicable to the judicial system created by this constitution until changed by legislation." By these provisions the justices' courts in existence at the adoption of the constitution were continued as a part of the judicial system of the state established by that instrument, and the laws relative to those courts, as well those providing for their organization as those which define their powers and duties, were continued in force until they should be changed by the legislature. By the act of March 26, 1866 (St. 1865–66, p. 423), a justices' court was created for the city and county of San Francisco, for which five justices of the peace were to be elected by the electors of the city and county at large for the term of two years; and the division of the city and county into townships for the purpose of electing justices of the peace and constables, which was authorized by section 6 of the consolidation act, as amended by the act of April 18, 1857 (St. 1857, p. 210), was abolished. This act was further amended by the act of February 10, 1870 (St. 1869–70, p. 56), and by section 12 thereof the office of constable in said city and county was abolished. These acts were in force at the adoption of the constitution, and, as seen above, are yet in force, unless they have been changed by the legislature. Section 11 of article 6, above quoted, recognizes the propriety of different provisions for justices of the peace in townships and incorporated cities, or cities and counties; and, at the first session of the legislature after the adoption of the constitution, that body revised title 1 of part 1 of the Code of Civil Procedure, and in chapter 5 assumed to comply with the directions of the above section of the constitution, and fixed the term of office of justices of the peace at two years. Section 85 declares, "There shall be in every city and county of more than one hundred thousand population a justice's court, for which five justices of the peace shall be elected, by the qualified electors of such city and county, at the general election next preceding the expiration of the terms of office of their predecessors." It is suggested, rather than argued, by counsel herein, that this act is unconstitutional; but, without passing upon this question, it is sufficient to say that, if it should be so held, it would follow that the above laws relative to San Francisco in force at the adoption of the constitution were not thereby changed, but still remain in force, unless they have been superseded by other legislation. This act was considered by this court in People v. Ransom, supra, and was held constitutional, so far as the matter then before the court was concerned.

Section 58 of the county government act of 1893 (St. 1893, p. 366) declares the officers of a township to be two justices of the peace and two constables, and directs the board of supervisors of each county to divide their respective counties into townships for the purpose of electing justices of the peace and constables. The legislature has never made the provision for township organization authorized by section 4 of article 11, and the township which is authorized by section 58 of the county government act is only a geographical subdivision of the county "for the purpose of electing justices of the peace and constables," and does not possess any attributes of government to be exercised by an officer. See Ex parte Wall, 48 Cal. 279. As the city and county of San Francisco is under a municipal government, and as there is no board of supervisors for the "county" of San Francisco, there is no authority for the division of the city and county into townships, and there has been no such division, and consequently these provisions of section 58 for the officers of a township, as well as the provisions of section 60 for the election of township officers, are inapplicable. It is not contended that there is any authority for the election of a constable in San Francisco. Even if a justice of the peace could, by any construction, be styled a "county officer," he has not been classed with the county officers enumerated in section 57 of the county government act, but, by section 58 of that act, has been specifically declared a township officer. But, as we have above seen, there is no provision for township officers in San Francisco.

Being a part of the judicial system of the state, justices of the peace are not included in the system of county government which the legislature is directed to establish and cause to be uniform throughout the state, and provisions relating to their election and term of office, as well as those relating to their powers and duties, are more appropriately placed in laws relating to the judicial department than in those relating to the system of county government. The different provisions in the constitution relating to the powers, duties, responsibilities, and election of justices of the peace are found in article 6, which treats exclusively of the judicial department. There is no provision in this article, or in the article relating to the legislative department, which requires that the term of office of a justice of the peace shall be the same in all parts of the state; and there are many reasons why the powers and duties of this officer, as well as his term of office, should be different in an incorporated city from those applicable to a sparsely-settled township. Section 10 of article 22 declares that judicial officers shall be elected at the time and in the manner that state officers are elected, but there is no requirement that the term of office of such judicial officers as the legislature may authorize to be elected shall be uniform throughout the state. The provision in section 11 of article 6 that the legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities, and towns, or incorporated cities and counties, shows that it was not intended that the laws relating to this portion of the judicial system should be uniform throughout the state, but the number for each of these subdivisions or bodies corporate is to be fixed by the legislature as it may deem applicable to their respective needs. This provision recognizes the necessity of different provisions for these bodies, and, in the absence of constitutional restriction, gives to the legislature the power to adapt its laws to their respective conditions. The further provision in section 11 that the legislature shall "fix by law the powers, duties and responsibilities of justices of the peace," is limited by section 25 of article 4, which prohibits that body from passing a local or special law "regulating the jurisdiction and duties of justices of the peace, police judges and constables," and by section 11 of article 1, that "All laws of a general nature shall have a uniform operation." The term of office of an officer is, however, entirely distinct from his jurisdiction or duties; and a law of a general nature has a uniform operation, if it affects all the individuals of a class for which the legislature is authorized to make specific laws. The act of March 18, 1885 (St. 1885, p. 213), gives to the police courts therein created certain exclusive jurisdiction of matters which by the general law is vested in justices of the peace; and in People v. Henshaw, 76 Cal. 436, 18 Pac. 413, this act was sustained and held not to be a local or special law. The act creating the police court for the city and county of San

Francisco confers upon it certain jurisdiction which is elsewhere exercised by justices' courts. From these considerations it must be held that the provision in the county government act fixing the term of office of justices of the peace for the townships into which the several counties are divided at four years does not apply to the justices of the peace elected for the city and county of San Francisco.

We hold, therefore, that the term of office of the foregoing municipal officers, and also of the judges of the police court, and of the justices of the peace who were elected at the general election in 1894, has not been changed by the county government act, and that an election for their successors must be held at the coming general election. The term of office of the assessor was made four years by section 4109 of the Political Code, upon its adoption in 1872, and by section 3 of article 9 of the constitution the superintendent of schools is to be elected at each gubernatorial election. Under these provisions these officers were elected in 1894 for the term of four years. The district attorney, sheriff, county clerk, county recorder, coroner, and public administrator are officers whose powers and duties are given by the county government act, or by other general laws, and do not derive any authority from the consolidation act, or exercise any function in the municipal government of San Francisco. These officers are therefore county officers, and their term of office, as well as the time of their election, are those provided by the county government act. The demurrer to the complaint was therefore properly sustained, upon the ground that it was necessary for the defendants to make preparation for the election of municipal officers at the coming general election. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.

TEMPLE, J. (dissenting). I am unable to agree with the conclusion reached by my associates. I fully concur, however, in the view that the consolidated city and county is a municipal corporation. The consolidation act of 1856 realized the intention stated in its title. It repealed the several charters theretofore existing of the city, and it consolidated the government of the city and the county. The two governments were merged, and both, so far as rights and liabilities and public functions were concerned, were continued in a new corporation then created,—the consolidated city and county. It succeeded to all the property rights and liabilities of both, and its officers performed all the functions which had been performed by county officers, and also all the functions imposed upon them which were purely municipal. All were, however, the officers of the municipal corporation. In no sense can it be said that some were county officers, and that some were city officers. The sheriff and county clerk are as much officers of the municipal corporation as the mayor or the police judge. Whatever may be said of their powers and duties, they are part and parcel of the corporate organization known as the "City and County of San Francisco." Any one officer is no less so than another. The legislature could then have made of the new corporation anything it chose, and it chose to create a consolidated government, upon which it imposed the duties, and to which it granted the powers, both of a city and of a county. It was thus enabled to maintain the relation of the state to the territory as a county, and to give to the inhabitants the benefit of a city government. But the officers of the consolidated government, who had the powers and performed the duties elsewhere performed by county officers, did so as officers of the new consolidated municipality. These powers and duties were expressly conferred upon them in the act of 1856 as officers of the municipality. Section 4 of that act provides, "All the existing provisions of law defining the powers and duties of county officers, except those relating to supervisors and boards of supervisors, so far as the same are not repealed or altered by the provisions of this act, shall be considered as applicable to officers of the said city and county of San Francisco, acting or elected under this act." We cannot, therefore, select certain officers, and say that they are county officers, and of others that they are city officers; for all are municipal officers, and municipal officers only. Therefore, if it be true that the legislature cannot in this mode change the terms of the officers of the municipality, because that would be to alter the charter, this law can have no application to the city and county of San Francisco. It would not follow from this that general laws affecting the powers and duties of county officers would not apply to the officers of the consolidated city and county. The idea of a consolidated government of this character is that thereby the state provides for the inhabitants of the included territory the benefit of a county government. To do this effectually such laws must apply to the consolidated government. As to the corporate existence of the municipality and the officers through whom the corporate functions shall be discharged, no reason exists why such interference should be allowed; and, if it were conceded that the legislature could so change the municipal charter, we cannot presume that it was intended. It was not necessary that the act shall include the consolidated city and county, in order that the law shall have a general and uniform operation. The city and county of San Francisco is not a mere county, but is recognized in the constitution itself, again and again, as constituting a class apart. Of course, if it is a municipal corporation, and therefore the legislature cannot thus change its charter, this point need not be further discussed. In my opinion, the legislature did not intend to ordain that some of the officers should hold office for four years, and others for two, there being no reason for the difference.

I concur: BEATTY, C. J.

114 Cal. 289

## DUBOIS v. SPINKS et al. (Sac. 109.)

(Supreme Court of California. Sept. 18, 1896.)

SALE—STATUTE OF FRAUDS—SUFFICIENCY OF DELIVERY.

Plaintiff purchased and took a bill of sale for wood piled on land of a third person, and subject to a lien for the cutting. The wood was measured and formally delivered, but was not moved. Within 3½ hours thereafter, the seller paid off the lien of the choppers out of the money received from plaintiff. *Held*, that there was a sufficient delivery and change of possession, within Civ. Code, § 3440, declaring void, as against creditors, a transfer of personalty, unless there is an immediate delivery, followed by a continued change of possession.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by M. Dubois against Alfred Spinks and D. Dierssen. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Holl & Dunn, for appellants. White, Hughes & Seymour, for respondent.

VANCLIEF, C. Action to recover damages for the conversion of 120 cords of wood. On October 12, 1894, John A. Meyer and his wife entered into a contract with two Japanese, by which the latter agreed to cut wood on land belonging to the former. The Japanese on the same day leased from T. D. Scriver a portion of his land, and by the agreement they were to haul the wood from the land where it was to be cut and pile it upon said leased land, and retain the possession of the wood until the price for cutting the same should be fully paid. Subsequently there was a change in the agreement as to the hauling, it being modified, verbally, so that the hauling might be done by the Meyers, and they were to be allowed a reduction therefor. Under the agreement about 126 cords of wood were hauled prior to November 20, 1894, and piled by Scriver's direction in two tiers outside and along and near his fence. On November 20, 1894, while the wood was so placed, the Meyers, for the purpose of raising money to pay the Japanese, borrowed the sum of $220 from the plaintiff, delivering to him their promissory note therefor; and, at the same time, and as security for its payment, they executed to him a bill of sale for said wood. After the bill of sale to plaintiff was signed, Meyer and his wife went with plaintiff and pointed out the wood to him, and measured it with a tape line. Meyer then said: "Mr. Dubois, there is the wood. It is yours. Do what you like with it." Within 3½ hours thereafter Mrs. Meyer paid the Japanese for the cutting of the wood, and they released their lien and possession. The wood was not marked in any way, nor was it moved. It was understood by plaintiff and the Meyers that whatever security the Japanese had on the wood should inure to the benefit of plaintiff. On November 23, 1894, the wood was seized by the defendant Spinks, a constable, on a writ of execution issued out of a justice's court upon a judgment in favor of defendant Dierssen against said J. A. Meyer. No notice of garnishment was served on plaintiff. On December 4, 1894, plaintiff served upon defendant Spinks a verified claim in writing, stating that he claimed the wood under a bill of sale from John A. and Agnes M. Meyer. On December 6, 1894, and before the sale of the wood on execution, plaintiff informed defendant Spinks that he had loaned the Meyers $220 on the wood, and held a promissory note dated November 20, 1894, payable 60 days from date. The wood was sold in pursuance of said levy, and purchased by the defendant Dierssen. The court below gave judgment in favor of plaintiff for $312.50. The appeal is from the judgment, and from an order denying defendants' motion for a new trial.

1. Appellants contend that the transfer of the wood was void against them, for want of an immediate delivery, followed by an actual and continued change of possession, as required by section 3440 of the Civil Code, and decisions construing it. What constitutes an immediate delivery, or an actual and continued change of possession, in the sense of section 3440 of the Civil Code, is a question of fact to be determined on the evidence; and where, as in this case, the evidence tends to prove such delivery and change of possession, the finding of the court will not be disturbed. Porter v. Bucher, 98 Cal. 459, 33 Pac. 335; Claudius v. Aguirre, 89 Cal. 503, 26 Pac. 1077. In Samuels v. Gorham, 5 Cal. 226, it was said: "By immediate delivery is not meant a delivery instanter, but the character of the property, and its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirement of the statute." This case was cited and approved in the case of Carpenter v. Clark, 2 Nev. 246, in which Lewis, C. J., said: "Perhaps a delay of two or three days in making a delivery, after the sale is otherwise complete, might not be sufficiently immediate to meet the requirements of the statute. That is a fact, however, which is to be determined by a consideration of all the circumstances of each case." Bassinger v. Spangler, 9 Colo. 189, 10 Pac. 809, is to the same effect, wherein the court said: "The fact that the property was sold one day to the plaintiff, and not delivered until the next day, does not render the sale void, if it appears in evidence that the delivery was impossible on the day of sale; and it is properly a question for the jury to answer wheth-

er the property was so situated and the parties were so located at the time of the making of the sale that instant delivery could not be made, and whether it was made as soon thereafter as practicable." See, also, Parks v. Barney, 55 Cal. 239; Hesthal v. Myles, 53 Cal. 623; Redington v. Nunan, 60 Cal. 632. Considering the ponderous and bulky nature of the 126 cords of wood, it was not necessary to change its situation for the purpose of effecting a delivery of possession (Hutchins v. Gilchrist, 23 Vt. 86); and, had the order of the acts constituting the whole transaction been reversed, there could have been no question that they constituted an immediate delivery. But, since all those acts were done within 3½ consecutive hours, I think that, under the circumstances, the court may have properly considered the satisfaction and release of the lien held by the Japanese, and the delivery of the wood to plaintiff, as parts of the same transaction, and substantially contemporaneous. As soon as practicable after the money loaned by plaintiff was received by the Meyers, Mrs. Meyer paid the demand for which the wood was held in pledge by the Japanese, and they released their lien, thus removing all valid objections to plaintiff's rightful possession of the wood. It makes no difference whether the transaction be a sale or a pledge, since, in either case, it is a "transfer of personal property," in the sense of the statute. Woods v. Bugby, 29 Cal. 476; Hilliker v. Kuhn, 71 Cal. 214, 16 Pac. 707.

2. It is next contended by appellants that, if in plaintiff's favor at all, the judgment should have been limited to the amount of the debt due from the Meyers to him. The only case cited to sustain this view is Treadwell v. Davis, 34 Cal. 601. But in that case it was held that the plaintiff, a pledgee, was entitled to recover the full value of the property, in an action against the sheriff, on the ground that the sheriff, instead of seizing the property itself, should have served a notice of garnishment. The interest of the pledgor may be reached under an execution, but it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. By pursuing the latter course the sheriff became a trespasser, and therefore could not be said to be in privity with the pledgor. The same rule should apply here.

3. Appellants claim that plaintiff was not entitled to judgment because he did not make such a claim upon the defendant constable as is required by section 689 of the Code of Civil Procedure. The claim did not state that the plaintiff had taken the wood in pledge. It stated, however, that he was entitled to possession under the bill of sale. And that was true. I think the notice was sufficiently explicit. Section 689 is intended solely for the protection of the officer making the levy, and the notice was sufficient for that purpose.

4. The view of the case above taken renders it unnecessary to discuss in detail the alleged errors in the admission of evidence. It need only be said that such evidence was relevant for the purpose of showing the situation of the wood, as bearing upon the questions of delivery and change of possession. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

114 Cal. 255

## WELLS v. WOOD. (S. F. 246.)

(Supreme Court of California. Sept. 16, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT —ASSESSMENT.

1. A description of a street improvement, in a resolution of intention and subsequent proceedings, as "grading and macadamizing," is sufficient to authorize a regrading and remacadamizing, where the street for a part of its width had been graded and macadamized some 15 years previously.

2. Where a lot is assessed for more than its proper proportion of the cost of a street improvement, and the owner fails to appeal from the assessment, the error is waived.

3. The failure of the superintendent of streets of a municipal corporation to record a contract for a street improvement at the proper time does not affect the right of the contractor to enforce the lien of a street assessment levied to pay the contract price.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Joseph Wells against Joseph M. Wood. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Joseph M. Wood, in pro. per. Edwin C. Knapp and William H. Chapman, for respondent.

VANCLIEF, C. Action to enforce lien of street assessment in the sum of $101.46 for labor and material performed and furnished by plaintiff's assignor under contract with the superintendent of streets in improving Mission street, in the city of San Francisco, from Cortland avenue to West avenue. The judgment was in favor of the plaintiff for the sum demanded, and defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. On the trial defendant proved that the portion of Mission street to which said contract related had been graded, curbed, and macadamized to official grade in March, 1877, about 14 years prior to the letting of the contract in question, and also proved that in 1888, by order of the board of supervisors, that part of Mission street involved in this action had been widened by adding 16½ feet to the eastern side thereof. On June

1, 1891, the board of supervisors passed a resolution of intention to order the improvement in question, describing it as follows: "That Mission street, from Cortland avenue to West avenue, be graded to the official line and grade, that redwood curbs and rock gutterways be laid thereon, and that the roadway and sidewalks thereof be macadamized." In all the subsequent proceedings, including the contract, the improvement was described as in the resolution of intention, except that certain specifications, in accordance with general orders of the board, were added to the contract. The principal ground upon which appellant claims a reversal of the judgment is that the improvements were not properly nor sufficiently described in the resolution of intention nor in the subsequent proceedings; that while the work done on the addition of 16½ feet to the east side of the street may have been grading and macadamizing, that done on the old part of the street was regrading and remacadamizing, and should have been so denominated. Waiving other possible answers to this objection, I think the description of the proposed work was sufficient. The substantial nature of the work of grading and that of regrading is the same, namely, grading. The latter is only a repetition of the former. The statute requires only a description of the work; that is to say, an intelligible description, sufficient to notify owners of lots fronting on the proposed improvement of the nature and extent of the work of which the improvement is to consist. It would add nothing material to such notice to inform the lot owners that work of the same kind, in the same place, had been done 10 or 15 years before, since they are bound to pay for a repetition of the work whenever, in the discretion of the board of supervisors, such repetition is deemed necessary. McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885. The fact that the street had been graded and macadamized 15 years before the proposed repetition of such grading and macadamizing constituted no defense to this action, even if it had been pleaded as such; nor, as evidence, did it tend to rebut the prima facie case of plaintiff, as proved by the assessment, warrant, diagram, etc.

2. It is contended that the amount of the whole assessment was not equally distributed to the lots fronting on the improvement, and that defendant's lot was assessed for more than its proper proportion. Defendant's lot fronted on the improvement, and was lawfully assessable. If it was assessed for more than its lawful proportion, the defendant waived the error by failing to appeal to the board of supervisors, and the error cannot be corrected on this appeal. Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034; Warren v Riddell, 106 Cal. 352, 39 Pac. 781.

3. The point that the superintendent of streets failed to record the entire contract at the proper time, even if conceded, is of no consequence as affecting any right of the contractor. Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885. But the record furnishes no ground for this point, since due recordation of the contract is alleged in the complaint and is not denied in the answer. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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114 Cal. 350

## PEOPLE v. EPPINGER. (Cr. 131.)

(Supreme Court of California. Sept. 19, 1896.)

CRIMINAL LAW—JUDGMENT—NEW TRIAL.

1. On a conviction under an indictment charging the making and passing of a fictitious check with intent to defraud (Pen. Code, § 476), it is error to enter judgment of conviction of forgery (section 470), though the penalty is the same for both offenses.

2. A motion for new trial, or permission to make such motion, on the ground of newly-discovered evidence, is properly denied,—no affidavits being produced or offered, or statement made of the nature, character, or time of discovery of the evidence.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco, William T. Wallace, Judge.

W. L. Eppinger appeals from a judgment entered on a conviction under an indictment charging the making and passing of a fictitious check with intent to defraud. Reversed.

W. M. Cannon, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. On April 4, 1895, the defendant was convicted under an indictment for passing and publishing a fictitious check, with intent to defraud, and which also charged a prior conviction for petit larceny. A verdict of guilty was returned by the jury as to making and passing the fictitious check, but the verdict was silent as to the prior conviction for petit larceny. An appeal was taken from that judgment to this court, and the court below was directed to treat the verdict as a finding against the defendant upon the crime charged and in favor of the defendant upon the question of prior conviction, and the judgment was reversed, with directions to the trial court to pronounce a judgment and sentence upon defendant, in the exercise of his discretion, upon the facts and circumstances of the case, as provided for by section 476 of the Penal Code, and further directing the court that the judgment should designate the offense as the making, passing, and publishing a fictitious check with intent to defraud. 109 Cal. 294, 41 Pac. 1037. On November 8, 1895, after the remittitur had gone down from this court, the defendant was called for judgment, and was asked if he had any legal cause to show why judgment should not be pronounced against him. As to what then occurred the bill of exceptions taken by the defendant shows the following facts: "The defendant thereupon, through his counsel, did not make a motion for a new trial, but offered and requested permission to make a motion for a new trial, upon the ground that, since the taking of the last appeal, new evidence had been discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. The defendant did not offer or request permission to read in support of said motion any affidavit, and, being called on to state what the newly-discovered evidence was, the counsel declined to do so." The court refused to allow the said motion for a new trial, and to its refusal the defendant excepted, and assigns the same as error. The court thereupon rendered judgment as follows: "That, whereas, the said W. L. Eppinger having been duly convicted in this court of the crime of felony, to wit, forgery, it is therefore ordered, adjudged, and decreed that the said W. L. Eppinger be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of fourteen years." And from this judgment the defendant appeals, upon the judgment roll and a bill of exceptions. Upon this record two questions are made and argued by appellant: (1) That the charge upon which he was tried and convicted was for making and passing a fictitious check with intent to defraud, while the judgment is for a different offense, namely, "forgery." (2) That the court erred in refusing to permit him to make a motion for a new trial.

1. The indictment upon which the defendant was tried and found guilty was held, upon the former appeal, to charge the crime of making and passing a fictitious check, with intent to defraud. As to the correctness of that ruling no question is made by either party. That the crime of forgery as defined in section 470 of the Penal Code, and that of making and passing a fictitious check with intent to defraud, under section 476 of the same Code, are different offenses was held in People v. Elliott, 90 Cal. 586, 27 Pac. 433. In that case the defendant was charged with forging a certain check signed "A. F. Rice & Co." This court said: "If we assume that there was such a firm in existence, then the judgment must be reversed, and a new trial ordered, by reason of the insufficiency of the evidence in not showing that the check was not signed by such firm. If we assume there was no such firm in existence, then the check was a fictitious check, and the prosecution should have been had under section 476 of the Penal Code, and the case must be reversed upon that ground. From the facts set forth in the information, it is apparent that it was filed and conviction had under section 470 of the Penal Code, which section is quite broad in its scope, but not sufficiently broad to include matters contained in section 476." See, also, People v. Eppinger, 105 Cal. 36, 38 Pac. 538. In People v. Johnson, 71 Cal., at page 388, 12 Pac., at page 262, it is said: "The clerk has no power to enter, and it is at least error in the court to direct, a judgment declaring that a defendant has been convicted of one offense when in fact he has been convicted of another and distinct offense. The entry of a judgment declaring that a defendant has been convicted of an offense of which he has not been convicted is more than a mere 'technical' error. A judgment is a solemn record, which is ordinarily conclusive evidence of the facts recited in it, and we ought not to permit such evidence to stand, when, on direct appeal, it appears that the matters recited in it are not true. Inasmuch as no proper judgment has been entered in the court below, the judgment in form must be set aside, and a proper judgment entered." In that case the information charged an embezzlement, while the judgment was for grand larceny; and there, as in this case, the penalty is the same for the offense charged as for that named in the judgment, and it was contended that the error in the judgment did not affect any substantial right of the parties; but this court cited section 1207 of the Penal Code, which provides: "When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had," etc.,—and said: "There can be no doubt that this statement of the offense is part of the judgment." It may be added that accuracy in the designation of the offense is rendered more important under the provisions of the Penal Code, which authorizes the fact of a previous conviction of another designated offense to be charged in the indictment or information, and which requires the jury to find upon it, unless the defendant admits it. If the record of the previous conviction should show that the indictment charged a forgery, and the judgment was for a different offense, which of the different offenses should be charged in the indictment, and which would be sustained by the record? These are questions which we do not propose to answer now, but which we may have to answer if the judgment in its present form is permitted to stand.

2. It is not quite clear, from the record, whether the defendant made a motion for a new trial, or asked permission to make such motion. The bill of exceptions is not clear upon the point, while the judgment recites that a motion for a new trial was made, and denied by the court. In either case, however, the ruling was right. The grounds of the motion, or proposed motion, were stated by counsel to be the discovery of new evidence after the former appeal had been taken.

No affidavits, either of the defendant or his counsel, or of the persons by whom the newly-discovered evidence could be given, were produced or offered; nor was there any statement by counsel of the nature or the character of the newly-discovered evidence, or when it was discovered, or that its discovery was so recent as to prevent the obtaining of the affidavits by the use of reasonable diligence. The question discussed by counsel as to the right of a defendant to show cause against a new judgment need not be considered. That question does not necessarily arise upon this appeal. Appellant, however, asks that the judgment be reversed, with permission to show cause against a new judgment in the manner provided by sections 1200 and 1201 of the Penal Code. Without considering or deciding the question of defendant's right under those sections to show cause why a proper judgment should not be rendered, it is sufficient to say that there is nothing in the record before us which indicates that the defendant has any grounds for such motion, and the request of counsel should therefore be denied.

The judgment appealed from should be reversed, with directions to the court below to render judgment against the defendant for the offense of making and passing a fictitious check with intent to defraud.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to render judgment against the defendant for the offense of making and passing a fictitious check with intent to defraud.

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(114 Cal. 338)

## PEOPLE v. WHITEMAN. (Cr. 119.)

(Supreme Court of California. Sept. 19, 1896.)

FORGERY—EVIDENCE—GUILTY KNOWLEDGE — ORDER OF ADMITTING EVIDENCE.

1. In a prosecution for forging and uttering a check, the admission in evidence of the certificate of protest of the check, while erroneous, was not prejudicial, where the fact of nonpayment of the check was admitted.

2. On a trial for forging and uttering a check, other checks, signed by different names, though shown to have been issued by defendant at about the same time, and to have been protested, are not admissible to prove guilty knowledge, without proof that they were forged.

3. The fact that letters of a defendant, containing admissions, were admitted in evidence before the corpus delicti had been proven, will not authorize the reversal of a judgment of conviction, the order of testimony being largely discretionary with the trial court.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

A. J. Whiteman was convicted of forgery, and from the judgment, and an order denying a new trial, he appeals. Reversed.

W. S. Hinkle, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant was convicted of forging and uttering a check which purported to be the check of one Frank Dixon. The check as described was drawn in favor of defendant upon the Traders' & Importers' Bank of New York. The appeal is from the judgment and an order refusing a new trial.

The first point made by appellant is that the court erred in admitting in evidence the protest which accompanied the check which it is charged was forged and uttered by the defendant. It is not seriously denied that this ruling was error, but it seems impossible that injury could have resulted therefrom to defendant. The only materiality in the evidence, and the only way in which injury could have resulted, is that it tended to show that the check was not paid upon presentation in New York. But this was never a fact in controversy. It was proven in many ways, and was admitted by the defendant.

The next point relates to the admission of four other checks which there was evidence tending to show defendant negotiated, and upon which he obtained money, and which were not paid by the drawees. They were each objected to as incompetent, irrelevant, and immaterial, and also upon the ground that there was no proof even tending to show that the check set out in the indictment was a forgery. The checks all purported to be drawn upon banks of the city of New York. The first was as follows: "No. 876. New York, M'ch 27, 1894. $200. The Importers' and Traders' National Bank of New York, through the New York Clearing House Association: Pay to A. J. Whiteman, or order, two hundred dollars. $200. G. S. Hyman." Indorsed: "A. J. Whiteman." It was accompanied by a protest for nonpayment which was also read in evidence. It was shown that the defendant had procured money upon this check from one Maxwell, who is the same person upon whom the check mentioned in the indictment had been passed; also, that the check had been presented to the bank in New York, and payment was refused, and that defendant, upon being informed of the fact, had repaid the money to Maxwell. The prosecution produced no evidence whatever tending to show that the check was forged, and none to show G. S. Hyman was a real person, and, of course, none to show that, if he was a real person, he had not authorized defendant to use his name in that way. Possibly this statement should be qualified in one respect, for, after all the checks had been read in evidence, as well as certain letters which it was admitted defendant wrote, an expert upon the examination of the handwriting testified that in his opinion they were all in the same handwriting. But, if this evidence tended to prove that they were all written by the defendant, there was still wanting evidence that the apparent drawer was a real person, or, if he was, that he had not authorized such use of his name. Another of the checks was for $250, drawn on the Bank of Commerce of New York, March 27, 1894. It purported to have been signed by S. W. Williams, and was payable to E. A. Delafield, or order. Delafield, it was proven, was an alias by which defendant was then known. The check was indorsed, "Pay to the order of A. J. Whiteman. E. A. Delafield," and had upon it the indorsement, "A. J. Whiteman." There was proof that the defendant had passed this at the Bank of California, and had been enabled to do so through the indorsement of Thomas Day & Co., who ultimately had to pay the check to the Bank of California. As to this check, also, there was a total lack of evidence as to its being a forgery, except as in the case of the last-mentioned check. Another check, dated April 1, 1894, was drawn upon the Importers' & Traders' Bank of New York, and purported to have been signed by Ensign & Carney. Defendant procured money upon it from W. F. Roeder. It was shown that the check had been presented to the drawee, and that payment was refused. The proof in regard to its being a forgery was exactly as in regard to the first-mentioned check. Still another of the checks was dated New York, March 24, 1894. It purported to have been drawn by E. A. Delafield. It was indorsed by defendant in that name, and by him negotiated. It was shown that payment had been refused. As in the case of the other checks, there was no proof of the forgery, or the existence of the apparent drawer, or of lack of authority.

The prosecution was also permitted to prove that defendant was registered at the Occidental Hotel under the name of E. A. Delafield, and while there he procured money from the cashier of the hotel upon three checks drawn on the Importers' & Traders' Bank of New York. The checks purported to be drawn by J. A. Delafield & Co. in favor of E. A. Delafield, and were indorsed by him in that name. There was also some effort to show that in all of the checks put in evidence the same blank forms had been used. One of the three last-named checks was forwarded to New York, and presented to the bank, and payment was refused. Upon being informed of this, the defendant refunded the money, and took them all up. They were, therefore, not produced, and, of course, as to them, there was not the slightest attempt to prove that they had been forged. As Delafield was confessedly an assumed name, it is probable that the signature J. A. Delafield & Co. was a fictitious firm. There was, however, no proof upon that subject.

We have here, then, including the check described in the indictment, eight different checks, for small sums, purporting to have been drawn by five different drawers upon New York banks. They were all negotiated within a few days in San Francisco, and none were paid on presentation. Letters written by the defendant were also read, in which he seems to admit that he did not think they would be paid. But as to none of them was there evidence that they had been forged. No evidence short of conclusive proof of guilt could have been more damaging. At least, this evidence tended very strongly to prove that the defendant was a cheat and reckless swindler. The evidence was admitted only for a limited purpose, and, in the charge of the court, its effect was expressly restricted to that purpose. When one of the checks was offered, and had been objected to, the court said: "I understand that all these matters are simply to show guilty knowledge in the transaction mentioned here, and for no other purpose." To which the prosecuting attorney responded, "Yes, sir." In the charge the court said: "Now, in order to show guilty knowledge, the prosecution have been allowed to introduce before you cases of other checks alleged by them to have been forged; but you will be careful to remember that such evidence is applicable only to the question of guilty knowledge." The jury was also told, as to the principal check, that the fact that there were no funds to meet it did not tend to prove that the check was forged. These checks were not, then, offered or received for the indorsements which were admitted to be in the handwriting of defendant, for the purpose of comparison, nor as the basis of a theory tending to show that all the checks were forged, but to show guilty knowledge only. But there was no proof that the other checks were forged, and, therefore, it was not shown, nor was there evidence tending to show, that about the same time the defendant had passed other forged checks. When the fact of guilty knowledge becomes material, it must appear that the check described in the indictment was itself a forgery. Proof that defendant passed other checks which were forged cannot be introduced, when unaccompanied with other inculpating facts, to establish the corpus delicti. And, when the body of the offense has been established, and that defendant passed the check, and it is sought to show guilty knowledge by the fact that defendant also passed other forged paper, the prosecution assumes the same burden as to all the other checks introduced. It must show that such checks were forged.

The evidence did tend very strongly to prove the defendant a swindler, and I have no doubt that it would be much easier to convince a jury that defendant forged the Dixon check after they had been convinced that he was a swindler. And such an impression is natural and reasonable. But to allow proof of the bad character of a defendant as a step in the proof of guilt has never been the policy of the law. On the contrary, pains is sometimes taken to prevent knowledge of the bad character of the defendant from reaching the jury. Thus, where a defendant has been previously convicted of an infamous offense, and such fact is charged in an indictment, a method is devised by which a defendant may prevent that part of the indictment from being read to the jury. As to the three checks which were not produced there was no evidence of their genuineness, and, as to the others, none except that the expert testified that all were in the same handwriting, as were also certain letters which it is admitted defendant wrote. There was no evidence that the persons by whom the checks purported to be drawn were real persons, and none that, if they were real persons, defendant was not authorized to use their names.

It is stated—perhaps through some misapprehension—that the learned judge of the trial court ruled that it was incumbent on the defendant to show that he had such authority, after it has been shown that he has drawn checks in the name of another. The attorney general does not contend for any such doctrine, and it is repudiated in the charge of the court in this case. The jury were told: "When an accused man pleads not guilty, as he has pleaded here, immediately there arises a presumption of innocence in his favor, which accompanies him all through the trial, and never deserts him." To prove that an accused person signed the name of another to an instrument, and that he passed such instrument as genuine, does not prove the commission of a crime. It must still be shown that it was a false instrument, and this is not proven until it is shown that the person who signed another's name did so without authority. Until this proof is made, it is not shown to be a false instrument, and the defendant is not put to his proof at all. The defendant, when on the stand, admitted that he drew two of the four checks which were produced at the trial, and that he negotiated them. He claimed, however, that he had authority from the drawers to so use their names. Waiving the necessity of corroborating evidence as to the corpus delicti, would any one contend that this proved forgery? Suppose that he had admitted that he drew the Dixon check, and claimed that he had authority from Dixon to draw it, would this admission have put the burden upon him to show such authority? It would be a new departure in criminal law. It arises from a difficulty which is inherent in our system. We have inherited the idea, which we carefully place in all our constitutions, that an accused person must be confronted by his witnesses in court. State process cannot cross state borders, and hence justice is sometimes defeated. The courts have not created the difficulty, and cannot provide a remedy by depriving a defendant of the presumption of innocence, and putting the burden upon him.

I do not think there was reversible error in admitting letters of the defendant which contained certain admissions before there was proof of the corpus delicti. The rule is that there must be other and independent proof that a crime has been committed by some one. Then it can be shown by the extrajudicial confessions that defendant is the guilty party. In some cases it has been held that the order of proof is material. That it is the fairer course that there should be independent proof, first, as to the body of the offense, cannot be doubted. But I do not think a case should be reversed merely because of a departure from the natural and just order of evidence.

It is said that the case must be reversed because the prosecution produced no evidence that defendant was not authorized to use Dixon's name, and also because they did not show that Dixon was a real person. Perhaps there was no such evidence when the prosecution rested, but, after the court had refused an application to instruct the jury to acquit the defendant, he voluntarily took the stand as a witness, and supplied the evidence which had been lacking. If there was error, it was thus cured. For the error above indicated, however, the cause is remanded and a new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

114 Cal. 356

## ROBRECHT v. REID et al. (S. F. 305.)

(Supreme Court of California. Sept. 19, 1896.)

EJECTMENT—TITLE TO DEFEAT RECOVERY.

Recovery by plaintiff in ejectment of premises which he claims under foreclosure of mortgage cannot be defeated by one not connecting himself with the title, by a showing that, three years before execution of the mortgage, the mortgagor was declared a bankrupt under the federal laws, and that the register in bankruptcy then conveyed to the assignee in bankruptcy the bankrupt's property,—notice of the assignee's appointment not having been published, and the assignment to him not having been filed for seven years, though Rev. St. U. S. § 5054, required immediate publication of the notice, and recording of the assignment within six months; and it appearing that the mortgagee never had notice of the bankruptcy proceedings till after the foreclosure, and that nothing was done by the court or assignee in bankruptcy till nearly seven years after appointment of the assignee, when he sold out his claim to the property, worth $7,000, for $50, and the mortgagor having till then remained in undisturbed possession, claiming the property as his homestead.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Ejectment by Anthon Robrecht against George W. Reid and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Scrivner & Schell and Horace Hawes, for appellants. E. R. Taylor, for respondent.

BELCHER, C. This is an action of ejectment to recover possession of a lot of land in the city of San Francisco. The complaint is in the usual form, alleging ownership and right of possession in the plaintiff, and his ouster by defendants, and the damages sustained. The answer admits that defendants are in possession of the lot, but denies that plaintiff is the owner or entitled to the possession thereof, and alleges ownership and right of possession in the defendant Reid. The case was tried by the court without a jury, and the findings and judgment were in favor of the plaintiff, from which judgment, and an order denying their motion for a new trial, defendants appeal.

The facts proved are, in substance, as follows: The lot in question is situated between Seventh and Eighth streets and Folsom and Clementina streets. It has a width of 25 feet, facing on the two last-named streets, and a length of 160 feet between them. There are two two-story buildings on the lot, one fronting on Folsom and the other on Clementina street, and there is a fence, between them, with a gate or opening through it for passage from one house to the other. Both houses were constructed for use as flats, except the lower story of the one on Folsom street. The front part of that story was intended for a store, and in the rear were rooms for family use. In March, 1874, one P. F. Cusick became the owner of the said lot, and on July 26, 1878, he, his wife joining with him, executed in proper form a declaration of homestead thereon, and on the next day caused the same to be duly recorded. At that time he was residing with his family on Langton street, but, the night before executing the declaration of homestead, he and his wife went to the Folsom street house and slept there, on a mattress, in one of the back rooms in the lower story. They took their supper that night and their breakfast the next morning at their house on Langton street, but a few days later they moved into the Folsom street house, and thereafter made it their place of residence. On July 30, 1878, Cusick filed, in the United States district court for California, his petition in bankruptcy, with accompanying schedules, showing, among other things, that the property here in controversy was incumbered by a mortgage to one Portal for $5,000, bearing interest at the rate of 12 per cent. per annum, and on August 7th he was regularly adjudged to be a bankrupt under the federal bankrupt laws then in force. Thereafter, on September 2d, one J. H. B. Wilkins was regularly chosen and appointed assignee of the estate of said bankrupt, and on that day the register in bankruptcy, by an instrument in writing, assigned and conveyed to the said assignee all the estate, real and personal, of the said bankrupt. No notice of the assignee's appointment was published, and the assignment to him was not filed in the office of the clerk of the court or recorded in the office of the county recorder until April, 1885, though the immediate publication of such notice and the recording of such assignment within six months were required by the bankrupt act (Rev. St. U. S. § 5054). Cusick remained in possession of the said property, using a portion thereof as a place of residence for himself and family, and collecting the rents for the portions leased to tenants, until March 3, 1881, when, to pay off the mortgage thereon to Portal for $5,000 he borrowed from plaintiff the sum of $5,100, for which he and his wife executed to plaintiff their promissory note, payable two years after date, with interest at the rate of 10 per cent. per annum, and also at the same time executed to him a mortgage on the said premises to secure payment of the said note. To complete the transaction all the parties met at the city hall, and the plaintiff then, at the request of Cusick, paid the money loaned to Portal, who then satisfied his mortgage. Before making the loan plaintiff employed an attorney to examine the title, and after an investigation the attorney reported to him that it was good. Neither the plaintiff nor his attorney had ever had any knowledge or notice of any of the said bankruptcy proceedings. The said note not being paid, plaintiff commenced an action in the superior court of the city and county of San Francisco against Cusick and his wife to foreclose his mortgage, and such proceedings were had therein that on March 26, 1885, a judgment and decree was duly given and made foreclosing the same, and adjudging that the whole amount of principal and interest due thereon was unpaid and owing from the defendants to plaintiff, and directing that the mortgaged premises be sold for the purpose of satisfying the mortgage lien. Under this decree the said premises were regularly sold by the sheriff and bid in by the plaintiff, and on September 29, 1885, he obtained a sheriff's deed therefor, which was duly executed, acknowledged, and recorded. So far as appears, nothing, except as above stated, was done by the court or the assignee in the bankruptcy proceedings until April 6, 1885, when the assignee executed to the defendant a deed of the said premises, who thereupon took possession of the same, and thereafter retained such possession up to the time of the trial. The consideration for the deed was $50, and it was proved that the value of the said property at that time was more than $7,000. Shortly after obtaining his deed the defendant commenced an action against the plaintiff herein to quiet his title to the property, and on appeal to this court it was held that the deed was void and conveyed no title. Reid v. Robrecht, 102 Cal. 520, 36 Pac. 875.

Upon these facts the appellant contends that the findings of the court were not justified, and that the judgment should therefore be reversed. This contention is based upon the following propositions: (1) That the declaration of homestead executed and filed by Cusick and his wife was invalid and of no effect, because the declarants were not at the time of executing the same actually residing upon the property. (2) That, when the register assigned the property of the bankrupt to the assignee, the assignment related back to the commencement of the proceedings in bankruptcy, and vested the title to the property in the assignee as of that time. (3) That, when Cusick and his wife executed the mortgage to the plaintiff, they had no estate or interest in the property, and could not incumber or convey the same in any way whatever, and hence the mortgage created no lien on the property. (4) That the fact that the plaintiff loaned his money to pay off a pre-existing valid mortgage on the property did not in any way subrogate him to the rights of the prior mortgagee. (5) That it is immaterial whether the plaintiff had notice of the bankruptcy proceedings when he took his mortgage, as under the bankrupt law a purchaser from the bankrupt can acquire no right to property vested in the assignee, whether he has notice of the proceedings or not. (6) That it was competent for the defendant to defeat the plaintiff's title by showing, as he did, that the title was outstanding in the assignee.

We do not deem it necessary to discuss these several propositions at length, for, conceding that each one of them is sound, still they are not, in our opinion, controlling in this case. It is true that in an action of ejectment, when the plaintiff relies upon a paper title, the defendant may show the true title with right of possession to be outstanding in a third person, without connecting himself with it, and may thus defeat the action. Moore v. Tice, 22 Cal. 514; Simson v. Eckstein, 22 Cal. 581; Dyson v. Bradshaw, 23 Cal. 528; Cranmer v. Porter, 41 Cal. 462. Here it appears that Cusick and his wife remained in undisturbed possession of the property, claiming it as their homestead, for nearly seven years after the bankruptcy proceedings were commenced. This possession was evidence of an admitted right on their part to the possession of the property, and was certainly sufficient to have enabled them to maintain an action to dispossess any mere intruder upon it. And that this right was recognized by the assignee is shown by the fact that, during all the time named, he took no steps to obtain possession of the property himself, as it would otherwise have been his duty to do, and at the end simply sold out his claim thereto for $50, when the property was in fact then worth more than $7,000. But, when the plaintiff obtained the sheriff's deed under the foreclosure proceedings, he succeeded to all the rights of the mortgagors, whether existing at the time the mortgage was executed or subsequently acquired, and was therefore entitled to maintain his action against the defendant, who in no way connected himself with the title. The bankrupt law provided as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a third person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." Rev. St. U. S. § 5057. Whether, in view of this statute, the assignee, at the time he made his deed to the defendant, could have maintained an action to recover possession of the property, is a question which does not arise here, and need not be considered. In any event, however, the defendant should not be permitted to defeat this action by the showing made as to the title of the assignee. It follows, in our opinion, that the findings of the court were justified, and that the judgment and order should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(114 Cal. 266)

### TONINI v. CEVASCO et al. (S. F. 220.)[1]

(Supreme Court of California. Sept. 17, 1896.)

LIBEL — PLEADING DAMAGES — CONSTRUCTION — HARMLESS ERROR.

1. Sustaining an objection to a question, the purpose of which was to show that witness was unfriendly to defendant, if error, is harmless; witness having already testified that he was unfriendly to him.

2. Publishing, concerning one engaged in the railway and steamship ticket business, that a certain firm engaged in that business were compelled to discharge him for "conduct not irreprehensible," followed by a publication that while such person gives notice in a circular that he is no longer with such firm, but has moved his business, "as a matter of truth, and to guard the public against any surprise, we must confirm the statement, already publicly made," that he "has not moved away, but has been discharged" by said firm "for conduct not irreprehensible," is libelous per se, so that special damages need not be averred or proved; Civ. Code, § 45, defining "libel" as a false publication "which exposes any person to * * * obloquy."

3. That the court, in an action for libel, left to the jury the determination of the meaning of the publications, with instructions that they were to be taken in the sense that is most natural and obvious, and in that sense in which those persons to whom the publications should come would be most likely to understand them, cannot be complained of by defendant; the publications being such as might properly be construed as defamatory.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by M. G. Tonini against Cevasco & Crespi. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Wm. J. McGee and Jos. F. Cavagnaro, for appellants. Gordon & Young, for respondent.

McFARLAND, J. This is an action to recover damages for an alleged libel by the defendants, in a newspaper owned by them, to the injury of plaintiff. The jury rendered a verdict for plaintiff in the sum of $1,000, which, on the motion for a new trial, was reduced by the court to $500. Defendants appeal from the judgment, and from the order denying a new trial.

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[1] Rehearing denied.

Appellants' first contention is that the verdict is not sustained by the evidence, but this contention cannot be maintained. The main issues of fact were whether or not the respondent was discharged as an employé by the firm of Cevasco & Co., and whether the alleged libelous matter was true. While the evidence upon these two issues was conflicting, there certainly was sufficient evidence to warrant the jury in finding in favor of the respondent upon both said issues.

Appellants contend that the judgment should be reversed on account of errors committed by the trial court with respect to the admissibility of evidence, but we think that this position taken by appellants is not tenable. When the defendant Crespi was on the stand as a witness for respondent, he was asked by the appellants whether or not the alleged libelous article was true, and an objection by respondent that this question was not in cross-examination was sustained; and this ruling is claimed to have been erroneous. But nothing was asked witness on the examination in chief about the truth of the article, and we do not think the court erred in holding the question not proper on cross-examination. Afterwards the said witness was examined on the part of the appellants, when the whole matter of the truth of the article might have been properly gone into by the appellants, and was, to a considerable extent. Upon cross-examination of the same witness by appellants, he was asked whether or not the appellants Cevasco had not sued him on a certain note, and attached his interest in the paper, and an objection to this question by respondent was sustained. Whether or not this ruling was technically correct, it is evident that no harm could have been done to appellants by the ruling. The only purpose of the question was to show an unfriendly feeling on the part of the witness to the appellant Cevasco, but the witness had already testified that he was unfriendly with said Cevasco. When the respondent, Tonini, was being examined on his own behalf in rebuttal, and at the very close of the evidence, he was asked on cross-examination if, after the second publication made by the appellants, and set forth in the complaint, he had not also had an advertisement in a certain paper called the "L'Elvezia"; and the respondent objected to the question as not rebuttal, irrelevant, incompetent, and immaterial, and that the advertisement spoken of was after the commencement of the suit. The court sustained the objection, and appellants contend that this ruling is reversible error. We do not think that the ruling was erroneous. We do not see how the matter proposed to be proven was competent, or that the court abused its discretion in not allowing it at that stage of the trial. The foregoing are the only objections to rulings of the court as to the admissibility of evidence which are presented in the brief.

Appellants contend that the language alleged in the complaint to have been published is not libelous per se, and that, as no special damages were proved, respondent should not have recovered. At common law there was great difficulty in determining, in actions of either slander or libel, when language was actionable per se,—that is, language from which the law would presume damage,—and when is was actionable only upon averment and proof of special damage. It is quite evident that such an action can rarely be successful where the plaintiff is compelled to plead, and specifically point out and prove, the time, place, mode, and circumstance of his damage. Under the earlier decisions in actions of slander, words were held not to be actionable per se unless they imputed a crime involving moral turpitude, although, even in actions of slander, the rule was afterwards greatly relaxed. But there was always a distinction running through the cases between actions of slander and actions of libel,—between words spoken and words written or printed; and, in actions of libel, language was held actionable per se which would not have been so held in actions of slander. Some few judges thought this distinction not sound, but they admitted that it was well established by the authorities. See notes to section 18, p. 71, of Townshend on Slander and Libel. Townshend says (section 18): "To language in writing is attributed, in most cases, a greater capacity for injury than is attributable to language spoken or speech, so that language which, if spoken, gives no right to redress, may, if reduced to writing, give a cause of action." In Broom, Com. Law, 760, it is said, "There is, however, this great distinction between the two actions: that from a libel damage is always implied by law, whereas only some kinds of slander are actionable without proof of special damage"; and in 1 Chit. Gen. Prac. 45, it is said that the distinctions between slanders and libels "proceed upon the principle that the former are often spoken in heat, upon sudden provocations, and are fleeting and soon forgotten, and therefore less likely to be permanently injurious, but that written slander is more deliberate and more malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious." For the same reasons, no doubt, libel is, in most countries, a public offense, and its perpetrator may be punished criminally, while the author of spoken slander is liable only to damages in a civil action. However, in most of the states there is a statutory definition of libel, and in such case language which is fairly included in such definition is libelous per se. It is only when the libelous meaning of the publication is covert—not apparent on the face of the language used—that averment and proof of special damage is required. Our Code defines "libel" as follows: "Libel is a false and unprivileged publication by writing, pictures, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45. This definition is very broad, and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally, or with respect to his occupation.

In the case at bar it is alleged in the complaint that the parties are all Italians by race, and members of what is known as the "Italian Colony" of the city of San Francisco; that for many years plaintiff had been engaged in San Francisco in the business of railway and steamship agency, selling railway and steamship tickets, and doing all business incidental thereto; that such business was done principally with Italians; that such business required mutual confidence, and that great reliance was placed in plaintiff's honesty, honor, and trustworthiness; and that defendants are also engaged in the same business, and are business rivals of plaintiff, having their place of business at No. 632 Montgomery street, in said city. It is further averred that defendants are also the proprietors and publishers of a certain newspaper of general circulation, called "La Voce del Populo," which circulates among, and is read by a large number of, the Italian residents of said city, and is declared by defendants to be the organ of the Italian population in California, and that on November 16, 1893, and on several other occasions, the defendants published in the Italian language, in said newspaper, concerning plaintiff, certain words, which, being translated into English, are as follows: "The agency of G. B. Cevasco & Co. must state, besides, as a matter of truth, that since the first of November they were compelled to discharge Mr. M. G. Tonini for his conduct not irreprehensible." It was further averred that afterwards, on December 6, 1893, the defendants made the further publication of language, which, being translated into English, is as follows: "We have received from the agency of G. B. Cevasco & Co. the following: 'Mr. M. G. Tonini gives notice in a circular that he is no more at 632 Montgomery street, but that he has moved to another place his business.' As a matter of truth, and to guard the public against any surprise, we must confirm the statement already publicly made; that is, that Mr. Tonini has not moved away, but has been discharged by the firm of G. B. Cevasco & Co. for conduct not irreprehensible." The complaint also contains the usual averments as to defendants' intent in publishing said language; how it was understood by those who read it, etc. We think that the language charged, upon its face, tended naturally, necessarily, and proximately to produce some, at least, of the results mentioned in section 45 of the Code above quoted; that its natural effect was to expose plaintiff to "obloquy,"—among the definitions of which given by Webster are "blame, reprehension,"—and to "injure him in his occupation"; and that, therefore, no averment or proof of special damage was necessary. "To expose one to obloquy is to expose him to censure and reproach, as the latter terms are synonymous with the word 'obloquy.'" Bettner v. Holt, 70 Cal. 275, 11 Pac. 713. Surely no intelligent man could read these publications without understanding them to mean that plaintiff was not an honorable person, and had been guilty of such reprehensible misconduct as should deter people from trusting him in his occupation. It cannot be justly said that the language does not import anything of a defamatory character concerning the plaintiff. See Bettner v. Holt, 70 Cal. 270, 11 Pac. 713; Lick v. Owen, 47 Cal. 252; Edwards v. Society, 99 Cal. 431, 34 Pac. 128; Fitch v. De Young, 66 Cal. 339, 5 Pac. 364.

We do not see that, in the matter of instructing the jury, any error was committed prejudicial to appellants. It is no doubt the law that, where the language of an alleged libel is unambiguous, it is the province of the judge to determine its construction, and that where it is capable of two constructions the jury are to determine in what sense it was used. Van Vactor v. Walkup, 46 Cal. 124; Townsh. Sland. & L. §§ 281, 286. In the case at bar, while the judge did not expressly state upon which of these two theories he proceeded, still he actually left to the jury the determination of the meaning of the publications. In that state of the case, if the verdict had been for defendants the plaintiff might have plausibly made the point that he had been injured because the judge had not himself construed the language as defamatory. The verdict, however, was for plaintiff; and defendants were not prejudiced, unless upon the proposition that the language was not defamatory, and that the jury should not, and could not rightly, have found it to be of that character,—a proposition which cannot be maintained. The judge gave a large number of instructions requested by defendants, which stated their side of the case fully and fairly, and we do not think that any prejudicial injury arose out of the refusal to give a few other instructions which they asked. These latter, so far as they were correct, were fairly included in the instructions given. The jury were told, among other things, that "the publications alleged to be libelous are to be taken in the sense that is most natural and obvious, and in that sense in which those persons to whom the publications should come would be most likely to understand them"; and this was certainly putting the case as favorably for defendants as it could rightfully have been put if the judge had himself construed the language. Upon the whole, we see no good reason for reversing the judgment. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

114 Cal. 363

**PEOPLE ex rel. MILLER et al. v. DAVIE et al. (S. F. 420.)**

(Supreme Court of California. Sept. 21, 1896.)

CITIES—AMENDMENT OF CHARTER—SPECIAL ELECTION—OFFICERS—SHORTENING OF TERM.

1. Under Const. art. 11, § 8, providing that proposed amendments of city charters may be submitted to a vote of the electors at "a general or special election," such amendments may be legally submitted at an election held for the sole purpose of voting thereon.

2. The term of an incumbent of a city office may be shortened by an amendment of the city charter abolishing the office, or devolving its duties upon other officers.

Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Quo warranto by the state on the relation of W. N. Miller and R. A. Hughes, against John L. Davie and others and the city of Oakland. Judgment for respondents, and relators appeal. Affirmed.

Atty. Gen. Fitzgerald and Geo. E. De Golia, for appellants. Reed & Nusbaumer, S. F. Daniels, J. A. Johnson, and J. K. Piersol, for respondents.

**GAROUTTE, J.** This is an investigation instituted in the name of the people, in the nature of quo warranto, to test the title to office of the present board of public works of the city of Oakland; said board consisting of three commissioners. The defendants the mayor, the city attorney, and city engineer are ex officio the commissioners, and form this board of public works. They claim title to office under and by virtue of certain amendments to the charter of the city of Oakland. Their tenure of office is attacked by plaintiff upon two grounds: First, that the election at which the amendments to the charter were submitted to the people was not authorized by law, and therefore said amendments never became part of the city charter; and, second, it is contended that, if the election was legal, and the amendments adopted in accordance with law, still Miller and Hughes, as members of the board of public works, were entitled to hold office for a full term of four years.

The amendments to the charter were submitted to the people under an election called and held by virtue of a power claimed to exist in the city council, coming from section 8, art. 11, of the constitution of the state, which provides: "The charter * * * may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature, as herein provided for the approval of the charter." Appellants' position as to this provision of the constitution is that the words "special election" refer to an election held for the purpose of filling a vacancy in office (section 1043, Pol. Code); that a special election, under the Code, is an election held for that purpose; and that the legislative mind had such an election in view when this provision of the constitution was enacted. It is further insisted that such provision is a limitation of power, and the mode there prescribed is the measure of the power. Appellants then claim that, these amendments having been voted upon at an election held solely for the purpose of voting upon them, such an election was neither a general nor special election, and hence there was no power and authority vested in the city council to call and hold the election that was so called and held. In People v. Hoge, 55 Cal. 612, the provision of the constitution here under consideration was before the court, and it was then held to be self-executing. As to the legal soundness of such holding we have no doubt, and, that being the fact, the sole question remaining upon this branch of the case rests upon the signification to be given the words "special election." It is urged by appellants that in the Hoge Case there is found an intimation that these words refer to an election at which a vacancy in office is to be filled, but there was no such question before the court in that case. As to what constituted a special election, in the light of this constitutional provision, was not under consideration by the court. The election involved in that case was a special election, from any point of view, and the merit of that litigation was in no way dependent upon the construction to be given those words. For these reasons we hold the case is no authority in support of appellants' position. All elections are either general or special. This election was not a general election. Hence it must have been a special election. This much is conceded, but it is contended that it must be a particular kind of special election; that is, an election held to fill a vacancy in office. We find no warrant in the language used to justify such an interpretation. A special election to fill a vacancy in office contemplates haste and urgent action. The notice of election may be given for only 5 days. To adopt amendments to a charter there must be a publication of notice for 20 days, and a further lapse of time of 40 days before election day. Thus, the application of the construction contended for would be wholly impracticable, and in this regard almost nullify the law. An election held for the single purpose of voting a special tax, or for the issuance of bonds, is a special election. Yet appellants do not even contend that such an election is the special election referred to by the provision of the constitution. Again, no good reason can be urged why such an election should be held at the time and place where an election is being conducted to fill a vacancy in office. But, aside from any indirect reasons that may be invoked, looking against appellants' position, we are clear that the meaning of the provision itself, gazing squarely at it, is that the words "special election" refer to an election held for the purpose of voting upon the amendments to the charter. Such is the plain and natural construction of the language, and that such was the intention of the framers of the instrument we have no doubt.

The charter being legally amended, it is still maintained that the incumbents of the offices of commissioners of public works at the date that the amendments took effect should hold office for the balance of the four-year term for which they were appointed. Among other matters, these amendments to the charter provided: "There shall be a department of public works under the management of three commissioners, who shall constitute the board of public works. The commissioners shall consist of the mayor, city attorney and the city engineer. * * * General municipal elections shall be held biennially on the second Monday in March, commencing with the second Monday in March next after the adoption of this amendment. At each such general municipal election there shall be elected a mayor, who shall be ex officio a commissioner of public works, * * * a city attorney, who shall be ex officio a commissioner of public works, * * * and a city engineer, who shall be ex officio a commissioner of public works." The salary of a county or city officer may be reduced during his term of office by the legislative power, or his term of office shortened or even extinguished. And, when we consider the foregoing provisions of the charter as amended, which provide who shall constitute the board of commissioners of public works, and when the commissioners shall be elected, it is patent that upon such election a new board was created, and that the old members were no longer clothed with official authority. These amendments to the charter necessarily repealed by implication any provisions of the law fixing the term of office at four years. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

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114 Cal. 375

## MARCH v. BARNET et al. (S. F. 436.)

(Supreme Court of California. Sept. 26, 1896.)

SUBROGATION — RIGHTS OF INDORSER OF NOTE AGAINST MAKER.

A sale on execution of the property of an indorser of a note, to satisfy a judgment against him and the maker, gives such indorser a cause of action against the maker only for the amount actually credited on the execution, after paying the costs of the sale out of the proceeds thereof, since it was the duty of the indorser to have voluntarily paid the judgment, without levy and sale.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by William F. March against S. B. Barnet and others for the recovery of money. From a judgment for plaintiff against defendant Jacob Steen, and an order denying a new trial, said Steen appeals. Modified.

Z. N. Goldsby, for appellant. W. D. Story, for respondents.

GAROUTTE, J. One Button recovered a judgment against Steen and March, the maker and indorser, respectively, of a certain promissory note. He assigned the judgment to Barnet. Barnet's assignee took out execution, and levied upon the property of March. Under execution sale this property, to the extent of $770, was applied to the payment of the judgment and costs of sale. The present action is brought by March against Steen, Barnet, and others, who were assignees of the judgment at certain times, for the sum of $1,400. The complaint alleges the value of March's property levied upon and sold to be that sum, and charges the defendants with conspiracy in making the levy, etc. The trial court rendered judgment against Steen for the sum of $770, and also rendered judgment in favor of the other defendants for their costs. Steen appeals from the judgment and the order denying his motion for a new trial.

The judgment being in favor of all the defendants except the appellant, Steen, it becomes unnecessary to pass upon many of the objections made to the complaint by demurrer. For the same reason, any lack of findings upon issues of fact pertaining to the defendants not appealing will not be considered. Indeed, it is somewhat difficult to determine the exact theory upon which plaintiff formulated his complaint. And, as far as this appellant is concerned, both the complaint and findings largely abound in matters of surplusage. But it does appear by both complaint and findings that a judgment was rendered against Steen, the maker, and March, the indorser, of a certain promissory note; and it further appears that March's property was levied upon, sold, and the proceeds applied to the satisfaction of that judgment. These facts created a liability against Steen, and in favor of March; for, if March had voluntarily paid the judgment, he would have had a cause of action against Steen for the amount paid, and he had the same cause of action when his property was sold by the sheriff, and the proceeds applied upon the judgment. Such liability appearing by both complaint and findings, we see no necessity for a reversal of the judgment and a new trial. It appears that while plaintiff's property brought $770 at forced sale, still only $596.10 were credited upon the execution returned to the court, the balance being applied to the payment of the costs of sale. As to the owner of the judgment, it was the duty of the plaintiff, March, to pay the entire amount without a levy and sale of his property, and we see no reason why Steen should be liable for the costs of the sheriff in selling March's property. See Simpson v. Griffin, 9 Johns. 131. Steen only received a benefit from March to the extent of the amount of money actually applied upon the judgment, and that amount measured his liability. The superior court therefore erred in giving to the plaintiff a judgment against Steen for $770, instead of the $596.10; and it is accordingly directed to modify the judgment, and to enter judgment in favor of the plaintiff against Steen for the sum of $596.10, with interest thereon from June 10, 1892, and costs, and, as so modified, the judgment and order will stand affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

## NIOSI v. EMPIRE STEAM LAUNDRY et al. (L. A. 225.)

(Supreme Court of California. Sept. 16, 1896.)

APPEAL—FILING POINTS AND AUTHORITIES.

A motion to dismiss an appeal will be denied, notwithstanding appellant's failure to file his points and authorities within the time required by the supreme court rules, if appellant presents such points before the hearing of the motion, and it appears that the appeal is presented in good faith, and that the delay was caused in part by a misunderstanding of counsel, and in part by appellant's inability by reason of his poverty, to obtain the money necessary to pay the expenses of the appeal.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Rosario Niosi against the Empire Steam Laundry and another. From a judgment for defendants, plaintiff appeals. On motion to dismiss. Denied.

Murphey & Gottschalk, for appellant. J. S. Chapman, for respondents.

PER CURIAM. This is a motion to dismiss an appeal for the failure of appellant to file his points and authorities within the time required by the rules of this court. The points and authorities should have been filed not later than June 1, 1896. The motion to dismiss the appeal was made upon June 12th, and appellant's points and authorities were presented before the hearing of the motion. It appears that the appeal is prosecuted in good faith, and that the delay was occasioned in part by a misunderstanding between counsel for the respective parties, and in part by reason of the difficulties which the appellant by reason of his poverty, experienced in obtaining moneys necessary to pay the expenses of appeal. Altogether, sufficient is shown in excuse of the failure and neglect of appellant; and, as no hardship is worked to the respondents by reason of the delay, the motion to dismiss is denied.

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(114 Cal. 216; 5 Cal. Unrep. 436)

## PEOPLE v. SANDERS. (Cr. 95.)[1]

(Supreme Court of California. Sept. 15, 1896.)

CRIMINAL LAW—CONTINUANCE—EVIDENCE TENDING TO PROVE ANOTHER CRIME—INSTRUCTIONS—CONDUCT OF COUNSEL.

1. Where a year elapsed between the indictment of a defendant and his trial, during which both prosecution and defense searched without success for persons who were material witnesses, the court was justified in refusing a further continuance on the ground of their absence.

2. In a trial of a defendant charged with having forged and uttered a draft, evidence that the person whose name purported to be signed to such draft had, prior to its date, been murdered by defendant, is pertinent and material, both as tending to prove that the instrument was forged, and also the knowledge of its false character by defendant when he uttered it; and it is not rendered inadmissible by the fact that it tends to prove the commission by defendant of a separate crime.

3. Where evidence is properly admitted in a criminal trial, though it tends to prove the defendant guilty of another crime than the one charged against him, counsel for the prosecution has the right to discuss such evidence to the jury, and to argue any theory which may legitimately be deduced therefrom.

4. Where the prosecution, to prove as a fact material to the issue that a certain person had been murdered by defendant, was permitted to introduce evidence tending to show that such person was seen riding with defendant, and that at a point further along the road defendant was riding alone, it was prejudicial error to exclude the testimony of a witness offered by defendant to the effect that at a point still further along the road the witness met the defendant and another riding with him, and tending to show that such other was the person claimed to have been murdered.

5. Testimony of witnesses shown to have been in the vicinity that they did not see a vehicle claimed by defendant to have passed along a certain road is admissible, its weight being for the jury to determine.

6. Where the existence of a certain person in regard to whom a defendant has testified is questioned by the prosecution, it may introduce testimony in rebuttal showing that efforts have been made by the officers to learn of the existence or whereabouts of such person, and that they were unsuccessful.

7. The fact that witnesses have testified that, in their opinion, a letter offered in evidence by a defendant is genuine, while there is no direct testimony in rebuttal, does not require the court to instruct the jury that they must consider the letter as genuine, where the evidence of the prosecution tends to establish other facts which disprove its genuineness.

8. Where the prosecution claimed that certain instruments executed before the defendant as a notary were forged and fictitious, while defendant testified to their genuineness, the refusal of the court to instruct as to the presumption of genuineness arising from the defendant's certificate as notary was not erroneous, as such presumption added nothing to the positive testimony of defendant, or to the presumption of his innocence, which cast the burden of proof on the prosecution.

9. In a prosecution for uttering a forged draft, where the prosecution had introduced evidence tending to show that the purported drawer had been murdered by defendant previous to the time when the draft was written and uttered, it was proper to refuse to instruct the jury that they should not presume the death of such person, as a circumstance tending to show defendant's guilt, unless such death and defendant's knowledge of it were proven beyond a reasonable doubt; defendant's guilt not being necessarily dependent on such fact, and the jury being entitled to consider the evidence in relation to it in connection with the other evidence, though they might not regard it as established beyond a reasonable doubt.

10. It is improper for a prosecuting attorney to comment in argument on the failure of a defendant to testify upon any particular point.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

W. A. Sanders was convicted of forging and uttering a draft, and appeals. Reversed.

Frank H. Short and F. E. Cook, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. W. A. Sanders was indicted for forging the name of William Wootton in a draft upon the Kutner-Goldstein Company for the sum of $1,400, payable to the order of said Sanders, and for uttering and passing the said draft, knowing the same to be false and forged. From the judgment of conviction, and from the order denying him a new trial, he prosecutes these appeals.

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[1] Rehearing denied.

The story, as told by the evidence in this case, is extraordinary, and in some respects without parallel. The defendant is a man nearly 60 years of age, who has resided in this state for more than half of his lifetime. For many years he was prominent in educational circles. He had been a teacher in the public schools in different parts of the state. He was well educated, and possessed of much learning, and more than local reputation as an agriculturist, horticulturist, and botanist. He was married, and the father of children, who were growing up about him in his home in Fresno county, where he had resided for many years, and where he seems to have enjoyed, up to the time of these transactions, the universal regard and respect of his fellow men. Wootton was an old man, past 70 years of age, possessed of valuable farming lands lying near the home of Sanders. Wootton was unmarried, and lived upon his land alone, saving for the presence of Charles Rohloff, who was employed as a farm hand. Sanders and Wootton were friends. For some time prior to the date of these occurrences, Sanders represented to Wootton and to others that one John Knausch had in contemplation the purchase of the Wootton land, designing to devote so much of it as was practicable to the culture of citrus fruits. Acting, as he represented, for Knausch, who was in San Francisco or elsewhere, Sanders made an examination of the Wootton land, platted it, showing its sources of water supply, fences, and other improvements, describing the nature of its soil; in short, collating such information as a purchaser unfamiliar with the property would naturally desire to possess. This information he sent by letter to Knausch. Wootton was reluctant to sell, or at least reluctant to sell for any price which Knausch was willing to give. Sanders, by letter, suggested to Knausch that, when he should come to bargain in person with Wootton for the property, it would be well for him to bring $20,000 in gold coin, the sight of which would tend to excite old Wootton, to stimulate his desire to sell, and enable Knausch to secure a better bargain. Knausch being unfamiliar with the Wootton land, Sanders also suggested to him that, when he came, he should not drive directly to the Wootton house, but should drive up a valley to the rear of Wootton's house, and, leaving his vehicle there, cross the steep, high hill which interposed between the valley and Wootton's home; that, by this mode of approach, he would be enabled to take from the top of the hill a comprehensive view of the Wootton property, and thus save much time which would otherwise be spent in travel and inspection.

The matter of these transactions was in agitation for over a year. Upon the 1st day of February, 1894, Sanders was at Wootton's house, whither he had driven, as he says, to await the coming of Knausch, whom he was daily expecting. The hour for the noonday meal had arrived. Rohloff, the farm hand, came in from the field. The noonday meal was eaten, and Rohloff went back to his work, which was that of sowing grain; Sanders agreeing that when he should leave for home, as he proposed to do later in the afternoon, he would bring out to him upon his buckboard some sacks of seed grain. After Rohloff had gone, and when Sanders and Wootton were alone in Wootton's house, John Knausch appeared, accompanied by a man named Graves, the two having crossed on foot by the trail over the hill to the rear of Wootton's house, Knausch carrying with him a stout valise containing $20,000 in gold coin, which would weigh about 73 pounds. The subject of the purchase and sale of the Wootton ranch was speedily broached. There was haggling over the terms and price, when Knausch opened his valise, and began to pour the gold upon the table. Wootton became much interested, told Knausch to keep on piling up the gold, that the table could stand it, and, with visible excitement, exclaimed, "We can trade!" The terms of the transaction were then and there agreed upon. Some papers relating to it had been brought by Knausch in anticipation of effectuating the bargain. Others were prepared upon the spot. The result was that Wootton deeded all of his property to Knausch. Knausch would have nothing to do with any of the land saving that which was fit for citrus culture, and, by an arrangement between him and Sanders, such part of the land as was unsuitable for that purpose was to be conveyed to Sanders, while Sanders, in exchange, was to convey land of his own suitable for such purposes. In addition, there was drawn up and signed by the parties a long agreement, under which the lands were to be planted with citrus-bearing trees, under the direction and management of Sanders, who was to receive a salary for his services as superintendent. Knausch was to tunnel the hills for water for irrigating purposes, and, being a practical miner, was to have charge of that work. The expenses were to be borne equally by the four, saving that Knausch was to lend to Sanders, if necessary, moneys with which Sanders was to furnish his share of the expense. This land was to be deeded to a son of Sanders, because the son was a minor, and was to be redeeded by him to the individual owners, upon demand, after he had attained his majority. Sanders was a notary public. The acknowledgments to each and all of these papers which could have been acknowledged before him were taken before Sanders. In the matter of the deed from Knausch to Sanders, and of Sanders' deed in exchange to Knausch, because Sanders could not acknowledge a deed to himself or from himself, the plan of an intermediary dummy was suggested and adopted. Knausch deeded to one Abbott, a young man of the neighborhood, Sanders taking the acknowledgment to this deed; and he afterwards, and upon Sanders' representations and explanations, deeded the same land to Sanders. Wootton took the $20,000 in gold. For the remaining part of the purchase price, Knausch offered Wootton a check for $25,000. Wootton refused the check, and it was understood that he should accompany Knausch and Graves either to Fresno or to Los Angeles, where the rest of the money would be paid him. The papers were left with Sanders, with directions from all the parties that, if he heard nothing from them to the contrary in the course of a few days, he was to place them on record, which in fact he did. Wootton, dazzled with the sight of the money, and exercised over the transactions of the day, showed an ever-increasing excitement, until he acted, as Sanders said, like a man dazed or in his sleep. Knausch and Graves left the house, walking back over the hill by the trail to the valley where they had left their vehicle, with the understanding that they should drive down the valley to the county road leading to Fresno, while Sanders and Wootton should proceed down the road from Wootton's house until they overtook them, when the four were to make the rest of the journey to Fresno together. Sanders harnessed his mules to his buckboard, loaded the seed grain for Rohloff, and drove down the road, accompanied by Wootton. The money was in a valise at Wootton's feet. The farm hand, Rohloff, had used up his seed grain, and was looking to see whether Sanders was coming with more, when he noticed the buckboard and its two occupants driving hurriedly down the road. When it reached the spot where Sanders was to unload the grain, it was stopped, and, according to the testimony of Rohloff, Sanders climbed over the seat of the buckboard, holding the reins in his hand, and, without dismounting from the vehicle, kicked and thrust the grain off upon the ground, some of the sacks striking a barbed wire fence, which tore them open, and scattered their contents. The buckboard was then driven hurriedly on by Sanders to a gate, which was closed. Here Sanders dismounted, opened the gate, came back, took the reins, which he had placed upon the seat, and, holding the reins as he stood upon the ground, drove through, closed the gate, climbed into the buckboard, and drove off. Rohloff was some distance from the road, but noticed that Wootton, whose habit it was never to leave the ranch without instructing the hired man what to do in his absence, and informing him of the date of his return, upon this occasion sat with his hands in his lap, seemingly staring straight ahead. Sanders testifies that Wootton, in his nervousness and anxiety to get away, said that he did not want to see or speak to anybody, and urged Sanders to hurry up; that the mules were restive, having been without exercise for some days, and took a rapid pace of their own accord. He denies, however, that he drove through the gate, saying that Wootton took the lines himself, and drove through. A mile and a half below the point where the two were thus seen by Rohloff, two men, Wiseman and Record, plowing near the county road, saw Sanders, and recognized him, and testified that he was driving alone. This Sanders denies, insisting that, at the time, Wootton accompanied him. Some miles further on, Sanders was again seen by an acquaintance, Gobin, who testifies that, when he passed him, Sanders was driving alone. This is admitted by Sanders in his testimony, and explained as follows: He said that he drove on with Wootton until they overtook Knausch and Graves; that Wootton, in his nervousness, became exercised over the way in which Knausch was driving the buggy, fearing a breakdown, which would prevent their arrival at Fresno, and insisted upon getting out of Sanders' buckboard, and into Knausch's vehicle, to drive for them. This he did. It was while he was so driving in Knausch's buggy that Sanders, pursuing the journey upon another road, was met and passed by the acquaintance who testified to seeing him alone. Thereafter Wootton returned to Sanders' buckboard, and rode with him. While so riding with him, Sanders, who was much elated at the outcome of the day's work, and at the prospect of receiving $500 commission for effecting the sale, indulged in some jocose remarks to Wootton, such as, "Another milestone is passed, and your money is safe." These remarks roused the old man to great indignation. He declined to travel further with Sanders, and insisted upon dismounting, and getting into the vehicle with Knausch and Graves. This he did, carrying the gold with him. Sanders, realizing from the old man's indignation that it was idle for him to continue the proposed journey to Fresno with them, turned off to his home. This is the last, so far as the evidence goes, that was ever seen of Wootton, even according to the testimony of Sanders. The last statement, however, is to be taken with this reservation: A witness testifies that he saw Wootton in San Francisco on or about the 10th of February, 1894. He is certain that it was Wootton, but not certain of the date.

Of Graves, Sanders himself could tell little, and no one else anything at all. He was a friend of Knausch, whom Sanders had casually met two or three times before. Upon one occasion he recognized Knausch in San Francisco, followed him into a church, and sat in the pew adjoining that occupied by Knausch and his companion, whom he afterwards knew as Graves. The only thing that he remembered was that Graves upon that occasion "made a splendid, good prayer." Concerning Knausch the evidence is much fuller, though not much more satisfactory. Sanders had known him for many years. He had "grub-staked" him in the early days, when Knausch was a miner, and Sanders a school teacher. He had lost track of him until some years before, when Knausch appeared in the section of the country where Sanders resided. He was a tall, dark man, and wore an enormous mustache. Knausch informed Sanders that he had made a good deal of money, and was looking about for an investment in fruit lands. He was with Knausch once in San Diego, and spent the night with him in his room. Upon the occasion of this trip they inspected citrus lands. Knausch was solitary, retiring in deportment, a recluse by habit; seldom, if ever, stopped at hotels; had no fixed abiding place of which Sanders knew; wrote him occasionally, rarely or never directing where the replies should be addressed. Knausch was in the neighborhood of Sanders' home upon one occasion, but would not visit his home, because he had met a woman in Oregon who had formerly worked for defendant, and this woman said that defendant's wife had given him "such a setting out it made him chill." For this reason he never wanted to see defendant's wife, and would not therefore go to defendant's house. One George Sargent testified that in 1884 or 1885 he was introduced to John Knausch by Sanders. The credibility of Sargent's evidence is impeached by the testimony of witnesses who testified that he is unworthy of belief. A. G. Sanders, son of the defendant, 17 years of age, testified that he had seen John Knausch while his mother was East, five, six, or seven years before. There is no other or further evidence of the existence or whereabouts of Knausch or of Graves, saving the testimony of Sanders, to the effect that after these occurrences, and in pursuance of a letter which he had received from Knausch, he went to Mojave, to meet Knausch, Graves, and Wootton. He found neither Knausch nor Wootton, but only Graves, who represented to him that Knausch and Wootton were in the country, looking at mining property. Graves urged him to go with him and join them, but there was an undefinable something about Graves, a suspicious air and bearing, which caused Sanders to mistrust him, without defining why; and, in consequence, Sanders refused to go, and took the next train home. Letters, however, were received by Sanders and others through the United States mail, purporting to come from and to be written by Wootton. The genuineness of these is claimed by the defendant, and disputed by the prosecution.

It was not disputed that Sanders presented and obtained money upon the draft, it being claimed by Sanders that the draft was an inclosure in a registered letter received by him from Wootton, which letter was mailed at San Fernando; that he believed it to be the genuine writing of Wootton, and had no cause or reason to believe otherwise. The expert evidence is, as usual, conflicting; the witnesses for the prosecution testifying that the writing of the draft was not the handwriting of Wootton; others, for the defense, testifying to their belief in its genuineness. It was proved that the letter was, in fact, mailed at San Fernando, but by whom is not established.

The theory and argument of the prosecution is that Knausch and Graves were myths; that Wootton was done to death by Sanders upon the 1st day of February, and his body concealed; that each and all of these acts were part of a preconceived and elaborately executed design to obtain the property, real and personal, of William Wootton. On the 19th of May, 1894, this indictment was presented against the defendant. On May 21, 1894, the defendant was arraigned. Upon March 9, 1895, defendant moved for a postponement and continuance of the trial, upon the ground of the absence of material witnesses, Knausch, Wootton, and Graves. On April 8, 1895, the trial was actually commenced. There had thus elapsed between the date of the indictment and the date of the trial nearly one year, all of which time was available to defendant to procure the attendance of these witnesses. Their importance was known to the defendant and to his counsel. It appears also that the prosecuting officers during this time were making diligent search for them. The failure of both sides thus to learn the whereabouts of these witnesses, and to procure their attendance, gave reasonable cause to believe that no further postponement would secure their attendance, and the court was justified in refusing a continuance.

The draft in question was dated Los Angeles, February 5, 1894. Evidence was introduced by the prosecution, over the objection and exception of the defendant, tending to show that William Wootton, upon February 5, 1894, was dead; that upon the 1st day of February, 1894, he had been murdered by the defendant, Sanders. The point most strongly urged by appellant is that the court erred in admitting this evidence, in that it was evidence of a separate and distinct crime from the one charged in the indictment, and that a defendant may be charged with but one crime in a single indictment, and tried for but one offense thereunder. An indictment, it is true, must charge but one offense; and, generally speaking, evidence of a separate and distinct offense is not admissible in proof of the one charged. Thus, it will not be permitted generally to prove that a defendant committed some other, independent, and distinct crime from the one charged, as the basis of inference and argument that he may have committed the particular one for which he is on trial; for—First, the defendant shall be charged with and tried for but one crime under a single indictment; second, he may and probably will be unprepared to meet with evidence the offense undisclosed by the pleadings; and, third, there being no logical connection between the two offenses, the first does not tend to elucidate or prove any material fact connected with the second, and does tend strongly to distract the minds of the jury from the issue which they are called upon to decide, and to subject the defendant to unjust suspicion and discredit. People v. Jones, 32 Cal. 80. But so far the rule goes, and no further. Carefully as the law guards the rights of a defendant charged with crime, to see that he is not exposed to unwarranted aspersion or attack, it does not extend that care into indulgence. A defendant in a criminal case is treated with fairness, but not with favor. If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime. People v Tucker, 104 Cal. 440, 38 Pac. 195. The general tests of the admissibility of evidence in a criminal case are: First. Is it a part of the res gestæ? Second. If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not. The commonest instance of the admission of evidence of another crime is where it becomes pertinent to prove the scienter or guilty knowledge under the particular charge. Thus, where a man is charged with passing counterfeit coin, it is allowable, in order to prove his knowledge that the coin was counterfeit, to show that upon other occasions, with knowledge of the false character of the money, he has passed similar coins. In People v. Cunningham, 66 Cal. 668, 4 Pac. 1144, and 6 Pac. 700, 846, in the prosecution of the defendant for the larceny of cattle, to rebut the presumption that the defendant came innocently into the possession of the cattle, it was permitted to be shown that a steer belonging to a third person, which was found in the defendant's possession with the cattle of the complaining witness, was stolen. In People v. Lane, 101 Cal. 514, 36 Pac. 16, where the charge was murder, the defense pleaded insanity, claiming that the deflowering of defendant's daughter by deceased had upset his reason. The people, in rebuttal, were permitted to show that the defendant had committed incest with that very daughter, as combating the view that deceased's acts could have deranged defendant's mind.

In the case at bar it was incumbent upon the prosecution to show that the instrument purporting to be executed by William Wootton was in fact a forgery. One mode by which they undertook to establish this was by evidence that Wootton was dead before the day upon which the instrument bore date. True, this would not conclusively establish the false character of the draft, for a man might postdate such an instrument. Nevertheless, it would be evidence tending to show its false character. Again, it was a proper part of the case of the prosecution to show that the defendant uttered and passed the instrument knowing it to be forged; and if the prosecution could establish to the satisfaction of the jury that Wootton had died before the day upon which the instrument bore date, and that Sanders knew of his death, it would, unquestionably, be strong evidence tending to show that he knowingly passed a forged instrument. But the prosecution, having the undoubted right to prove these things, was not to be deprived of that right merely because the proving of the death involved evidence of the crime of murder against the defendant. The prosecution, in proving the death of Wootton, was entitled to show the manner of his death; and if, in so showing, it was made to appear that he had been foully dealt with, and had come to his end at the hands of the defendant, it was not for that reason to be excluded from the consideration of the jury. The evidence was thus not introduced to besmirch the defendant, or cast unwarranted suspicion upon him. It was necessarily introduced in proof of a material fact, which it was competent for the prosecution to show.

As to the argument of the counsel for the people, of which appellant bitterly complains, it need but be said that, with the evidence properly before the court and the jury, the prosecution was entitled to base thereon any reasonable argument or theory within the legitimate purview of that evidence, being controlled therein by the sound discretion of the court.

For the reasons we have already discussed the evidence of Rohloff, Wiseman, Record, and Gobin, tending to show that on and prior to the 5th day of February, 1894, Wootton was dead, was admissible, even though it also tended to show that he was murdered by Sanders.

It will be remembered that in explanation of the fact that, at the time he was seen by the witness Gobin, he was driving alone, Sanders, in his narration of the events of the day, declares that during that portion of the journey Wootton had left the buckboard, and was riding with Knausch and Graves, over a different road. He further explains that the four met again near the town of Reedley; that Wootton once more took his place in Sanders' buckboard, and the two vehicles and their occupants proceeded along the road together. Defendant sought to introduce the evidence of a witness, Wesley Traver, an acquaintance of defendant, to prove that there and at that time Traver saw Sanders, and was able to identify him and his conveyance; to prove further that he saw another vehicle in company with that of Sanders, and that each of these vehicles contained two men; to prove by general description, if not by exact identification, that the man riding with Sanders was William Wootton; to show the time when the meeting took place, the direction in which the men were traveling; and to afford something of a description of the other two men. Under the circumstances, and under the nature of the evidence which had been brought to bear against Sanders, he should have been allowed the fullest latitude in the matter. The court, however, under objections from the prosecution, refused to admit the evidence of the witness Traver, and left such fragments of it as were admitted in an eviscerated and well-nigh unintelligible condition. Only by setting out in detail the record of the case, disclosing the futile efforts of the defense to present to the jury the evidence of this witness, could the hardship and injury which were worked to the defendant be adequately shown. The following, however, will serve as an example: The witness, having been allowed to testify that he did see Mr. Sanders, is asked: "Q. Who did you first see, Mr. Sanders or the others? Mr. Snow: We object to that as incompetent. Mr. Hinds: Irrelevant for any purpose whatsoever. Mr. Short: Q. What way were they going when you saw them? Mr. Hinds: We object on the ground it is incompetent and irrelevant for any purpose. The Court: Same ruling. Mr. Short: Q. What position were the men in when you saw them,—the three men you have described? Mr. Hinds: We object on the ground it is incompetent and irrelevant for any purpose. The Court: Let the objection be sustained." Considering the claim of the prosecution that in the mile and a half of road which lay between the place where Rohloff saw Wootton and Sanders driving together, and the place where Wiseman and Record, plowing in the field, saw Sanders driving alone, Wootton and all trace of him had disappeared as completely as though he had been whirled to another sphere, the importance to the defendant, Sanders, of evidence, even the slightest, showing or tending to show that after that time Wootton was seen in his company, and in the company presumably of the two men whom the prosecution claims to be myths, is manifest; and no discussion is needed to show the injury which the rulings worked. The language of this court in People v. Myers, 70 Cal. 582, 12 Pac. 719, in reviewing similar rulings of the trial court, may here be appropriately employed: "In other words, if needed in order to more clearly present the ruling: If the evidence offered would tend to show the guilt of the defendants, it was admissible; but, if to show their innocence, it was inadmissible."

Prior Nance and his wife lived in the valley up which Sanders testified that Knausch and Graves drove upon the 1st of February, and in which they tied their team when they crossed on foot over the hills to Wootton's home. Nance and his wife were allowed to testify that they saw no vehicle or men there upon that day. The evidence was admissible. The weight of it was for the jury.

In rebuttal and in disproof of the testimony of Sanders as to the existence and whereabouts of Knausch, the prosecution called as a witness J. Scott, the sheriff of the county, and proved by him that he had made search and inquiry as to the existence and whereabouts of the said Knausch. He testified that he had written letters to people in different parts of the state where Sanders had at one time or another located Knausch; that he wrote to the hotels, livery stables, and prominent men in the southern part of the state; made a trip to Los Angeles and San Bernardino; made a thorough search; "wrote north and to every locality I have heard of his being"; that within the county of Fresno he had inquired of all the old citizens, and at every hotel, livery stable, and railroad ticket office; that he had carried on these investigations all over the state for something over a year; and that during the whole time he had never found a man that had ever heard or known of John Knausch. The prosecution, as part of its case, here undertook to prove a negative,—to prove the nonexistence of John Knausch. As the evidence of the defendant left Knausch a wanderer, without fixed habitation or abode, the only evidence in rebuttal which the people could introduce was evidence that, after diligent investigation and inquiry in every place where the testimony of Sanders located Knausch as having been, no trace of him could be discovered, and to this effect was the evidence of Scott. It may at once be said that the evidence was not conclusive; that, under the circumstances shown, Knausch might still have existed, and yet knowledge of his existence have escaped the inquiries of the officer; but this goes merely to the weight of the evidence, which was exclusively for the jury. Conceding, indeed, that the evidence was slight, it was in its nature the best evidence which the prosecution could bring forward, and how much or how little importance should be attached to it was for the jury alone to say.

The defense introduced in evidence a letter purporting to have accompanied the alleged forged draft, which letter made reference to the draft as an inclosure, and gave directions as to the disposition of the moneys to be obtained upon it. Four witnesses familiar with the handwriting of Wootton testified, for the defense, to their belief that the letter was written and signed by him. Against this no direct opposing evidence was offered by the people. The court refused certain instructions proposed by the defense (Nos. 51 and 52), to the general tenor and effect that the failure of the prosecution to introduce rebutting evidence made it the duty of the jury to treat and consider the letter as written and signed by Wootton. These instructions were properly refused. While there was no expert evidence upon the question of the letter in opposition to that introduced by the defense, other evidence in the case, and, indeed, all of the evidence in the case upon the part of the people, tended to show that it was impossible for the letter to have been written by Wootton. The mere fact that experts were not called in direct rebuttal of the testimony of the defense upon the subject of the letter did not leave the case of the people without any evidence tending to show its fictitious character.

It will be remembered that the notarial certificates to many of the instruments introduced in evidence were executed by the defendant, Sanders, himself a notary public. The defendant offered, and the court refused, certain instructions (Nos. 53, 54, and 55) as to the presumption that public officers properly perform their duties; that a notary public is a public officer; and that the certificate of a notary of the acknowledgment of a deed is prima facie evidence of the facts stated in the certificate. These instructions are sound, as expositions of the law, but they were properly refused by the court in this case. In a civil action the notarial certificate of acknowledgment entitles a deed to be placed of record, and, when thus placed of record, the recordation carries constructive notice to the world. When offered in evidence, the effect of such a deed with its certificate is to shift the burden of proving that it is not a genuine and duly-executed instrument to the side opposing. For this reason it has come to be and is truly said in the law that the notarial certificate is prima facie evidence of the facts therein stated, and of the character of the officer taking the acknowledgment, which character is recited therein. But in this case the burden of proof was always upon the people to show the false and fraudulent character of the instrument, and the presumption of innocence always remained with the defendant until overcome by evidence. It was upon the prosecution to establish to the satisfaction of the jury that the instruments were not genuine. The defendant testified with positiveness that they were genuine. As against the proof required to be established by the people, and the declarations thus made by the defendant himself, the mere presumption of regularity or due execution amounted to nothing. The presumption could neither have added to nor detracted from the weight and effect of defendant's own statements.

Many of the instructions proposed by the defendant and refused by the court were sufficiently covered by those given of the court's own motion. Others, however, were not fully embraced in the instructions given. Defendant's proposed instruction No. 18, as to the reception by the jury of evidence of extrajudicial admissions or confessions, was unobjectionable in law, and should have been given. Instruction No. 40 might also well have been given. Instruction No. 46 declared to the jury that they were not to presume, as a circumstance in the case tending to show that the defendant was guilty of uttering the instrument with knowledge that it was forged, that the said William Wootton was dead at the time the draft was written, passed, or uttered, unless the prosecution had established by the evidence in this case, to their satisfaction, and beyond a reasonable doubt, the fact that he was dead at that time, and that the defendant so knew. Some stress is laid upon the alleged error of the court in refusing this instruction. We think, however, it was properly refused. The jury were not to be debarred from considering this evidence, with all the evidence in the case, because the death of Wootton might not have been proved to their satisfaction beyond a reasonable doubt; for the death of Wootton might not have been, under the evidence and in the view of the jury, necessary to be conclusively established to warrant a verdict. If, however, the jury believed from the evidence that the defendant was not guilty, unless it were proved that Wootton was dead, and that Sanders knew of his death, then, under such a state of the evidence, it would unquestionably be incumbent upon the prosecution to establish the fact of his death, and of defendant's knowledge thereof, beyond and to the exclusion of any reasonable doubt.

We note no other points presented by appellant that seem to call for a special comment, saving the objection to the argument of the district attorney. A book of blank drafts introduced in evidence was claimed by the prosecution to be in a different condition from that in which it was upon a former trial. Defendant was not interrogated upon the subject of the book. The district attorney, in argument, commented upon this, saying that, if it was in the same condition now as it had previously been, the defendant, better than any one, could have explained and testified to that fact. Defendant's failure to testify upon any particular point should not be commented on in argument. People v. McGungill, 41 Cal. 429; State v. Fairlamb (Mo.) 25 S. W. 895.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

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114 Cal. 250

## In re HOWELL. (Cr. 176.)

(Supreme Court of California. Sept. 16, 1896.)

PERJURY—STATEMENTS OF OPINION.

A prosecution for perjury cannot be predicated on the testimony of a witness in giving his estimate of the value of certain assets of a bank, where it does not appear that he made any misstatements of facts, or that he did not answer all questions in accordance with his best judgment.

Department 2. Application by John W. Howell for a writ of habeas corpus. Writ granted, and prisoner discharged.

Frank H. Farrar and James F. Peck, for petitioner. F. G. Ostrander, for respondent.

HENSHAW, J. The petitioner, John W. Howell, after examination before a justice of the peace in the county of Merced, upon a charge of perjury, was held to answer before the superior court of said county upon said charge. He claims that his imprisonment is illegal, in that he was committed to the custody of the sheriff of the county upon the charge of perjury without reasonable, probable, or any cause, and in substantiation of this claim a transcript of all the evidence taken before the committing magistrate is brought before this court for consideration and review. It appears from this evidence that the petitioner was cashier of the Merced Bank. At the time of these occurrences the Merced Bank was in liquidation. The bank commissioners of the state sought to learn whether or not the bank was actually insolvent, or whether, by allowing it to continue in business, it would be able to realize upon its assets, and meet its obligations in the course of business as they fell due. For the purpose of acquiring this information, the said John W. Howell was put under oath by the commissioners, and interrogated as to the condition of the affairs of the bank. There had been prepared and presented to the commissioners a statement of the assets and liabilities of the bank, and as part of the assets there was an item of $176,000 for loans and overdrafts. A statement had likewise been prepared showing in detail the items which composed the $176,000 loans and overdrafts. These items were made up of the names of the bank's debtors, alphabetically arranged, and opposite each name was set down the face value of the indebtedness. The total amounted to the sum of $176,000. The cashier was charged with having falsely sworn that the loans and discounts were of the value of $176,000, "whereas in truth and in fact the value of such loans and discounts was not then and there of the value of $176,000."

The principal witness in support of this charge was J. B. Fuller, one of the bank commissioners. His testimony in chief amounted substantially to this: that with the statement in his hand, showing in detail the debtors of the bank, he interrogated the cashier as to the value of each item on the list, and that the cashier told him that the claims were collectible and good. It is not pretended that the cashier ever swore that the value of the loans and overdrafts was $176,000, but that he made representations, while under oath, to the bank commissioners, that the separate items aggregating $176,000 were good and valid assets. There is nowhere in the record any evidence that the cashier did not answer fully and fairly and in accordance with his best judgment upon the matter of these items. There is no evidence that any of the items were false, or simulated, or manufactured, or that the statements of the cashier were willfully made, and in perversion of the truth, and not in the exercise of his best judgment, however faulty that judgment may have been.

When the evidence of the witness Fuller comes to be analyzed, it abundantly appears that the sum of $176,000 was not accepted as a direct and positive statement, made under oath, by the cashier, of the value of the assets, but that the same was reached in the exercise of a common judgment upon the part of the cashier and of the bank commissioners in estimating the value of these assets. It is quite true that in most cases the information as to the value was derived from the statements of the cashier, but, as has been said, it nowhere appears that the cashier either suppressed the truth or made declarations willfully false, or did anything but express his own opinion and judgment upon the value; and, even after he had so done, many of the items credited as valid assets were so credited in the independent exercise of the judgment of the commissioners. To illustrate: One item was "W. P. Applegate, $3,550.30." Bank Commissioner Fuller is asked: "Q. What value did Mr. Howell place upon that? A. He said it was good after the court decided it was good. It was left with the court. He reported to me just that,—that the court said the bank would have to wait; that they would probably get it. Q. Is that what you call reporting a good asset? A. Yes, I think it is a good asset. Q. If there was a probability of getting it, you would call it a good asset? A. In a bank liquidation, yes. Q. Then, if it was doubtful, you would put it in as good? A. Yes, a doubtful one; yes." It was under these circumstances that this item was marked "Good" by the bank commissioner. Again, the witness is asked, as to a claim of $119.60, what report Howell made as to that, and the answer was that he reported it "good in part; perhaps all. Q. What value did you set on that? A. The full value. Q. That was considered good for all? A. I should say so. It seemed that there was a probability of collecting it." Still again, the witness being interrogated as to certain notes which the cashier told him were in suit, says: "You could not know how the suit was going to be decided. Until it was decided, you could not tell how much you was going to get out of it. When he said a note was in suit, I would put it down good, because you could not say it was bad. Q. Notes that were in suit you would call good? A. Yes, sir. Q. In this statement all the notes reported to you as in suit you put down good? A. Yes, sir; couldn't write it off. You couldn't say it was bad until the court had so decided. Q. Whenever Mr. Howell told you one of these notes was in suit, and might be collected at the end of a lawsuit, you put that down as a good asset? A. For a bank in liquidation, yes." The witness further testified that as to many of the items, amounting in the aggregate to over $10,000, the cashier told the commissioners that he "thought the claims were good." All of these items which the cashier declared that he thought were good were entered by the bank commissioners as collectible assets of full face value.

Numberless other extracts might be made from the evidence showing the nature of the cashier's testimony, and the method by which the bank commissioners reached their conclusion. It would but unduly and unnecessarily extend this consideration to notice them all. One further example, however, should be given: At the close of this examination before the bank commissioners, when the discussion became general upon the question of the bank's solvency, the same witness, Fuller, bears testimony as follows: "The cashier was there, and we talked to him about the solvency of the bank. He said, in so many words, that, with a good season, there would be no doubt of the bank paying every dollar it owed. Q. It was a qualified statement? A. Yes, sir. Q. If they had a good season? A. Yes." The result of it all was, by Fuller's own testimony, that of the items composing the $176,000 the cashier had reported $12,000 to be of no account, and over $14,000 he "thought to be good," while many others, without any concealment or evasion upon the part of the cashier, and under a plain statement of facts, were set down by the commissioners themselves as being good. The only evidence to prove the falsity of the cashier's statement was evidence of other witnesses conversant with the value of real estate, or of the financial standing of the debtors of the bank, who, testifying that they rejected all claims which they did not feel certain were collectible, made the cash value of the assets, as it naturally would be, very much less than the result reached by the bank commissioners, who allowed full value for every item which was not demonstrated to be totally bad. There was in this evidence no reasonable or probable cause for holding the defendant for trial. It appears throughout, as has been said before, that the defendant was giving to the commissioners his judgment upon matters of extreme uncertainty,—the value and collectibility of debts. We do not mean to say that, even in a matter calling for the exercise of judgment, a perjury might not be predicated if one willfully and wickedly and maliciously refrained from exercising and giving expression to the exercise of his best judgment, if in law he was bound so to do. But, in the absence of a showing that there was such a willful failure and refusal to exercise an honest judgment, a charge of perjury could not be successfully maintained. And, moreover, as appears from the quotations above made, the fixed sum of $176,000 was reached quite as much in the exercise of the judgment of the commissioners in determining under the statements of the cashier what they believed to be good assets as from any declaration of the cashier himself. Let the prisoner be discharged.

We concur: McFARLAND, J.; TEMPLE, J.

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114 Cal. 400

## FISK v. FRENCH. (No. 15,811.)

(Supreme Court of California. Sept. 28, 1896.)

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—DISSOLUTION.

1. Where the facts which the statute requires to be stated in an affidavit for attachment are not so stated, the attachment should be dissolved, even though such requisite facts are alleged in the complaint.

2. In an action on notes, in which an attachment was issued, where the petition shows that one of the notes was secured by an assignment of corporation stock as collateral security, and the affidavit for attachment falsely states that the notes have not been secured by any mortgage or lien on real or personal property, or any pledge on personal property, the attachment will be dissolved.

3. The defect in the affidavit is not cured by an amendment to the petition stating the fact that such note was secured by the assignment of stock as collateral, that the collateral was sold in accordance with the contract, and the proceeds credited on the note, and that a balance stated remains due and unpaid thereon.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Asa Fisk against J. B. French on four notes, in which an attachment issued and levied. From an order discharging the attachment, plaintiff appeals. Affirmed.

P. L. Benjamin and Daniel Titus, for appellant. Knight & Heggerty, for respondent.

VANCLIEF, C. Appeal from an order discharging an attachment in an action on four promissory notes,—the first for $30, dated December 5, 1891; the second for $40, dated March 25, 1892; the third for $100, dated April 12, 1892; and the fourth for $238.58, dated November 17, 1892,—the first and last two drawing compound interest at the rate of 3 per cent. per month, and the second like interest at the rate of 2½ per cent. per month. Neither the substance nor legal effect of any one of the notes was stated in the body of the complaint, but a copy of each note was attached to the complaint, and therein referred to as an exhibit. Immediately under the note of November 18, 1892, for $238.58, was written an assignment by defendant to plaintiff of 100 shares of Belcher mining stock, "as collateral security for the payment" of the last-mentioned note, and an authorization of plaintiff to sell the stock at public or private sale, with or without notice, in case of default in payment of principal or interest of that note, and to apply the net proceeds of the sale to the payment of the last-mentioned note, and the surplus, if any, to the payment of any other obligations of defendant to plaintiff which might be held by the latter at the time of such sale.

The following is a copy of the affidavit for attachment: "State of California, City and County of San Francisco—ss.: Asa Fisk, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the defendant, J. B. French, in the said action, is indebted to the plaintiff in the sum of three hundred and seventy-six and $^{38}/_{100}$ dollars, gold coin of the United States, over and above all legal set-offs and counterclaims, upon an express contract, for the direct payment of money, to wit, four promissory notes, and that such contracts were made and are payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant. Asa Fisk." After the writ of attachment had been issued and levied, defendant moved, on the complaint, affidavit for attachment, and other papers on file, to discharge the attachment, upon the ground that the affidavit upon which the attachment was issued is false in the statement therein that the payment of the notes had not been secured by any mortgage, lien, or pledge upon personal property; and is otherwise insufficient in that it does not state that the collateral security appearing on the face of the complaint had become valueless without any act of the plaintiff, nor even allude to that security. When the motion to discharge the attachment came on to be heard, the plaintiff, by leave of the court, amended the fourth count of his complaint (founded on the note dated November 17, 1892) by substituting for the second paragraph thereof the following: "(2) That plaintiff has ever since been, and now is, the owner and holder of the said note. That to secure the payment of the said sum of $238.58, and the interest thereon, according to the terms of said promissory note, the said defendant did, on the 17th day of November, 1892, assign and transfer to said plaintiff one hundred shares of the capital stock of the Belcher Mining Company, with full power and authority in said plaintiff to sell the stock at any time after the note became due, without notice to said defendant, at public or private sale, at plaintiff's option, and to apply the net proceeds of the said sale of said stock to the payment of the said principal sum and the interest thereon, according to the terms of the note. That after the said principal sum and interest became due, and on, to wit, the 17th day of February, 1893, the said plaintiff, under the said authority and power, sold the said capital stock so pledged to him as aforesaid by said defendant, and realized from the said sale the sum of $74 net; and the said plaintiff applied the sum of $74 in payment of the interest then due, amounting to $14.62, and the balance thereof, amounting to $59.38, on said principal. That the interest has been paid on the said note to February 17, 1893, and the sum of $59.38 has been paid on account of the principal of the said note, and that no other payments have been made on the said note, and the sum of $179.20 of the principal of said note, together with the interest thereon from the 17th day of February, 1893, is now due, owing, and unpaid by defendant to plaintiff." I think the court did not err in discharging the attachment. The amendment of the complaint did not supply or cure the defects in the affidavit for the attachment; but, on the contrary, incontestably proved that it was false in the material statement that the payment of the notes had not been secured by any mortgage, lien, or pledge upon personal property, and that it was fatally deficient, in that it failed to state that the security had become valueless. What the statute requires to be stated in the affidavit must be stated, and truly stated, in the affidavit; and, if not stated in the affidavit, the attachment should be dissolved, even though the requisite facts, omitted in the affidavit, are alleged in the complaint. Complaints on contracts for the direct payment of money generally and necessarily state nearly all the facts required to be stated in an affidavit for attachment in actions on such contracts; yet the statement of such facts in the complaint alone does not satisfy the requirement of the statute that they must be expressly and directly stated in the affidavit for an attachment. The case of Hathaway v. Davis, 33 Cal. 168, has no bearing on the question under consideration. In that case there was no pretense that the affidavit was defective in any respect.

If the views above expressed are correct, it is unnecessary to consider the other questions argued by counsel. I think the order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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(114 Cal. 310)

## BURRIS v. LANDERS et al. (S. F. 48.)[1]

(Supreme Court of California. Sept. 18, 1896.)

TRIAL—FINDINGS BY COURT—RESPONSIVENESS TO ISSUE—PAROL GIFTS OF LAND—ENFORCEMENT IN EQUITY—PROMISE TO MAKE GIFT—WHEN ENFORCED.

1. A complaint which alleges that defendant's intestate, in his lifetime, made a parol gift "in relation and in respect to" certain land, whereby "he promised and agreed," if plaintiff would go into possession, to make a deed on demand; that plaintiff subsequently took possession, and made valuable improvements; and that intestate died without making a conveyance, etc.,—does not plead an attempted gift, defective in form, which equity will perfect, but alleges merely a promise to make a gift, the execution of which was never attempted by the donor; and a finding that intestate made a gift to plaintiff is without the issues.

2. A parol gift of real estate in præsenti will be enforced in equity against the donor or his representatives, if the donee enters into possession, and makes valuable and permanent improvements.

3. One who enters into possession of land in reliance on the owner's verbal promise to give him a deed on demand, and makes permanent improvements, exceeding the rental value of the premises, may enforce such promise, in eq-

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[1] Rehearing denied.

uity, against the promisor or his legal representatives.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Butler Burris against Amy Landers and another, administrators of the estate of Michael Landers, to enforce a verbal promise by defendant's intestate to convey real estate. From a judgment for plaintiff, defendants appeal. Reversed.

J. W. Carter and Adams & Adams, for appellants. Andrew Thorne, for respondent.

HENSHAW, J. The appeal is from the judgment, taken within 60 days after its rendition. The evidence is brought up for review by a bill of exceptions. The action was brought by plaintiff against Amy Landers as administratrix, and William J. Landers as administrator, of the estate of Michael Landers, deceased. The complaint charged that Michael Landers was upon the 16th day of April, 1883, the owner of a certain piece of land,—a lot with 25 feet frontage by 90 feet in depth, situated upon Shotwell street, in the city and county of San Francisco, upon which had been erected a dwelling house. It then averred "that in consideration of long-continued, faithful services of plaintiff to said Michael Landers, on said 16th day of April, 1883, and in his lifetime, the said Michael Landers made a parol gift in relation and in respect to said lot of land and the improvements thereon, whereby the said Landers promised and agreed to and with this plaintiff that if he (this plaintiff) would go into the possession and occupancy of said land and premises, hereinafter described, he (the said Landers) would at any time thereafter, upon demand, when so requested, make a good and sufficient deed to this plaintiff of the legal title thereto; that on said day, and subsequent to said agreement, and previous to the death of said Landers, this plaintiff, with the knowledge, consent, and concurrence of said Landers, took possession of said lot and premises, and made lasting and valuable improvements thereon, paid the state, city, and county taxes thereon, and all charges for street improvements; that said Michael Landers died as aforesaid on the 20th day of October, 1886, seised of the legal title to said lot of land, without having made a conveyance thereof to this plaintiff." A decree was sought compelling the representatives of Landers, deceased, to execute a conveyance to plaintiff of the property in question.

It is claimed that the action is one in which the aid of a court of equity may be invoked to compel due execution of a parol gift of land, but the complaint does not sufficiently state a cause of action for this purpose. It does not aver a gift of the land, but "a gift in relation and in respect to said lot of land, whereby the said Landers promised and agreed to make a good and sufficient deed to plaintiff upon demand." Under the complaint, which must govern plaintiff's right of recovery, a case is not pleaded of an attempted gift, defective in form, which, to prevent injustice upon the donee, equity will perfect. It is an effort simply to enforce a promise to make a gift, the execution of which was never attempted to be completed by deceased in his lifetime. The cases are numerous, and the rule may be considered well settled that where a parol gift of real estate is made in præsenti, and the donee has entered under the gift, and has made permanent and valuable improvements upon the realty, and the circumstances are such that it would be an injustice upon the donee if he were thereafter to be deprived of the property by reason of imperfections in the gift, equity will treat the acts of the donor, together with the acts of the donee, as being such performance of the gift as will relieve the contract from the operation of the statute of frauds, and it will, under such circumstances, lend its assistance to the perfection of the donee's title. Thornt. Gifts, par. 372 et seq. That, however, is not the case here pleaded, and the finding of the trial court that upon the 16th day of April, 1883, Landers made a gift of the property to Burris, is without the issues.

Plaintiff's contention, under his pleadings, is that he entered with the knowledge and approval of Landers, and under Landers' promise that he would thereafter, upon demand, make him a deed, and that, relying upon that promise, he made lasting and valuable improvements upon the property. His claim, as deduced from his complaint, is that because of the change in his situation, brought about by the promise of Landers, it would be an injustice, amounting to a fraud upon him, if Landers or his representatives were not compelled to make good the promise. This, it will be noted, is a different action from one to compel the perfection of a gift presently but incompletely made. That equity will, however, even in such cases, and to prevent wrong, enforce the performance of such a promise, is recognized by the authorities. If a donor, by promises, induces the donee to change his position to his detriment, after the change is made the donor can be compelled to make his promise good. The relation between them then becomes one of contract. Thornt. Gifts, par. 337. In Anderson v. Scott, 94 Mo. 637, 8 S. W. 236, the court had under consideration a promise very like the one at bar, and stated the rule as follows: "Where the donee has accepted the promise, entered into possession of the land, made improvements on the faith of the promise, and thus changed his condition, the donor will be required to make good his gift. Such a state of facts will take the case out of the statute of frauds." But, to give the plaintiff the benefit of this rule, the expenditures must have been made upon the faith of the promise, and must be in the nature of lasting benefits and improvements to the land, tending to enhance its value over and above the value of the use of the property to the plaintiff. Wack v. Sorber, 2 Whart. 392. Slight and temporary improvements, or trivial outlays, made to suit the taste or convenience of the occupant, do not raise an equity in favor of the donee (Pom. Spec. Perf. §§ 128–131; Poorman v. Kilgore, 26 Pa. St. 365); for, if the value of the expenditures made by the occupant does not exceed the benefit to him of the use of the land without charge or rental, then, generally, and in the absence of other circumstances of hardship shown, he not only will not have been injured, but will in fact have been advantaged, by the promises made. It is shown by the evidence that the rental value of this property is $30 a month; that there was erected upon it, at the time that plaintiff entered into possession of it, a substantial dwelling house; that the plaintiff has had free use and occupation of the premises for the period of four years. The court found that lasting and permanent and valuable improvements had been made by the donee upon the property. It appears that the house was in process of construction at the time when Landers told the plaintiff that he might occupy it, and that in anticipation of his occupancy, and for his convenience, plaintiff made some changes in the arrangement of the house, costing about $300. During his occupancy, plaintiff expended about $100 for painting the house, $45 for a mantel, and about $150 for papering, decorating, and carpets. These latter improvements would amount to $295, or less than a year's rent. In addition, the court finds that the plaintiff expended $473 for taxes and street improvements; and, allowing interest upon that amount, the total expended for such purposes is $584, or less than two years' rent. The evidence, then, in support of the findings, shows that the total expenditure of the plaintiff did not equal the rental value of the property during the time of his occupancy, and that the so-called permanent improvements were rather expenditures made to suit the convenience and taste of the occupant, and were not such as the law requires, or of a character to enhance the value of the realty. The judgment is reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

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114 Cal. 302

## KROHN v. LAMBETH. (S. F. 25.)

(Supreme Court of California. Sept. 18, 1896.)

VENDOR AND PURCHASER—WHO IS PURCHASER—UNDISCLOSED PRINCIPAL.

Defendant agreed to furnish to a broker a certain amount of money, to be used in the purchase of a mine, which was to be conveyed to a corporation to be formed, in which defendant was to have a certain share of the stock; the money advanced to be repaid him from the profits. The broker purchased the mine in accordance with the agreement, making a cash payment thereon, which was furnished by defendant, and executing his own note for a deferred payment, defendant not being known in the transaction with the seller. *Held*, that the broker, and not defendant, was the purchaser, and that defendant could not be held liable on the note, as an undisclosed principal.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by John Krohn against Milton Lambeth. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Naphtaly, Friedenrich & Ackerman, for appellant. Geo. A. Rankin, for respondent.

PER CURIAM. This action was brought by the plaintiff to recover from the defendant the sum of $800, the balance of the purchase price of certain mines, said sum being the amount of a promissory note executed to the plaintiff by one J. Murray Bailey in his own name; it being alleged by plaintiff that, in making said purchase and executing said note, Bailey in fact acted as agent for the defendant, though plaintiff then, and for a long time thereafter, supposed and believed that he was acting in his own behalf. The jury returned a verdict for the plaintiff, upon which judgment was entered; and this appeal is from the judgment, and from an order denying defendant's motion for a new trial.

The only point made by appellant for reversal is that the verdict is not sustained by the evidence. Plaintiff was the owner of certain mines, and had given a bond to Holcombe & Beale to sell and convey said mines to them, at a price therein named, for the purpose of enabling them to sell the property. Bailey was a broker engaged in buying and selling mines, and Holcombe & Beale called his attention to the property, and exhibited to him specimens of the ore, which he had tested and found valuable. Lambeth, the defendant, was a mining man of considerable means; and Bailey, who was without means, and unable to purchase on his own account, called the attention of Lambeth to the property, and showed him the samples of the ore. Bailey testified that he proposed to Lambeth that when the property was secured he would form a corporation, and would give Lambeth the control "if he would put up the money and purchase the mine, provided he approved of it when he examined it"; that Lambeth said he would let him know, and the next day informed him that he was "ready to go in that mine." The understanding in relation to the interest each was to have in the stock of the corporation was that Lambeth should have 110,000 shares out of the 200,000 which was to represent the capital of the corporation, and Bailey was to have 90,000, out of which he was to provide for Holcombe & Beale, who held a bond on the mines. On June 11, 1891, Lambeth, Holcombe, and Bailey visited the mines, and spent two days in examining them, and Lambeth said (as Bailey testified): "Bailey, I will put up $12,000 for this property. That is all the money I have loose, and I will put up no more. I will give $5,000 for the title, and the remaining $7,000 shall go to repairing the mill, and for the development of the property." The price named in the bond held by Holcombe & Beale was $22,500, and Bailey agreed to give them 40,000 shares out of his 90,000, they to permit the purchase to be made direct from the owner. Lambeth desired Bailey to put the proposition that he would give but $5,000 for the title in writing, when Bailey suggested that that was "a big come-down from $22,500, and that he might not be able to get it for that." Mr. Krohn, the owner, had not been seen at that time. Lambeth then said: "I will go as high as two thousand or three thousand dollars more than five thousand dollars cash, if you have to do it to get the property; but if you have to pay more than $5,000 cash, and go as high as two thousand or three thousand dollars more, you take it on a long-time note, of two or three years." Bailey then wrote, and Lambeth signed, the following: "Waterloo Mine, June 13, 1891. To J. Murray Bailey—Dear Sir: I will advance $12,000,—$5,000 to pay for the property, and $7,000 to be expended in repairing the mill and opening of mine. All money advanced by me to draw ten per cent. per annum until paid out of the profits of the mine, either by working or sale of mine. The property to be incorporated; capital stock, 200,000 shares; I to receive 110,000 shares. In regard to negotiating with Mr. Krohn, you can go as high as $3,000 over the $5,000 cash, if you have to do it as a last resort, but should get two or three years' time. [Signed] M. Lambeth." Lambeth then proposed to return to the city of San Francisco, where both he and Bailey resided. Bailey felt doubtful about getting the property for $5,000, and suggested to Lambeth that he had better go and try it; but Lambeth replied that as he was known to be a man of wealth the parties would jump it upon him, or something to that effect, and at once returned to the city. Krohn lived some five miles from the mines, and had not been seen. Bailey then gave Holcombe a written agreement to give him, for himself and Beale, 40,000 shares of the stock, when issued, for their interest under the bond, and they gave written authority to Krohn to deal with Bailey regardless of the bond. Bailey then visited the plaintiff, who asked $10,000, but finally agreed to take $6,000,—$5,000 in cash and a note for $800, payable in 15 months and 15 days, without interest. Bailey executed the note, and plaintiff executed a deed for the property to Bailey, as grantee, and these instruments were placed in escrow. Bailey did not disclose Lambeth's connection with these transactions, nor did plaintiff know that any one save Bailey himself was interested as purchaser. Upon Bailey's return to the city, Lambeth was fully informed of the transaction, and made no objection thereto. He deposited $12,000 to the credit of Bailey, out of which Bailey paid $5,200 to the bank, which held the deed and Bailey's note in escrow; and the bank delivered the cash and the note to the plaintiff, and the deed to Bailey. Bailey went to the mine, and took personal charge thereof. The corporation was formed, and the stock issued and distributed according to the arrangement hereinbefore stated. Bailey testified that he executed said note in his own name because he had no authority to sign Lambeth's name, and because of Lambeth's suggestion that if he were known in the transaction the price might be raised.

The verdict was returned and the judgment entered upon the theory that the evidence showed that Lambeth was an undisclosed principal in the purchase of the mine, acting through his agent, Bailey. We are of the opinion that no such interpretation can reasonably be put upon the evidence. Lambeth was not the purchaser of the property. Lambeth was not to receive from Bailey a deed to the property, or to any part thereof. Bailey was a "promoter," desirous of securing the ownership and control of the mine. He was without financial means to do so himself. He interested Lambeth in the proposition, and agreed with Lambeth that, if he (Lambeth) would advance to him (Bailey) money wherewith Bailey might purchase the mine, Bailey in turn would organize a corporation, convey certain shares of stock to others for their interest in the property, would retain a certain amount for himself, and would make over to Lambeth 110,000 shares. The money which Lambeth advanced, or in effect lent, to Bailey, was not even to be repaid in the form of stock. He was, under his agreement, still entitled to a return of every dollar of it out of a designated fund,—the profits of the mine. If Lambeth had said to Bailey that he would advance him $12,000 for the indicated purposes, without taking any interest in the corporation, and that Bailey was to repay this money out of the profits of the mine, it would not be contended for an instant that Lambeth was any more an undisclosed principal than would have been any other person from whom Bailey might have secured the desired loan. But the circumstance that Lambeth is to receive shares of stock in the corporation to be formed does not alter his position under the agreement. Bailey is still the principal in the transaction with plaintiff. It devolved upon Bailey to purchase the property, not for Lambeth, but as a part of his agreement to secure the mine, organize the corporation, and convey to it the property. Lambeth's promises of money enabled him to do what otherwise he would have been unable to accomplish. For Lambeth's failure to make good those promises Bailey might have had his cause of action against Lambeth, but as between plaintiff and Lambeth there was no privity. Bailey was not alone acting as principal, but in fact was the principal. The judgment and order are reversed, and the cause remanded.

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114 Cal. 378

## KELLOGG v. KING et al. (Sac. 224.)

(Supreme Court of California. Sept. 26, 1896.)

TRESPASS—EQUITABLE RELIEF—TITLE OF PLAINTIFF—LEASE—PARTIES—RIGHTS IN WILD ANIMALS—JUDGMENT ON APPEAL.

1. That one may have relief for trespass, it is enough to show bona fide possession of the premises, under claim and color of title.

2. A lease of certain premises, the lessors reserving the right to pasture the same, and the right of way over every part thereof; the lessee covenanting not to disturb such reserved rights; and the lessors covenanting that the lessee, paying the rent and performing such covenants, shall peaceably hold and enjoy the premises for the sole purpose of hunting game thereon; the lessee covenanting that the number of persons who may be authorized by him to hunt on the premises shall not exceed 40,—gives exclusive rights in the premises as a hunting preserve.

3. Injunction will lie to prevent trespassing on a game preserve, whereby not only is game killed, but game is frightened away and deterred from returning, the remedy at law being inadequate.

4. The prevention of a multiplicity of suits is ground for injunction in case of repeated trespasses by a large number of persons.

5. A lessee, who, under the lease, is a trustee of an express trust, may maintain suit to enjoin trespass without joining with him the beneficiaries.

6. Under Civ. Code, § 656, declaring that "animals wild by nature are the subject of ownership while living only when on the land of the person claiming them," one has rights in wild birds within his game preserve, entitling him to protect them from trespassers.

7. The supreme court, on reversing a judgment on appeal, cannot order a judgment for the other party without a new trial, where the findings of fact will not support such a judgment, though such findings are not supported by the evidence.

Department 1. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by Charles W. Kellogg, as trustee of the Cordelia Shooting Club, against William King and others. Judgment for defendants. Plaintiff appeals. Reversed.

Young & Powers and Coghlan & Harvey, for appellant. L. G. Harrier and John M. Gregory, for respondents.

VAN FLEET, J. This is an action for an injunction to restrain the defendants (some 40 in number) from threatened acts of trespass upon plaintiff's premises, by entering thereon and destroying his game preserve, by shooting, killing, and driving away the wild game thereon. The evidence (which was quite full, and wholly without complaint) tends to show, substantially as alleged in the complaint: That plaintiff, as trustee of the Cordelia Shooting Club, an association of sportsmen, of which plaintiff is the president and executive officer, rents, under a written lease, at a yearly rental of $1,200, a large body of unreclaimed swamp and overflowed land in Solano county, for the purposes of a game preserve. That, under his lease, plaintiff has taken and now holds possession of said land, and has completely inclosed, by means of a substantial, barb-wire fence, and natural boundaries, consisting of wide and deep sloughs, the greater part of said land, some 3,000 acres in extent. That within such inclosure are numerous ponds, sloughs, and lagoons, and wide reaches of overflowed tule lands, which afford inviting and favorite feeding grounds for wild game fowl, such as ducks, geese, rail, and snipe, and where, more particularly during the months intervening the 1st of September and the 1st of March, those species of game birds are in the habit of returning annually, and congregating in great numbers, and thereby affording valuable and very desirable hunting privileges. That, within such inclosure, plaintiff has placed arks and other buildings and structures suitable and necessary to a complete and convenient shooting resort, for the use and enjoyment of the members of said club, and employs keepers to look after and protect the said premises, and for the further purpose of preserving said premises to the use and enjoyment of said club, and to warn all others than members thereof from invading and encroaching upon said preserves. Plaintiff, soon after taking possession of said premises, did, in September, 1894, have posted and set up, and has since maintained, throughout said inclosure, in and about the ponds, sloughs, and other bird resorts therein, between 400 and 500 notices stating that said premises were inclosed, and warning all persons from trespassing thereon, either for shooting or other purposes. That such notices are in large type, and so conspicuously and numerously distributed over said inclosure as to necessarily arrest the attention of any person intruding thereon. That these defendants, in pursuance of a concerted design and common purpose entered into by them to interfere with and defeat plaintiff's rights and those of said club in said premises, and to prevent their exclusive enjoyment thereof, did, during the months of September, October, and November, 1894, and during plaintiff's possession of said premises, on divers and numerous occasions, and in various numbers, invade and intrude upon said inclosure, both by day and by night, and shot, killed, and carried away large numbers of said game birds, and largely frightened away and dispersed such birds as they did not kill, shot into and broke down plaintiff's said notices, and threatened and intimidated his employés in charge of said preserve, and otherwise violated plaintiff's rights in various ways. That, while upon said premises, each of the defendants, in addition to the warning in said posted notices, was personally served with a notice in writing, signed by plaintiff as lessee, stating that said premises were leased and inclosed by him, and warning said defendants to trespass no further thereon, but to remove therefrom; but such notice and warning were entirely ignored by defendants and each of them, and a number of said defendants returned repeatedly to said premises after such warning. That the defendants threaten to continue and repeat their said acts of trespass, and to enter upon said premises and hunt and kill such game birds whenever they so desire, regardless of plaintiff's rights therein. That the effect of constant and indiscriminate shooting at said birds, such as is practiced and persisted in by the defendants, is and has been largely to frighten said birds, and permanently drive them from said resort, and deter and prevent their return thereto, and thereby to wholly destroy the value of plaintiff's said premises as a game resort and preserve, and work irreparable injury thereto, which cannot be compensated in money damages. That owing to the great number of defendants, and their constant, continuous, and repeated acts of trespass, the law furnishes plaintiff no adequate protection through its ordinary processes, and he is compelled to resort to equity for relief. Despite this showing, the learned judge of the superior court, in substantial effect, found all the material facts against the plaintiff, and denied him any relief. From the judgment, and an order denying him a new trial, plaintiff appeals, contending that the findings are wholly without support in the evidence.

The respondents, however, notwithstanding the uncontradicted character of the evidence, urge that the judgment is right, and assign various reasons why it should not be disturbed. It is claimed by them that the evidence is insufficient to show ownership or title in the leased premises in plaintiff's lessors, and the finding is in accord with this claim. Aside from the fact that we think there is sufficient evidence in the record to establish prima facie ownership in the lessors, the fact is not essential to plaintiff's recovery. Title in fee is not necessary to a recovery for trespass, and, although title may be alleged, it is not required to be shown, where, as here, the evidence shows bona fide possession of the invaded premises under claim and color of right. Possession is itself evidence of title. Winans v. Christy, 4 Cal. 70; Castro v. Gill, 5 Cal. 40. And a party may rely upon his possession, as against a mere trespasser. Fitzgerald v. Urton, Id. 308; McCarron v. O'Connell, 7 Cal. 152; Mining Co. v. Fremont, Id. 317; Taylor v. Woodward, 10 Cal. 91; Weimer v. Lowery, 11 Cal. 104.

It is also claimed by respondents that the evidence justifies the further finding that plaintiff acquired no exclusive right to the possession of the leased premises under his lease, that the only right granted thereunder was the privilege of hunting thereon, and this not an exclusive one. This claim, like the finding which upholds it, is not only directly against the evidence, but is evidently based upon a total misconstruction of the lease in question. By that instrument the owners of the land "lease and demise unto said party of the second part, his heirs and assigns, all that certain tract of swamp and overflowed land situate," etc., "for the term of four years from the 22d day of July, 1893, at the yearly rent or sum of twelve hundred dollars." The lease provides that "the parties of the first part hereby reserve to themselves, their heirs and assigns, the right to pasture said lands, and the right of way over and upon said lands, and every part thereof, and the party of the second part covenants not to in any way disturb such rights reserved as aforesaid, and the said parties of the first part covenant that the said party of the second part, paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly hold and enjoy the said demised premises for the term aforesaid, for the sole purpose of hunting game thereon; and the party of the second part hereby covenants, promises, and agrees that the total number of persons who may be directly or indirectly authorized by him to hunt over and upon said premises shall at no time during the term of such lease exceed forty." The party of the second part is described as "Charles W. Kellogg, of San Francisco, California, as trustee for the Cordelia Shooting Club, of that city." While admitting that, if plaintiff had the exclusive right of possession, he would be the "owner," for the purpose of prohibiting others from hunting on his land, respondents argue that no such right is given, because the lessors reserve to themselves the right of pasturage, and also restrict the number of persons plaintiff can admit to the hunting privileges; that by the reservation of the right of pasturage the lessors reserved to themselves "the right to open the grounds to the world," and, in restricting the number of hunters plaintiff can admit, "they reserved all hunting privileges, over what forty men can do," to themselves. Manifestly, the paper is open to no such construction. The reservation of the pasturage in no way affects or militates against the exclusiveness of plaintiff's rights in the premises as a hunting preserve, which the lease clearly contemplates; and the reservation of the number who shall be permitted to hunt obviously has in view the preservation of the premises as a resort for wild game, and that its value in that respect may not be entirely destroyed during the lease by the admission of an unlimited number of hunters. There is nothing in the language to indicate an intention to reserve to the lessors any part of the hunting privileges during the term. Even if such were the terms of the lease, however, none of the defendants attempt to show that they held any privilege or license from the owners to hunt thereon.

It is further contended that the evidence does not make a case entitling plaintiff to an injunction, for the reasons that it does not appear that any irreparable injury has been or will be worked by the acts or threatened acts of the defendants, and that it does not appear that plaintiff has not an adequate remedy at law, nor that defendants are unable to respond in damages. The mere fact that one has a right of action at law will not prevent his right to equitable relief by way of injunction against a threatened trespass, if, under the circumstances, the legal remedy would fail of affording adequate relief against the impending wrong. It is well settled that the remedy by injunction may be invoked to restrain acts or threatened acts of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved. And in such case the question of the solvency or insolvency of the wrongdoer is an immaterial factor. It is the nature of the injury, and not the incapacity of the party to respond in damages, which determines the right. Where the effect of the act complained of is, or may be, to largely impair or destroy the substance of the estate, by taking from it something which cannot be replaced, it may be enjoined, irrespective of the ability of the defendant to respond in damages. These principles are upheld in the leading case of Mining Co. v. Fremont, 7 Cal. 317, following the modern English doctrine first announced by Lord Thurlow in Flamang's Case, cited in Mitchell v. Dors, 6 Ves. 147. Originally the right to restrain by injunction mere acts of trespass seems to have been confined to instances where the injury was to the freehold, in the nature of waste, such as the taking of wood or timber, extracting the precious metals or other valuable minerals, and the like. But this limitation of the right appears to have been departed from in the later cases, and as stated by Mr. High: "The jurisdiction may now, however, be regarded as well established, although it is still sparingly exercised, being confined to cases where, from the peculiar nature of the property affected by the trespass, or from its frequent repetition, the injury sustained cannot be remedied by an action for damages, and where it may therefore be properly termed irreparable. The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multitude of suits; and, where facts are not shown to bring the case within these conditions, the relief will be refused. Equity will not, therefore, enjoin a mere trespass to realty, as such, in the absence of any element of irreparable injury. But where, owing to the peculiar character of the property in question, the trespass complained of cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity may properly interfere by injunction." 1 High, Inj. § 697. And Mr. Story, after stating the same fact as to the original lines of the jurisdiction, says: "It may be remarked, in conclusion, upon the subject of special injunctions, that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights and redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purpose of social justice in a great variety of cases, and therefore should be upheld by a steady confidence." Story, Eq. Jur. §§ 863, 929, 948, 856b. And see, also, Poughkeepsie Gas Co. v. Citizens' Gas Co., 89 N. Y. 493. If these principles are applicable to this case,—and we perceive no good reason why they are not,—the objection under consideration is not tenable. The property right which is here the subject of injury is of a peculiar and exceptional character. The sole value of the invaded premises to the plaintiff is as a game preserve, by reason of its features as a resort for wild game. This feature of the property, the evidence shows, is being taken from it, and its value largely, if not wholly, destroyed by the acts of defendants. And it requires little if any argument to show that the injury thus committed is, and will be, irreparable, as being beyond any method of pecuniary estimation. As suggested by counsel, it is not so much the value of the birds killed which constitutes the injury to plaintiff. That could be estimated in dollars and cents. But it is the destruction of the hunting privilege, by driving away the birds and deterring their return,—a thing which, once accomplished, cannot be restored, and which constitutes an injury that cannot be estimated in money damages. It seems to us that this showing, if true, makes out a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under his lease. But there is, moreover, another ground upon which, under the evidence, plaintiff should be entitled to the equitable remedy sought,—the avoidance of a multiplicity of actions. It is quite manifest that no adequate relief could be had at law by a plaintiff in such a case as is here disclosed, without the bringing of separate action against each individual defendant. "The necessity of preventing a multiplicity of suits," says Mr. High, "affords another exception to the rule, and will warrant the interposition of the strong arm of equity, even though there be a remedy at law." High, Inj. § 700. And again, says that author, "So a trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction." Id. § 697.

The further objection that plaintiff had not capacity to bring the action is untenable. Under his lease, plaintiff is a trustee of an express trust, and, as such, entitled to sue without joining with him those for whose benefit the action is prosecuted. Code Civ. Proc. § 369; Tyler v. Houghton, 25 Cal. 27.

The remaining points made in support of the judgment are without merit, and need not be specially noticed. The conclusions of the court below would seem to proceed upon the theory that there is no such thing as an exclusive private ownership or proprietorship in wild game, beyond such as may be acquired by reducing it to actual possession by killing or capture, and that for this purpose it may be pursued and taken wherever it may be found. This view of the law is incorrect. The wild game of the state, it is true, belongs to the people in their sovereign capacity, and is not subject to private dominion to any greater extent than the people, through the legislature, may see fit to make it. Ex parte Maier, 103 Cal. 476, 37 Pac. 402. But the legislature has seen fit to prescribe the limit where public proprietorship ends, and that of the individual commences; and, when within the provisions of such statute, an individual is as much to be protected in the enjoyment of his rights in this species of property as in any other under the law. Section 656 of the Civil Code provides that "animals wild by nature are the subject of ownership while living only when on the land of the person claiming them, or when tamed or taken and held in the possession, or disabled and immediately pursued." While these wild birds, therefore, are within the plaintiff's inclosure, he has, under this statute, such rights in them as entitle him to protect them from invasion by those not authorized to be there, and any person violating such rights is as much a trespasser as though entering unbidden the plaintiff's dwelling. We think, upon the evidence standing uncontradicted, the plaintiff made a case entitling him to the relief asked; and, as the findings are against such evidence, they cannot stand.

Plaintiff asks us, in the event the judgment is reversed, to order a judgment in his favor, without the necessity of a new trial. This we are not at liberty to do. This court has no power to make findings of fact, that being the exclusive province of the trial court. Since the findings here are against the plaintiff, a judgment we should order in his favor would be exactly in the position of the present judgment,—unsupported by the findings. It is only where the findings made by the lower court are such as to support a judgment for the appellant that this court, in reversing a judgment erroneously entered thereon, has jurisdiction to order a proper judgment to be entered. In the present case, therefore, there must be a new trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

(5 Cal. Unrep. 462)

## POTTKAMP v. BUSS et al. (S. F. 183.)[1]

(Supreme Court of California. Sept. 26, 1896.)

AMENDING PLEADING—EFFECT OF PRIOR JUDGMENT ON APPEAL—DEMURRER—QUESTIONS TO WITNESS.

1. Where the supreme court held it error to refuse permission to plaintiff to file his amended complaint, and remanded the cause "for a new trial, with leave to the parties to amend the pleadings," plaintiff may, after the remittitur goes down, file, without leave of the trial court, an amended complaint other than the one offered on the first trial.

2. The point that it cannot be ascertained how the cause of action in an amended complaint is connected with the cause of action stated in the original complaint is not reached by demurrer to the amended complaint on the ground that it is "ambiguous, unintelligible, and uncertain"; it not appearing in the amended complaint what was alleged in the original.

3. The issue being whether an instrument, in terms an absolute conveyance, was accepted as such, as contended by plaintiff, or as security, as contended by defendant, a question asked plaintiff, "State what you believed that document to be at the time it was delivered to you," will not be held to ask an opinion as to its legal effect.

4. Where one has testified on cross-examination as to the time when, and the circumstances under which, he signed an instrument, a further question on cross-examination, "Do you swear that you signed that instrument as a witness?" calls for a conclusion of law based on the facts stated by him.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Adolph Pottkamp against John G. Buss and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. J. Castelhun and H. C. Firebaugh, for appellants. A. B. Hunt and A. D. Lemon, for respondent.

PER CURIAM. This action was commenced June 16, 1888, and defendants answered and filed a cross complaint, upon which issue was also taken. During the trial, plaintiff asked and obtained leave to file an amended complaint; but when it was prepared the court refused to permit it to be filed, upon the ground that it did not conform to the proofs. Judgment went against the plaintiff, and his motion for a new trial was denied. On December 8, 1892, this court reversed the judgment and order upon the ground that the court below erred in refusing to permit the plaintiff to file his amended complaint, and remanded the cause "for a new trial, with leave to the parties to amend their pleadings." 31 Pac. 1121. On February 21, 1893, the plaintiff, without motion therefor, or leave given by the court below, filed an amended complaint, and defendants moved to strike it from the files. That motion was denied, and defendants excepted.

Appellants contend that an application to amend is never general, but always specific, and, as plaintiff did not file the amended complaint which he had asked leave to file during the first trial, that he had no right to file a different amended complaint without leave of the court below. The leave given in this court was not special, to file a particular complaint, but the order was general, permitting both parties to amend. It is admitted that the remittitur had gone down. It thereupon became a record in the lower court, and had at least all the force of an order made by that court. Code Civ. Proc. §§ 53, 958. The motion was properly denied.

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[1] For opinion on rehearing, see 46 Pac. 673.

2. Defendants demurred to said amended complaint, and contended that the court erred in overruling their demurrer. Eleven grounds of demurrer were specified. Of these, the first was for want of sufficient facts; the second, third, fourth, and fifth presented grounds only available upon motion to strike from the files, or to require different causes of action to be separately stated; the sixth, that said amended complaint "is ambiguous, unintelligible, and uncertain"; and the remaining five specified sections of the Code under which the cause of action was alleged to be barred by the statute of limitations. The purposes of the action, as disclosed by said amended complaint, were to reform a deed executed by defendant Buss to the plaintiff; to quiet plaintiff's title under the same, as against the defendants; to require defendants to account for rents received by them from the premises after plaintiff's exclusion therefrom; and for general relief. The complaint covers 12 printed pages of the transcript, and is somewhat difficult of satisfactory condensation. It shows, in substance, that on March 31, 1887, the plaintiff was, and for a long time had been, in the employ of defendant Buss, as foreman of his bakery; that Buss was then in financial difficulties; that prior to that time the plaintiff had loaned him considerable sums of money, and, with a loan made at that date, he was indebted to the plaintiff in the sum of $2,500; that Buss proposed to convey to plaintiff a lot at the southeast corner of Dolores and Seventeenth streets (subject to a prior mortgage thereon), together with certain personal property; that plaintiff, desiring to have said indebtedness fully paid and satisfied, agreed to accept said conveyance; that Buss then prepared and executed an instrument, of which the following is a copy: "John G. Buss to Adolph Pottkamp. Know all men by these presents, that I, John G. Buss, of the city and county of San Francisco, for and in consideration of $2,500, the receipt whereof is hereby acknowledged, do hereby sell, convey, and transfer to Adolph Pottkamp that certain store, and all the stock therein, and the bakery attached thereto, and the tools and fixtures of said bakery, situate at the southeast corner of Seventeenth and Dolores streets, in the city and county of San Francisco, state of California; also eight horses, three wagons, and one buggy, with the harness belonging to all and each of said wagons and buggy. In witness whereof, I have hereunto set my hand and seal this 31st day of March, 1887. [L. S.] John G. Buss. Witness: John Kelly." The complaint further alleged that said instrument was duly acknowledged on June 30, 1887, and recorded July 1, 1887; that said instrument was delivered to plaintiff on the day of its date, with the statement, "Here is the deed to this lot and premises, and to this storehouse and bakery," and, after pointing out said personal property, defendant Buss said: "All this property is yours. Now take possession of it." It was further alleged that, during all the time plaintiff had been in defendant's employ, the most friendly and confidential relations existed between them; that plaintiff, believing, trusting, and relying upon defendant's representations as true, accepted said instrument, without reading or examining the same, or having it read to him, as a good and sufficient deed to said premises, took possession of said premises and of the personal property, and held possession of the same until July 8, 1887, when the defendants Buss, Ludeman, and Pfeiffer, with intent to cheat and defraud him out of his money and out of his said premises, without right, and by force, put the plaintiff out, and by force entered, and unlawfully, and against his will, withheld said premises from his possession; that on July 2d Buss filed a declaration of homestead on said premises, and on July 8th filed a voluntary petition in insolvency and was adjudged an insolvent debtor; that on August 11, 1887, Buss executed a lease of said premises to defendant Pfeiffer for the term of five years, and on the same day assigned said lease to defendant Ludeman, and on August 31, 1888, conveyed said premises to Ludeman, and that Pfeiffer and Ludeman took with knowledge of the rights and interests of plaintiff, and that any claim made by them, or either of them, is subject and subordinate to the title of plaintiff; and that defendants have received in rents from said premises $5,000.

Most, if not all, these acts of defendant Buss, and also of his confederates, are alleged to have been done with intent to defraud the plaintiff, and tend to some confusion and obscurity in the statement of plaintiff's cause of action, but that a cause of action is stated we have no doubt. It is true, defendants demur also upon the ground that the complaint is "ambiguous, unintelligible, and uncertain," and thereunder specify three particulars. The first is that it cannot be ascertained how the cause of action in the amended complaint is connected with the cause of action stated in the original complaint. It does not appear in the amended complaint what was alleged in the original, and this point was therefore not reached by demurrer. The second specification is not well taken. It is argued that it is not charged, nor attempted to be charged, that Pfeiffer and Ludeman are "in any way responsible for the error, if there was any error, in the writing sought to be reformed," and that it is not attempted to be shown how the error therein ought to affect them. But it does clearly appear that their interests were acquired after the recording of the alleged conveyance to the plaintiff, and therefore with notice of whatever right or title he had thereunder; and this remark also answers appellants' third specification under this ground of demurrer. When the pleader alleges facts which in law constitute notice, it is equivalent to an allegation that the parties affected had notice. As to the demurrers alleging the bar of the statutes of limitation, the original complaint was to quiet title, and alleged that Pfeiffer and Ludeman claimed an interest, that it was without right, etc., but did not seek the recovery of rents and profits. The lease to Pfeiffer was made August 11, 1887, and Ludeman received the rents thereunder from that date. The last amended complaint was filed February 20, 1893, and therefore within five years from the date of the lease, and was not barred. See Code Civ. Proc. § 336, subd. 2.

3. Plaintiff, while testifying in his own behalf, was asked by his counsel: "State what you believed that document [referring to the instrument set out in the complaint] to be, at the time it was delivered to you." Defendants' objection was overruled. The defendants claimed that the instrument in question was a bill of sale given as security. The plaintiff claimed that it was a deed of conveyance, and the question was not, as counsel seem to think, what plaintiff "thought it was," or his opinion as to its legal effect, but what he believed it to be when he accepted it; in other words, whether he believed it to be what defendant Buss represented it to be. It was held upon the former appeal that the language of the instrument "clearly expresses the intention to convey the building in which the goods were stored, and the attachment thereto in which the business of baking was carried on"; and the question in issue upon the second trial was not whether its language expressed an intention to convey the real estate, but whether it was accepted as such, or whether it was accepted or believed to be merely a bill of sale of the personal property as security. We see no error in the ruling. Plaintiff's witness Leon was asked upon cross-examination, "Do you swear that you signed that instrument as a witness?" The objection that it was not cross-examination was properly sustained. He had not been interrogated in chief on that subject, and besides he had testified upon cross-examination as to the time when, and the circumstances under which, he had signed it, and under these circumstances the question called for a conclusion of law based upon the facts stated by the witness.

It is insisted that the court erred in denying defendants' motion for a nonsuit. Twenty-nine grounds were specified as the basis of the motion. We cannot consider these in detail, and can only say that the ruling was right. Such motions are not determined by a consideration of the weight of the evidence, further than is necessary to ascertain whether it would justify a finding upon each material issue essential to the plaintiff's case if the defendants should fail or refuse to introduce any evidence.

Most of the findings of the court are excepted to on the ground that they are not justified by the evidence. To notice all of these specifications in detail would require more space than can be devoted to this opinion. The evidence upon most points is conflicting, but it may be said, generally, that there is evidence sufficient to justify all of the findings upon the material issues involved in the case, namely, the indebtedness of Buss to the plaintiff, the execution and delivery of the instrument under which the plaintiff claims, and the fact that it was intended and accepted as a conveyance of the real as well as the personal property, and not merely as a security, and that Pfeiffer and Ludeman took their interests with notice of the plaintiff's title. The conveyance from Buss to the plaintiff was recorded July 1, 1887, and on the next day Buss placed of record a declaration of homestead on the premises, and on the 8th of July filed his petition in insolvency, in which proceedings on the 20th of July the premises were set apart to him as a homestead. On August 11th he made a lease of the premises to Pfeiffer for five years, and on the same day assigned the lease to Ludeman, and on August 31, 1888, conveyed the premises to Ludeman. In view of all the evidence in the case, the court was authorized to find that these conveyances were made for the purpose of enabling Buss to defraud the plaintiff; and the finding that Pfeiffer and Ludeman took their conveyances with knowledge of the rights of the plaintiff, and that the conveyance to Ludeman was without any consideration, rendered the title of the plaintiff superior to their claim. There is no evidence in the record that there was any consideration for these conveyances, and the allegation in the complaint that the defendants have received the rents therefor is not denied, the denial being merely of the amount received during a portion of the time. The judgment is limited to the amount which was proved to have been received.

Portions of the sixth and other findings are criticised. They are inartificially drawn, and the portions objected to are findings of probative facts which do not overcome or affect the findings of ultimate facts upon which the judgment is correctly based,—as, for example, whether confidential relations existed between the parties, whether plaintiff was in possession, whether certain things were done with intent to defraud and deceive, and whether Buss continued the business as before until he went into insolvency. These are probative facts, tending to establish ultimate facts, but do not control the findings upon such ultimate facts.

It is further contended by appellant Ludeman that he should have been allowed a further credit against the rents collected by him from the property in question, amounting to $819.50. The parties stipulated as to the amount of the rents with which he should be charged, and the credits which should be allowed him, except as to said sum, which was claimed to have been interest paid by him on money which he borrowed for the benefit and use of Buss in 1883. The amount so borrowed was $3,600, to enable Buss to build upon the lot in question, which Buss then held under a lease for five years, and which he assigned to Ludeman as security. About a year later Buss purchased the lot, and, at the time he was adjudged an insolvent, had reduced Ludeman's claim to $2,869.95; and this sum was presented by Ludeman as an unsecured claim against said insolvent, which was due to him upon the loan which he had made from the Franklin Savings & Building Association. Said sum of $819.50 was made up of monthly installments of interest paid by Ludeman to the bank after the insolvency of Buss had been adjudged. It was a portion of Buss' indebtedness to Ludeman under the transaction had in 1883, for which Ludeman had taken the lease from Bertz as security. But it does not appear to have had any other relation to the premises in question, and there is nothing in the record showing that it was a claim against this property. The affidavit of Ludeman, when he presented his claim therefor against the estate of Buss in insolvency, that he held no security for its payment, authorized the court to disallow it as a credit as the amount of rents received. The judgment and order appealed from are affirmed.

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114 Cal. 370

## Ex parte ANEAR. (Cr. 218.)

(Supreme Court of California. Sept. 24, 1896.)

GAME LAWS—VIOLATION—JURISDICTION OF JUSTICE OF THE PEACE.

Criminal jurisdiction of a justice of the peace being limited to cases where the punishment by imprisonment cannot exceed six months, nor the fine $500, he has not jurisdiction of a violation of the game laws, which Pen. Code, § 636, declares a misdemeanor, punishable by a fine of not less than $100, or by imprisonment for not less than 100 days, or by both such fine and imprisonment.

Application by Edward Anear for discharge on habeas corpus. Granted.

O. R. Coghlan, for petitioner. F. R. Devlin, for respondent.

GAROUTTE, J. The prisoner asks to be discharged from custody upon habeas corpus. He was prosecuted and convicted before a justice of the peace of Montezuma township, Solano county, for violating certain provisions of the fish and game law of this state, found in section 636 of the Penal Code, as amended. St. 1895, p. 262. The statute declares a violation of any of the various provisions of that section to be a misdemeanor, and further declares that any person found guilty of a violation of any of its provisions shall be fined in a sum not less than $100, or be imprisoned in a county jail in the county in which the conviction shall be had not less than 100 days, or be punished by both such fine and imprisonment. The minimum punishment only being prescribed by the section, the justice's court had no jurisdiction to try a defendant charged with a violation of its provisions. The jurisdiction of a justice's court is limited to those cases where the punishment by imprisonment cannot exceed six months, nor the fine exceed $500. This case does not come within that class, for the punishment administered in cases prosecuted under this section may be much greater. The district attorney invokes the aid of section 19 of the Penal Code, but it is clear he gets no relief there. That section, by its terms, is only applicable to cases where no different punishment is prescribed, and here a different punishment is prescribed. For the foregoing reasons, the prisoner is discharged.

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114 Cal. 367

## In re WHARTON. (Cr. 147.)

(Supreme Court of California. Sept. 23, 1896.)

ATTORNEYS—DISBARMENT.

It is no objection to a disbarment proceeding by the court under Code Civ. Proc. § 287, that the matter charged as violation of professional obligations constitutes a felony, and that he has not yet been tried by a criminal court.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Disbarment proceedings against Z. F. Wharton. His license was revoked, and he appeals. Affirmed.

J. H. Leggett, W. H. Layson, and E. C. Hart, for appellant. S. Solon Holl, W. P. Harlow, and Clinton L. White, for respondent.

GAROUTTE, J. This appellant, an attorney at law, was charged by accusation before the superior court of the county of Sacramento with violating his obligations as an attorney; and after issue joined, upon a hearing, he was found guilty of the charges filed against him, and his license as a practicing attorney revoked. An appeal to this court being accorded by section 287 of the Code of Civil Procedure, the matter is now here for consideration.

The main charges against Wharton, as indicated by the accusation, may be briefly and substantially stated as follows: "(1) As attorney for plaintiff in the divorce action of Hoxie vs. Hoxie, commenced in the superior court of the county of Sacramento, Wharton, in violation of his oath and duty as an attorney, and to mislead the court, exhibited to the court, and filed, as genuine, a false and fraudulent affidavit of service of summons, to which the name of one Peter Stortz was attached; that the defendant Hoxie had not been a resident of Sacramento county for more than two years, and was not in the county, and personal service of the summons could not be made on him in that county, and his whereabouts was unknown, all of which was well known to said Wharton. In fact, the summons was never served on Hoxie, either by personal service or by publication, nor did he ever appear in the action. Wharton obtained Stortz' signature by leading the latter to believe he was signing a receipt, and then, upon the false affidavit, procured the default of Hoxie to be entered, induced the court to accept the affidavit as genuine, had the case tried, and a decree rendered in favor of plaintiff, purporting to dissolve the marriage between plaintiff and defendant. (2) The accusation further shows that, in 1895, Wharton, acting as his own attorney, filed in court a complaint in which he, as plaintiff, sought a decree of divorce from his wife, Hattie Wharton. He returned the summons in this case with a false and fraudulent affidavit of service attached to it, also signed by Peter Stortz, the latter being led to believe by Wharton that he was signing his name as a witness to a will. Upon this fraudulent affidavit, Wharton caused the default of his wife to be entered in the action, the same as if she had been served with the summons and had failed to appear within the time allowed by law. He also induced the court to accept the fraudulent affidavit as genuine, and he called the case for trial the same as if the defendant in the case had been regularly served with summons and copy of the complaint, and had made default." The trial court found both of these charges made out by the evidence beyond a reasonable doubt; and that these acts of the accused are in law amply sufficient to demand his discontinuance of the practice of the law there is no doubt.

The accused has brought the evidence of the trial here in bulk, and, after a careful perusal of it, we are entirely satisfied that the findings of the court are fully supported therein. The general reputation of the accused, and also that of the principal witness against him, were largely involved in the investigation. Again, the evidence upon various branches of the case was contradictory; and for this reason, as to the facts, the case was pre-eminently one for the trial judge, whose conclusions we would not readily disturb.

It is further insisted that the accusation filed against the accused contains a charge amounting to a felony, and that recourse should first be had to the criminal courts for a trial of that charge, before this proceeding could be inaugurated. There is nothing in this contention. For a full consideration of this identical question, we refer to Ex parte Tyler, 107 Cal. 78, 40 Pac. 33. Neither is the accused entitled to a trial by jury. The statute (Code Civ. Proc. § 297) provides for a trial by the court, and the constitutionality of that section is beyond question.

There are a few other matters urged by the appellant why this judgment should be reversed; but, after careful consideration, we consider them of minor importance, and wholly insufficient as grounds for a retrial of the cause. Judgment affirmed.

We concur: HARRISON, J.; HENSHAW, J.; McFARLAND, J.; TEMPLE, J.

114 Cal. 390

## ORANGE COUNTY v. LOS ANGELES COUNTY. (No. 19,492.)

(Supreme Court of California. Sept. 28, 1896.)

DIVISION OF COUNTIES—ADJUSTMENT OF ASSETS—AWARD OF COMMISSIONERS—EFFECT—AUTHORITY OF COURT TO CORRECT MISTAKE.

1. Act March 11, 1889, creating O. county out of a part of L. county, provides that certain commissioners shall ascertain and adjust the respective liabilities of the two counties. *Held*, that the commissioners are charged by such statute with the performance of quasi judicial duties, and an award by them is not a bar to a future action for a demand, not actually submitted to nor adjudicated by them, though it was in existence when the submission was made, and though the agreement was to submit all demands.

2. Act March 11, 1889, creating O. county out of a part of L. county, provides that the commissioners shall ascertain and adjudge the indebtedness between the two counties. *Held*, that where such commissioners by mistake, and because they did not know of the existence of a certain asset consisting of an indebtedness due L. county from the state, omitted to take it into consideration in adjusting the assets and indebtedness of such counties, the court had no authority to adjust the matter, but it must be done by the legislature.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the county of Orange against the county of Los Angeles to recover from defendant a certain sum alleged to be due plaintiff as its proportion of a sum received from the state as repayment of money expended by Los Angeles county in providing for the support of aged persons in indigent circumstances between June 30, 1883, and March 11, 1889, prior to the formation of Orange county out of a part of Los Angeles county. From a judgment in favor of defendant after plaintiff's refusal to amend the complaint on a demurrer being sustained thereto, plaintiff appeals. Affirmed.

James G. Scarborough, for appellant. H. C. Dillon, for respondent.

BELCHER, C. This is an action to recover from the defendant the sum of $1,903.70, alleged to be the plaintiff's proportion of $19,032.43 received from the state of California as repayment of money expended by Los Angeles county in providing for the support of aged persons in indigent circumstances between the 30th day of June, 1883, and the 11th day of March, 1889. A general demurrer to the complaint was interposed and sustained, and, plaintiff declining to amend, judgment went for defendant, from which the plaintiff appeals.

The facts alleged in the complaint are, in substance, as follows: Orange county was created out of territory which had constituted a part of Los Angeles county, under the provisions of an act of the legislature approved March 11, 1889. After its organization was completed, commissioners were appointed, as required by the act, to ascertain and adjust the respective liabilities of the two counties. On June 9, 1890, the commissioners made a detailed report of the facts ascertained by them, showing, among other things, that the amount due from Orange county to Los Angeles county, on March 11, 1889, was $15,581. This amount was, however, by a supplemental report reduced by deducting therefrom $1,500, and the balance so found to be due was thereafter paid by plaintiff to defendant. In March, 1892, the defendant received from the state of California the sum of $19,032.43 as aid granted by the state, and as repayment of money expended by defendant in providing for the support of aged persons in indigent circumstances for the period of time from the 30th day of June, 1883, to the 11th day of March, 1889. The money so received by defendant was not included in the division of the assets between the plaintiff and defendant by the said commissioners, and it is alleged, on information and belief, that the claim against the state for such money was not known to exist by either of the parties to the action or by the said commissioners at the time said division of assets was made. Under the provisions of said act, and under the proportion established by said commissioners, plaintiff is entitled to a little more than one-tenth of said money as its share and proportion thereof, amounting to $1,903.70, for which sum defendant is indebted to plaintiff as for money had and received, with interest thereon. On the 25th of April, 1892, plaintiff presented to the board of supervisors of defendant and filed its claim, duly verified and itemized, for the sum of money last named, and the same was disallowed by said board in December following, and no part thereof has ever been paid to plaintiff, but the whole thereof with interest remains due and unpaid.

By section 7 of the act to create Orange county it is provided that: "They [the commissioners] shall ascertain the total amount of indebtedness of Los Angeles county existing at the time this act takes effect, and also the total value of all assets of said county, including real estate, buildings and bridges erected or in progress of erection, money and solvent credits of whatever nature, and any other property belonging to the said county of Los Angeles. They shall also ascertain the assessed value of all property in Los Angeles county under the assessment made in 1888, and also the assessed value of the property under the same assessment assessed in the territory hereby set apart to form Orange county. They shall then find the balance of the total assets and indebtedness of Los Angeles county, and, if there is a balance of indebtedness against said county, the same shall be divided between the two counties according to the following proportion: * * * Said commissioners shall then certify forthwith to the respective boards of supervisors of said counties of Orange and Los Angeles such amounts of the said indebtedness due from Orange county, together with the ascertained value of all bridges and other property estimated and reckoned among the assets of Los Angeles county, as aforesaid, erected or purchased by county funds, and situate in Orange county, which property shall be charged to the new county, and the amount thereof shall be an indebtedness to Los Angeles county, and shall thereupon become the property of said Orange county. In case said commissioners shall find a balance of assets of Los Angeles county over and above its liabilities, they shall belong to Orange county by the proportion aforesaid, and shall certify the same to the said boards of supervisors, together with the value of the bridges and other property as aforesaid; and if the amount of said balance of assets belonging to Orange county is less than the value of said property, then the difference between the two amounts shall be assumed and paid by Orange county to Los Angeles county; but if said amount is greater than the value of said property, then Los Angeles county shall pay the difference between the two amounts to said Orange county." In this state the legislature has power to change the boundaries of counties, to consolidate two or more counties into one, and to create a new county out of the territory of one or more previously existing counties, subject only to the limitations expressed in article 11 of section 3 of the constitution. And, as said in Los Angeles Co. v. Orange Co., 97 Cal. 331, 32 Pac. 316: "It has been established by an unvarying line of decisions that, upon the creation of a new county out of the territory of another, the legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just; and that, in the absence of any provision in reference thereto, the old county will be entitled to retain all public property and assets, except such public buildings and structures as lie within the territory of the new, and will also be liable for all its prior obligations." Assuming, as we must, that the money, a portion of which is sought to be recovered in this action, was paid to the defendant as alleged in the complaint, the payment must have been made under and in pursuance of the provisions of an act of the legislature passed in 1883 (St. 1883, p. 380), and of section 22 of article 4 of the constitution. San Francisco v. Dunn, 69 Cal. 73, 10 Pac. 191; Yolo Co. v. Dunn, 77 Cal. 133, 19 Pac. 262. Clearly, then, the money collected in 1892 was due and collectible on March 11, 1889, and it constituted a part of the assets of defendant, which might have been taken into account and apportioned by the commissioners, thus reducing the indebtedness of defendant to the extent of its proportion thereof. It was not taken into account, it appears, because the existence of such a claim against the state was not known to the plaintiff or defendant, or to the commissioners at the time the division of assets was made.

The question, then, is, can the plaintiff resort to the courts, and maintain an action to recover its proportion of the overlooked claim, as money had and received to its use? It is contended for the respondent that the matters set up in the complaint are res judicata; that the commissioners, in making the division of assets between the counties, acted in a judicial capacity, and that their report had the force and effect of a judgment as to all matters which were or might have been considered and passed upon by them, and hence that the plaintiff is estopped from claiming the relief here sought. On the other hand, it is contended for the appellant that the commissioners were required to perform only ministerial duties, and that at most they acted only in a quasi judicial capacity, like arbitrators or referees, and their report was not conclusive or binding as to any matters not actually considered and passed upon by them. We think the commissioners were charged with the performance of quasi judicial duties which were substantially the same as those imposed upon arbitrators. Their report should, therefore, be treated as the award of arbitrators would be. What, then, was the effect of the report? In some of the states it has been held that, after a submission to arbitrators of all demands of the parties against each other, and an award thereon, the award is a conclusive bar to an action for any demand subsisting at the time of the submission and award, though the demand for which the action is brought was by mistake omitted to be laid before the arbitrators, or intentionally withheld, and was not considered or decided on by them. The preponderance of authority is, however, opposed to this view. "It is generally held that an award will not operate as a bar to a future action for a demand which was not actually submitted to the arbitrators, nor adjudicated by them, notwithstanding it was in existence when the submission was made, and although the agreement was to submit all demands." 2 Black, Judgm. § 526, and cases cited.

But, conceding this to be so, still the question remains, can the courts interfere in a case like this? In Commissioners v. Bunker, 16 Kan. 498, it was said: "Where a county is divided, the rule for the division and apportionment of the debts and property between such county and detached territory belongs exclusively to the legislature, and not to the courts; and, when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere." In creating the county of Orange, the legislature determined how the debts and property of Los Angeles county should be divided and apportioned, as it had full power to do. The act prescribed the limits of each county's rights and the methods by which they were to be ascertained. In performing their duties the commissioners doubtless intended to make the division as required, and, if they failed to do so, the failure arose through mistake. The mistake was one, however, which, in our opinion, can be corrected by legislative action only, and not by the courts. The courts are without authority to adjust matters of this character between counties. We conclude, therefore, that the demurrer to the complaint was properly sustained, and that the judgment should be affirmed.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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114 Cal. 246

## SACRAMENTO COUNTY v. COLGAN, Controller. (Sac. 95.)

(Supreme Court of California. Sept. 16, 1896.)

Repeal of Statute—Tax Collector—Compensation.

1. Act March 5, 1870 (St. 1869–70, p. 148), entitled "An act to regulate fees of officers and salaries of certain officers," etc., provided (section 13) that the tax collectors of the several counties should receive for the collection of state and county taxes, except taxes for school purposes, 6 per cent. on the first $10,000 collected, 4 per cent. on all over that sum and less than $20,000, and 2 per cent. on all over the latter amount. Act 1874 (St. 1873–74, p. 204), fixing the compensation of officers in Sacramento county, provided (section 9) that the tax collector of said county should have 1 per cent. on all state and county taxes collected by him, to be retained out of the moneys so collected; and section 18 declared that the act of 1870 (setting out its title), "so far as it relates to the county of Sacramento, and all acts and parts of acts in conflict with the provisions of this act, so far as they apply to the county of Sacramento, are hereby repealed." *Held*, that the act of

1874 repealed the earlier act, as to the commissions to be retained by the collector of Sacramento county.

2. Act 1874, § 9 (St. 1873–74, p. 204), provided that the tax collector of Sacramento county should retain out of all state and county taxes collected by him 1 per cent. of said amount. Act March 30, 1874 (St. 1873–74, p. 909), subsequently passed at the same legislative session, made the sheriff of Sacramento county ex officio tax collector, and fixed his salary as such at a stipulated sum per annum, "and five per cent. commissions upon all delinquent taxes by him collected, and the per cent. now allowed the tax collector for the collection of licenses, in full for all services rendered by him or his deputy as such collector." *Held*, that the effect of the last act was to entitle the county to receive, and retain to its own use, such commissions as the collector would otherwise have been entitled to take and use, had a salary not been substituted for fees, to wit, the 1 per cent. allowed by the first act.

3. Where a county officer, whose compensation is derived wholly or in part from fees collected by him, is placed upon a fixed salary, the fees formerly retained by such officer are still to be collected by him, but are to be paid over to the county treasury. Smith v. Dunn, 8 Pac. 625, 68 Cal. 54, applied.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Petition by the county of Sacramento for a writ of mandate to E. P. Colgan, controller of the state of California. From a judgment denying the writ, petitioner appeals. Affirmed.

Albert M. Johnson and William M. Sims, for petitioner. Atty. Gen. Fitzgerald, for respondent.

HENSHAW, J. This is an action in mandate against the controller of the state, to compel him, in the next settlement to be made by him with the treasurer of the county of Sacramento, to allow the treasurer to retain, out of any moneys then in his hands and belonging to the state, the sum of $32,660.10. This amount plaintiff claims to be due it as commissions for collecting state taxes for the years 1876 to 1892, inclusive. The claim was presented under a recent act of the legislature, entitled "An act authorizing the allowance, settlement and payment of claims of counties against the state," approved March 9, 1893 (St. 1893, p. 109). The trial court found against the claim of plaintiff, and from its judgment this appeal is taken.

In 1870 there was in force an act entitled "An act to regulate fees of office and salaries of certain officers, and to repeal certain other acts in relation thereto." St. 1869–70, p. 148. Section 1 of that act provided, "Fees and salaries are allowed to the officers hereinafter named, * * * and such officers may lawfully charge, demand and receive the same to their own use and benefit." Section 13 of the act provided that the tax collectors of the several counties shall receive for the collection of state and county taxes, except taxes for school purposes, 6 per cent. on the first $10,000 collected, 4 per cent. on all over $10,000 and under $20,000, and 2 per cent. on all over $20,000. In 1874 the legislature passed another act, entitled "An act to regulate the fees of offices and to fix the compensation of the county officers in the county of Sacramento." St. 1873–74, p. 204. Section 9 of this act provided that "the tax collector of said county is allowed one per cent. on all state and county taxes collected by him * * * which said percentage shall be retained by him out of the moneys so collected as aforesaid." Section 18 provided, "An act entitled 'An act to regulate fees of office and salaries of certain officers, and to repeal certain other acts in relation thereto,' approved March fifth, one thousand eight hundred and seventy, * * * so far as it relates to the county of Sacramento, and all acts and parts of acts in conflict with the provisions of this act, so far as they apply to the county of Sacramento, are hereby repealed." On March 30, 1874, the legislature passed still another act, entitled "An act in relation to the government of the county of Sacramento." St. 1873–74, p. 909. Under this act the sheriff was made ex officio tax collector, and by section 2 his salary as ex officio tax collector was fixed at "$1,500 per annum and five per cent. commissions upon all delinquent taxes by him collected, and the per cent. now allowed the tax collector for the collection of licenses, in full for all services rendered by him or his deputies as such tax collector." In Smith v. Dunn, 68 Cal. 54, 8 Pac. 625, it was held that where a public officer, whose compensation had formerly been derived wholly or in part from fees by him collected, was placed upon a fixed salary, the fees formerly retained by the official are still to be collected by him, but are to be paid over into the treasury of the county. By the last legislative enactment above cited, the compensation of the tax collector was fixed, and that compensation was declared to be "in full for all services," whether rendered by him to the state or to the county. Nevertheless, that the state might bear its equitable portion of the expense of the collection of its own taxes, the county was still entitled to receive such commissions as had formerly been allowed by the state to the tax collector.

The sole question presented upon this appeal is whether, in the case of Sacramento county, and under the laws above set forth, that commission should be the 1 per cent. which the county has in the past demanded and collected from the state under the act of 1874, or should be the 6, 4, and 2 per cent. contemplated by the earlier act of 1870. The trial court held that the act of 1870 had been repealed by the later act of 1874. Of the soundness of its conclusion in this regard, we entertain no doubt. A reading of the two acts shows that, both in title and in contents, they deal with the same subject-matter. Under each act the tax collector was to be compensated for his services to the state by being allowed to retain a named percentage of the taxes by him collected. Both acts, then, deal with the compensation of the tax collector. The provisions fixing compensation under the later act are different from, and repugnant to, the provisions of the earlier one. The later act, in express terms, is made applicable to the county of Sacramento; and, if this were not enough to show the legislative intent that the two acts should not and could not be construed together, there is an express provision in the act of 1874 calling direct attention to the act of 1870, by its title, and repealing it, so far as it applied to the county of Sacramento, or conflicted with the terms and provisions of the later act. Even if the act of March 30, 1874, be treated as an act in effect amendatory and supplemental to the earlier act passed at the same session of the legislature, the condition of affairs is not changed. The sheriff, as ex officio tax collector, is put upon a fixed salary. The county is entitled to receive and retain to its own use such commissions as the tax collector would otherwise have been entitled to take and use, had a salary not been substituted for fees. Those commissions or fees would still be the 1 per cent. allowed by the act of 1874. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

114 Cal. 371

## ROSSI v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (Sac. 230.)

(Supreme Court of California. Sept. 26, 1896.)

APPEAL FROM JUSTICE'S COURT—ISSUES TRIABLE—EFFECT OF APPEAL—INTERVENTION.

1. In an action in justice's court to recover on a claim for labor assigned to plaintiff, defendant answered by a general denial, and a complaint in intervention was filed, in which the intervener, after denying the averments of the complaint, alleged that in another suit he had garnished the debt of defendant to plaintiff's assignor, and asked for judgment. Plaintiff's demurrer to this complaint was overruled, and the justice entered the default of the original parties for failure to answer in intervention, but denied intervener's motion for judgment on the default; and on the trial the issues were found for intervener, and judgment rendered in his favor against defendant, and in favor of defendant and against plaintiff for his costs, whereupon plaintiff appealed. *Held*, that plaintiff had a right to have the superior court pass on the sufficiency of his demurrer without any statement of the case, and also to have all the issues of fact presented below tried anew.

2. In taking such appeal, plaintiff properly served notice thereof on both defendant and intervener, who were "adverse parties," each of them having denied the allegations of the complaint.

3. The fact that intervener had garnished the claim in his suit against plaintiff's assignor would not of itself authorize him to defeat plaintiff's right of recovery against defendant, there being nothing to show that intervener had established his right against plaintiff's assignor, or recovered judgment in his action against him.

4. The effect of an appeal from a judgment of a justice's court is to vacate the judgment.

Department 1. Application by one Rossi for a writ of prohibition to the superior court of San Joaquin county to restrain further proceedings in an action pending in said court. Writ denied.

J. B. Webster and Chas. Light, for petitioner. Woods & Levinsky, for respondent.

HARRISON, J. One G. Gianelli commenced an action in the justice's court against D. J. Hoult, to recover the sum of $125 upon a claim for labor performed for the defendant by one Kass, and by him assigned to the plaintiff. Hoult answered the complaint, denying all its allegations. Before the trial of the action, the petitioner herein filed a complaint in intervention in the justice's court, in which he denied all the allegations in the complaint, and alleged that in another action, brought by him in the justice's court against Kass, he had attached the indebtedness of Hoult to Kass, and asked judgment that plaintiff take nothing by the action, but that judgment be rendered in his favor for such sum as might be found due from Hoult to Kass. A demurrer by the plaintiff to this complaint was overruled by the justice, and, before the day fixed for the trial, the justice entered the default of the plaintiff and defendant for failure to answer in intervention. The court denied a motion by the intervener for judgment upon this default, and, upon the trial of the issues, witnesses were examined and briefs filed on behalf of the intervener and the plaintiff, upon which the court found that the sum of $105 was owing from Hoult to Kass at the time of the garnishment, and rendered judgment in favor of the petitioner herein against Hoult for this amount, and in favor of Hoult and against the plaintiff for his costs. The plaintiff thereupon appealed to the superior court from this judgment, and from the whole thereof, on questions of both law and fact, serving his notice of appeal upon both the defendant and the intervener. The superior court overruled the plaintiff's demurrer to the complaint in intervention, and plaintiff thereupon, under leave of the court, filed an answer thereto, in which he denied its several allegations. The court having set the case for trial, the present application has been made for a writ of prohibition, restraining it from all further proceedings in the action so far as it relates to the proceedings had by reason of the intervention of the petitioner.

Counsel on both sides have assumed the right of a justice's court to permit a complaint in intervention to be filed therein, and our conclusion herein has been reached without determining whether such right exists. See, however, Code Civ. Proc. § 925. "An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant." Id. § 387. In the present case the intervener denied all the allegations in the complaint, and thus "united with the defendant in resisting the claim of the plaintiff," and created issues between him and the plaintiff in addition to those between the defendant and the plaintiff which were tried in the justice's court. Although, after overruling the plaintiff's demurrer to the complaint in intervention, the justice entered his default for failing to answer the complaint, yet the demurrer itself shows that the plaintiff was not actually "in default"; and the intervener himself, by his denial of all the allegations in the plaintiff's complaint, raised issues of fact between them which the justice was required to try; and that a trial of these issues was had appears from the recital in the justice's docket that the witnesses who were produced at the trial were examined by the counsel for the intervener.

The plaintiff had the right to appeal from the judgment rendered by the justice, and, in taking the appeal, was required to serve his notice of appeal upon the "adverse party," which in the present case included the defendant and the intervener, each of them having denied the allegations in his complaint. If it should be conceded that the filing by the plaintiff of an answer in the superior court to the complaint in intervention was unauthorized, yet upon his appeal plaintiff had the right not only to have the superior court pass upon the sufficiency of his demurrer to the complaint in intervention, without any statement of the case (Southern Pac. R. Co. v. Superior Court, 59 Cal. 471), but also to have all the issues of fact that had been presented in the justice's court tried anew in the superior court. The effect of the appeal was to vacate the judgment of the justice's court against the plaintiff (Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193), and to require that all the issues of fact between him and the intervener, as well as those between him and the defendant, be tried anew in the superior court; and, if, upon a trial of these issues, the superior court shall determine in favor of the plaintiff, it will be authorized to render a judgment in his favor against the defendant, notwithstanding the intervention of the plaintiff.

The complaint of the intervener does not show that he has ever established his claim against Kass, or recovered judgment in his action against him; and, while Hoult might desire to protect himself against the effect of the garnishment in that action, such garnishment would not of itself authorize the intervener to defeat the plaintiff's right of recovery against Hoult. The application for the writ is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

(114 Cal. 451)

## SALISBURY v. BURR (PERKINS, Intervener. L. A. 79).

(Supreme Court of California. Oct. 6, 1896.)

FRAUDULENT CONVEYANCES.

A transfer by an insolvent debtor to one not a creditor, made to prevent the property from being ratably distributed among his creditors, is void as to creditors, as a transfer with intent to delay or defraud them (Civ. Code, § 3439), if the transferee had reasonable cause to believe that the debtor was insolvent, and was making the transfer with such fraudulent intent.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by A. B. Salisbury against John Burr, in which Gregory Perkins intervened. From an order granting plaintiff a new trial, defendant and intervener appeal. Reversed.

Graff & Latham, for appellants. Walter Rose and W. H. Young, for respondent.

HENSHAW, J. Defendant and intervener appeal from the order of court granting plaintiff a new trial. The action was in claim and delivery, to recover of the defendant sheriff a stock of groceries, fixtures, horses, wagons, etc., of the alleged value of $2,800. The defendant denied plaintiff's ownership or possession, and justified his seizure and detention under a writ of attachment issued in an action between Perkins and Randall. Upon March 15, 1889, the writ was levied upon the property as the property of Randall. The sheriff further showed that on said March 15th, the day of the levy, Randall filed his petition in insolvency, and was adjudged an insolvent, whereupon defendant was appointed receiver of his property. Under this appointment he qualified, took the property, and at the commencement of this action so held it as receiver. Within 30 days before filing his voluntary petition in insolvency, Randall made sale of the property to plaintiff, which sale it is alleged was pretended, fraudulent, for the purpose of defrauding the creditors of said insolvent, and to prevent the property from coming into the possession of Randall's receiver. Further, it is charged that the pretended sale and transfer were out of the usual course of business, and with full knowledge by plaintiff that Randall was at the time insolvent, that the transfer would prevent the property from being ratably distributed among Randall's creditors, that Randall had no other property whatever with which to pay his debts, and that plaintiff, for the purpose of defrauding the creditors of the insolvent, pretends to have purchased the property, and is now wrongfully claiming to be the owner thereof. Gregory Perkins intervened, as assignee in insolvency of Randall, and tendered the same issues of fraud as did the sheriff. The jury returned the following special verdicts: (1) Randall was insolvent at the time the goods were transferred by him to plaintiff. (2) At the time he accepted the transfer plaintiff had reasonable cause to believe that Randall was insolvent. (3) The transfer was made by Randall to prevent his property from coming to the assignee in insolvency. (4) The transfer was made by Randall to prevent the property from being ratably distributed among his creditors. (5) The transfer was made by Randall with the view to defeat the insolvency act of 1880. (6) At the time the transfer was made, plaintiff believed, or had reasonable cause to believe, that Randall was making the transfer with a view to defeat the insolvency act of 1880. (7) Randall did not make the transfer with a view to give a preference to any creditor or person having a claim against him, or to any one who was under liability for him. (8) Neither Randall nor plaintiff, at the time the transfer was made, intended that the property Randall received from plaintiff in exchange should not go into the hands of his assignee in insolvency, or should not be ratably applied to pay his debts. The jury also rendered a general verdict, finding for the intervener "for the recovery of the property described in the complaint."

The motion for a new trial was based upon the minutes of the court. One of its grounds was errors in law occurring at the trial, and excepted to by plaintiff. As no specification of errors is found in the notice, this ground could not properly have been, and presumably, therefore, was not, considered by the court. Packer v. Doray, 98 Cal. 315, 33 Pac. 118. The sole remaining ground, and that, consequently, upon which the order must have been granted, was the irreconcilable conflict and inconsistency which the court believed to exist between the special verdicts or findings of the jury upon the questions of fact presented to them, and their general verdict in favor of the intervener; also because, as claimed by plaintiff, he was entitled to judgment under the special findings, which judgment could not be entered in his favor, by reason of the jury's failure to find the value of the property (Code Civ. Proc. § 667), from all which a mistrial necessarily resulted.

By section 3439 of the Civil Code, every transfer of property made with intent to delay or defraud any creditor or other person of his demands is void against all creditors, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. This broad provision renders void, at the instance of creditors or of the assignee in insolvency, any transfer of property made by the debtor with the intent to delay or defraud any of his creditors. Under this section it matters not whether the transfer be made to a creditor, or, as in the present case, to one between whom and the insolvent such relation does not exist. It is a void transfer if made with the intent—which intent is to be found as a matter of fact—to hinder or defraud. Section 55 of the insolvency act of 1880 creates a limitation upon the otherwise general right of a debtor to prefer certain creditors, and declares void enumerated acts of an insolvent, or of one in contemplation of insolvency, which have for their view the giving of a preference to any creditor or person having a claim against, or who is under any liability for, the insolvent, provided, also, that the person receiving the benefit of the act has reasonable cause to believe that the person making it is insolvent, or that it is done with a view to prevent the insolvent's property from coming to his assignee, or that it is done to prevent the same from being distributed ratably among his creditors, or that it is done to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of, the insolvency act. Section 55 of the insolvency act of 1880 contemplates, therefore, a somewhat narrow and special class of acts which the insolvent may be tempted to perform, and declares them void. Those acts have each and all to do with transfers, assignments, and generally with attempts upon the part of the insolvent to favor and prefer a creditor, or one under liability for him. And it must be held that, if a particular transfer by one in contemplation of insolvency be not made with a view to give preference to a person standing in this relation to the insolvent, the act does not come within the purview of section 55. But it by no means follows therefrom that the transfer by the insolvent, because it is not in violation of section 55 of the insolvency act, is therefore valid. A man in contemplation of insolvency might, for a very inadequate consideration, make a transfer of property to one who did not stand in the relation of creditor to him, trusting to a secret understanding with the transferee that he should in due time receive back from him the property transferred. The purpose and object of the transfer would thus be to defraud all the creditors of their just dues, for the benefit of the insolvent himself, and not for the benefit of any creditor. It would be absurd to say that such a transaction could be upheld, while the much more honest attempt of the insolvent merely to prefer one creditor at the expense of the others should come within the ban of the law. Such a transaction would be void at the instance of creditors or of the insolvent's assignee; but it would be void, not as violative of section 55 of the insolvency act, but as violative of section 3439 of the Civil Code. In Hass v. Whittier, 87 Cal. 613, 25 Pac. 917, the transfer was made to a creditor, and it was charged that the transfer was in violation of section 55 of the insolvency act. The complaint did not aver, however, that the insolvent transferred the property to the defendant creditors with a view to giving them preference. It was there held that, if the complaint sought to attack the transfer to a creditor as being void under the provisions of section 55 of the insolvency act, it should be averred and found that the transfer was made with a view to give such preference. The finding was that the property was received by the defendants with a view to give said defendants a preference, but it was held that, so far as the provisions of section 55 were concerned, unless the insolvent transferred the property with the view to give preference, the views or motives of the transferee in receiving it were of no importance. It was nowhere found in that case that the transfer was made either with a view to give a preference, or with a view to hinder or delay or defraud creditors, or to prevent the property from coming to the assignee, or to prevent it from being ratably distributed among creditors. The intent of the insolvent in making the transfer was not found by the court.

In Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549, it was claimed that the findings of fact did not bring the sale by the insolvent to the defendant within the provisions of the insolvency law, because it was not found by the court that the sale was made with a view to give a preference to a creditor, or a person having a claim against the insolvent vendor. The question presented to and passed upon by the court was whether such a finding was necessary to avoid a transfer to a purchaser for value. The opinion sets forth the finding of the trial court, which was to the effect that Marcuse, being insolvent and in contemplation of insolvency, and with a view to prevent his property from being distributed ratably among his creditors, made the sale and transfer of the goods, wares, and merchandise, and that the vendee had reasonable cause to believe that Marcuse was insolvent, and that said sale and transfer were made with a view to prevent said property from being distributed ratably among his creditors. It was held that these findings sufficiently evidenced a fraud which would avoid the sale. The court, in so deciding, held, it is true, that the findings were sufficient to bring the case within the prohibitory provisions of the insolvency act of 1880. The determination that the sale was void under the provisions of the insolvency act is not in harmony with the conclusion reached in Hass v. Whittier, and here reaffirmed, namely, that section 55 of that act deals only with the transfers made with the design to give preference to a creditor. The decision in Ohleyer v. Bunce was, however, sound. The sale and transfer, as found by the court, were clearly violative of section 3439 of the Civil Code. Where a transfer or sale is made in contemplation of insolvency, with a view to prevent the property from being distributed ratably among the creditors, and the transfer is accepted with knowledge that it is made for this purpose, all of which was found in Ohleyer v. Bunce, it is plain that the transfer is made by the insolvent with the intent to delay, if not to defraud, those creditors. In the case at bar the findings of the jury were to like effect. They found that Randall made the transfer with intent to prevent his property from coming to the assignee, and to prevent it from being ratably distributed among his creditors, and that Salisbury, at the time he accepted the transfer, knew, or had reasonable cause to believe, that it was being made with this intent and for this purpose. Under such circumstances the transfer was void, under section 3439 of the Civil Code. The general verdict of the jury in favor of the assignee was not, therefore, in conflict with the special findings. Under the specifications of errors, no valid ground appears why the order for a new trial was granted. The order is therefore reversed, and the cause remanded, with directions to the court to enter judgment in favor of the intervener.

We concur: TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

5 Cal. Unrep. 454

## FIRST NAT. BANK OF FT. COLLINS v. HUGHES. (Sac. 94.)

(Supreme Court of California. Sept. 16, 1896.)

NEGOTIABLE INSTRUMENTS—TITLE OF PLAINTIFF—SALE—WARRANTY—REMEDY FOR BREACH.

1. A finding that plaintiff bank was not the owner of the note sued on, which was in evidence, indorsed by the payee, cannot be sustained, as against the positive testimony of plaintiff's president and cashier that the note was bought by plaintiff of the payee before maturity, though plaintiff, on sending the note after maturity to another bank for collection, sent a new note to be executed by defendant, extending the credit for six months, which was made payable to the payee of the first note,—plaintiff's president testifying that it was customary to have renewal notes so executed, and then indorsed by

the payee,—and though the cashier of another bank testified that it was customary to have notes discounted by a bank marked differently from the one in question.

2. Transfer of a note to a bank for collection gives it such ownership thereof that it can sue the maker thereon.

3. A bill of sale of a stallion merely guarantying him to be a breeder excludes a guaranty of his being pure-bred.

4. A promise by the seller, in a bill of sale of a stallion guarantying him to be a breeder, that, on satisfactory proof that he is not a breeder, the seller will give another in exchange for him, on his being delivered at a certain place, limits the buyer's remedy, in the absence of a refusal of the seller to comply with such agreement.

5. After consummation of a sale, the buyer cannot rescind it for breach of a warranty not intended to operate as a condition, though a note for the balance of purchase money has not been paid; his remedy being for damages suffered from the breach.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by the First National Bank of Ft. Collins against George T. Hughes. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Needham & Dennett, for appellant. L. J. Maddux, for respondent.

SEARLS, C. This is an action to recover upon a promissory note dated May 25, 1891, made by defendant George T. Hughes, for $700, payable to the order of Jesse Harris, three years after date, at the First National Bank, Ft. Collins, Colo., with interest, etc. Plaintiff sues as the indorsee and owner of the note. Defendant's amended answer denies plaintiff's ownership of the note, or that it was ever the lawful owner thereof, or that it was ever, for a valuable consideration or at all, assigned to plaintiff, or that he is indebted to plaintiff on account thereof. Further answering, defendant avers that, at the date of the note, he purchased from the payee thereof, Jesse Harris, a "Cleveland bay stallion," for $2,100, for which he gave three promissory notes, of $700 each, payable in one, two, and three years,—the note in suit being the last thereof. The answer then proceeds to aver that Harris, as an inducement to the purchase of said horse, represented that the horse was a pure-bred Cleveland bay horse, and would transmit his color and general characteristics to all his progeny; that at the end of two years the horse proved to be not a pure Cleveland bay, and his progeny was of mixed and off colors, and but few of them were Cleveland bays; that the representations of Harris were false and fraudulent, and made with a view to misleading defendant, and inducing him to purchase and give the three notes; that before the development of the progeny defendant had paid the first two notes, amounting to $1,500, which was in excess of the value of the horse; that before this action was brought he tendered the horse to Harris, and demanded the note here in suit, etc.; that the consideration of the note has failed, etc. He further avers, on information and belief, that the note was not transferred to plaintiff for a valuable consideration, "but only for the purpose of collection," and was made after maturity thereof.

Among the errors assigned by the appellant, an important one is that a special finding of the jury is unsupported by and is contrary to the evidence. The court submitted to the jury the following interrogatory: "Interrogatory No. 1. Was the plaintiff the owner of the note in suit at the time of the commencement of this action?" To which the jury returned for answer, "No." Plaintiff, on its part, for the purpose of establishing its case and its ownership of the note in question, (1) introduced the note in suit, duly indorsed by Jesse Harris, the payee thereof. (2) It introduced the depositions of three witnesses, viz. of Franklin P. Avery, president, G. A. Webb, cashier, and L. C. Morse, assistant cashier, of the plaintiff bank, all of whom testified clearly and positively that the bank was the absolute owner, by purchase for a valuable consideration before maturity, of the note in question. Their testimony does not differ, and we quote that of Moore as a sample of the whole. It is as follows: "I am a resident of Ft. Collins, Colo. Am assistant cashier of the First National Bank of Ft. Collins. I was in the bank at the time of the transfer of the note in question, and examined the books again to-day. The note was transferred to the First National Bank of Ft. Collins before it became due, for a valuable consideration. The transfer to the bank was made March 21, 1894 (it fell due May 25, 1894). $739.25 was the price paid for the note. We bought the note for its present worth at that time, and gave Mr. Harris the money for it. The note was not left by Mr. Harris with us for collection or as a collateral security." Defendant also offered in evidence a letter from Jesse Harris to said defendant, dated before the maturity of the note, viz. May 7, 1894, in which he says "that the First National Bank of this place [Ft. Collins] owns your note coming due this month."

As opposed to this positive evidence, two circumstances were relied upon by defendant: First. After the note fell due plaintiff sent it to the First National Bank of Modesto on two occasions for collection, and on the last occasion sent a new note, to be executed by defendant, extending the credit for six months. This new note was, like the first, made payable to Jesse Harris. This was explained by the officers of plaintiff as their usual custom in such cases. Avery, the president of the plaintiff, in his testimony said: "The name of Jesse Harris, probably, was placed upon the new note. That was our customary way of taking renewals of notes of this class. We desired the note in the same form as the original, with Jesse Harris indorsing it, which at that time we considered good." The other circumstance is this: Each time when the note was sent out by plaintiff, it was marked for collection as follows: "First Nat'l Bank, Ft. Collins, Col." "Col. No. 21,755; also, 22,574." Defendant sought to prove by J. E. Ward, cashier of the First National Bank of Modesto, that these marks indicated that plaintiff held the note for collection simply, and not as an owner. The witness, however, did not so testify. He did testify that it showed the note had gone through plaintiff's collection register, and said it was customary, where bills were discounted, to mark them "D. B.," but, when pressed to say that it indicated that it was only turned over for collection, replied that "he could not say." The following question was put to the witness: "Q. Don't the collection number mean that it is in their hands for collection?" "A. Yes, sir; or it may be transferred from one department of the bank to another. You can't tell as to that."

It is matter of common knowledge with those who have transacted business with and for banks that many of them divide their business into departments, as, for instance, exchange department, collection department, discount department, etc. Under such circumstances it is quite natural that the collection department, receiving a security for collection, should treat it simply as a collection, to be accounted for to the bank or department from which it came. These considerations tend to weaken any inference or deduction of nonownership by the bank from the circumstance in evidence. Again, the answer of defendant avers, in substance, that the note was transferred to plaintiff for collection. This gave such an ownership in the note to the plaintiff as entitled it to maintain the action. True, if indorsed without consideration or subsequent to maturity, as is averred, it would be subject to any valid defense of the plaintiff, but a recovery could not be defeated for want of ownership in plaintiff, alone. Under these circumstances, we are of opinion the evidence militating against the showing of ownership by plaintiff of the note in suit did not raise a substantial conflict, and is wholly insufficient to support the special finding of the jury. For the foregoing reasons a new trial should be had.

There is further matter involved in the case, which, in view of another trial, calls for some notice. As hereinbefore stated, the defendant pleaded fraud on the part of Harris, whereby he was induced to purchase the stallion and make the three promissory notes. The answer in this respect is not as full and explicit in its statement as is desirable. At the trial defendant testified as to certain representations made to him, prior to the purchase of the horse, touching his breed, and that his colts, instead of being all bay in color, were not over one-fourth of them of that color, etc., when it transpired that defendant had received a written warranty upon the purchase of the horse, which warranty was without objection admitted in evidence. It is as follows:

"Original. No. 252. Office of Jesse Harris, Importer of English, French, and Scotch Horses. Ft. Collins, Colo., May 25, 1891. This is to certify that I have this 25th day of May, 1891, sold and delivered to George T. Hughes the imported stallion Emancipation, No. 209, recorded in volume I. of the American C. B. Stud Book. I hereby guaranty the above-named horse to be a breeder, and if, after two seasons' use, I have satisfactory proof that he is not a foal getter, I will, upon delivery of said horse at my establishment in Ft. Collins, Colo., give in exchange for him a horse of same breed, of equal value and merit, provided the above-named horse be returned to me in as sound and in as good condition as when purchased from me. Agents not allowed to deviate from this contract. Jesse Harris.

"I hereby accept conditions of above guaranty. George T. Hughes."

Upon the back of the bill of sale was the following further stipulation:

"Modesto, Cal., May 25, 1891. I hereby agree that if the horse Emancipation (No. 209), A. C. B. S. Book, is in as good and sound condition as when purchased from me, I will exchange for him another horse of same breed and value at any time I may be through this state within two years with other stock for sale, but I do not agree to make a special shipment of one horse to this state for that purpose. [Signed] Jesse Harris."

Printed letter heads from Harris were also introduced in evidence, showing him to be an importer and breeder of "Cleveland bay" and other breeds of horses, and of the former it is said: "The Cleveland bays are the purest breed and most prepotent coach horses in the world. * * * No other breed of horses transmits its color, form, and general characteristics to its progeny in such a marked degree as the Cleveland bay."

These letters were written after the sale to defendant, and could not have entered into the warranty. The warranty must be presumed to be a crystallization of the meaning of the several oral declarations which preceded it. A glance at that instrument shows that the parties settled upon the mode and measure of relief in case the animal sold did not fill the requirements of the warranty. This was that, at the end of two years, if he failed, Harris was, upon his delivery in sound condition at Ft. Collins, Colo., to exchange him for another horse of the same breed, of equal value and merit; or, as in the agreement of the same date indorsed on the warranty, to exchange him in like manner, at any time within two years, when Harris might be in California with other stock for sale, but he was not to make a special shipment of one horse for that purpose. There was no attempt made by defendant to prove that he ever returned the horse to Ft. Collins, or offered to do so, for exchange, or that Harris was in the state with horses, and refused to make an exchange. The fact is, as appears by the testimony of defendant, that he never offered to cancel the contract until October, 1894, when he proposed to deliver the horse to the agent of Harris upon the surrender of the note in suit, and that the agent then proposed to him to "ship the horse to Ft. Collins, Colo., and we will ship you a horse out here that we know to be a thoroughbred and true breeder." This was substantially what Harris had agreed in his warranty to do. "The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition." Civ. Code, § 1786. The sale in this case had been consummated for years, and was not open to rescission. If there was a breach of the warranty, and defendant suffered damages thereby, he is, upon proper pleadings, entitled to deduct the same from plaintiff's recovery, upon it appearing that plaintiff is not an innocent purchaser for value before maturity.

The judgment and order appealed from should be reversed, and a new trial ordered, with leave to defendant to amend his answer if he shall be so advised.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered, with leave to defendant to amend his answer if he shall be so advised.

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114 Cal. 414

## PACIFIC COAST S. S. CO. v. KIMBALL et al. (S. F. 123.)

(Supreme Court of California. Oct. 3, 1896.)

PRIVATE WHARVES—LEASE BY CITY—VALIDITY—CONSTRUCTION.

1. The state granted to the city of Monterey all the water front included within its corporate limits, with the condition that it should not be subject to execution, but might be leased, for a period not to exceed 10 years, on such terms as might be deemed most advantageous. The city had about 2,000 inhabitants, and there were about two miles of seashore within its limits. *Held*, that such city could lease a small portion of the water front to a steamship company for its special or private use.

2. A lease by the city of Monterey of a small portion of its water front to a steamship company recited that such company should erect a wharf thereon, and keep the same in good repair during the lease; that it could collect wharfage and dockage; and that in case of its failure to keep said wharf in repair, or its becoming unfit for use, and so continuing for 90 days after notice by the city, the lease should cease. The order of the city authorizing the lease stated that the company should not charge to exceed 50 cents per ton wharfage. *Held*, that there was nothing in the lease, or the order authorizing it, requiring such company to permit the use of the wharf by others.

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by the Pacific Coast Steamship Company against John S. Kimball and others for an injunction to restrain defendants from landing their passengers and freight at plaintiff's wharf at the city of Monterey. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

W. A. Kearney, for appellants. Geo. W. Towle, Jr., S. F. Geil, and J. J. Wyatt, for respondent.

TEMPLE, J. This action was brought to obtain an injunction restraining defendants from landing their passengers and freight at plaintiff's wharf at Monterey. In 1868 the legislature granted to the city of Monterey all the water front included within the corporate limits, for the use and benefit of the city, with the condition that it should not be subject to execution, but might be leased for a period not to exceed 10 years, by the city trustees, "in such manner and upon such terms as may by them be deemed most advantageous." Monterey contains about 2,000 inhabitants, and has railroad connections, as well as its advantages as a seaport. In 1880 it leased to the plaintiff a small portion of its water front, upon which was an old wharf, which, however, had become so dilapidated as to be unsafe. The indenture of lease contained the following: "In consideration whereof, the said party of the second part do hereby agree to erect a wharf on the said premises, and to keep the same in good repair during the term of this lease. Said parties of the second part shall be entitled to collect wharfage on goods and merchandise passing over said wharf at the rate of fifty cents per ton, and such rates of dockage for vessels as is ordinarily charged at other wharves on the Southern coast. And it is hereby agreed and understood by the parties hereunto that in case of failure by the party of the second part to keep said wharf in repair, or if the same shall become dilapidated and unfit for use, and should so continue for the space of ninety days after notice from the party of the first part to repair the same, then this lease shall cease, and thereafter shall be null and void." Plaintiff owned and operated several steamships, which made weekly trips between different ports of California, and was a carrier of freight and passengers. It at once, after obtaining the lease, proceeded to rebuild the wharf, and occupied and used it exclusively for its own business. It so continued to use the wharf up to 1888, when the present lease was obtained. During that period no vessels made use of the wharf, save their own, and a few schooners loaded with lumber, which used the wharf by plaintiff's consent. In 1888 a new lease was obtained from the city, identical in terms with the first lease. The order of the city council authorizing the new lease contains the following: "The lease to be executed and entered into with said company upon the condition that said company shall promise to keep said wharf in good repair, and shall not charge to exceed fifty cents per ton wharfage." There are about two miles of seashore within the city of Monterey. The portion leased extended 150 feet on each side of the wharf, and was an inconsiderable portion of the harbor. There is not now, and has never been, another wharf at Monterey. It is claimed that under the circumstances the city could not lease any portion of the harbor for a private wharf. I am unable to see, however, any ground whatever for this contention. A wharf is not, like a toll-bridge or a ferry, in its very nature a public utility. Wharves are often appropriated to the use of an individual or a company, and it cannot be doubted that Monterey could lease small portions of its water front for bathing grounds, or for any lawful purpose not injurious to the harbor, or an inconvenience to commerce. That being so, I see no reason why it might not lease a small portion to a steamship company for its special use. The sole question, in my opinion, is whether there is anything in the language used in the lease, or in the resolution of the council authorizing it, which requires plaintiff to permit the use of the wharf by others. I cannot see that it makes any difference that this is the only wharf at Monterey. The city did not obligate itself not to build, or to permit others to build. That it should constitute the only wharf was no part of the understanding. It was the grant of an estate in land, and not a mere franchise. If the right to collect wharfage and dockage is a franchise, the circumstances show that this franchise was at least not the reason which influenced plaintiff in seeking the lease. It was not exclusive. The lease was not obtained for the sake of the franchise, but, on the contrary, if the franchise constituted any part of the consideration which moved plaintiff, it must have been a very unimportant part. Monterey had no commerce, and, until the proceedings by defendants, it does not seem that any one has desired to use the wharf, except in connection with plaintiff's boats, and a few schooners with lumber. The stipulation to keep the wharf in repair is accounted for by the fact that at the termination of the lease the city will become the owner of the wharf. The regulation, however, was evidently not regarded as a grant of the right to collect wharfage and dockage, but as a restriction upon a right which it was assumed was incident to the privilege of building a wharf. It is so expressed in the resolution authorizing the lease. As the city had a right to lease a wharf for private use, the grant must be judged like any other, and we cannot put a condition upon the estate which is not expressed or clearly implied. Counsel admit that, if there were other wharves by which commerce could be accommodated, such a lease could be made. As already stated, whether there are other wharves or not is an immaterial circumstance. I cannot find in this mere limitation upon the charges which could be made a condition of the estate granted. The giving of the lease has promoted commerce at Monterey. It has secured the landing of at least five steamers per week. Whether otherwise she would have any commerce, does not appear. It is no monopoly, for the city can easily cause other wharves to be constructed for general use. It is conceded by appellant that, if the defendants are not entitled to demand the use of the wharf by tendering the maximum wharfage allowed, plaintiff is entitled to the remedy demanded. For this reason I have not stated the nature of the trespass threatened. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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5 Cal. Unrep. 460

## SLOSSON v. GLOSSER et al. (S. F. 422.)

(Supreme Court of California. Sept. 29, 1896.)

APPEAL — ATTACHMENT — MOTION TO DISSOLVE — SECURED DEBT.

1. An order refusing to dissolve an attachment will not be reversed on appeal where the evidence is conflicting.

2. Under the provision of Code Civ. Proc. § 538, excluding from the debts on which an attachment may be obtained those secured "by any mortgage or lien upon real or personal property, or any pledge of personal property," the fact that a debt is secured by a bond executed by the debtor with sureties will not defeat an attachment thereon.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Edw. P. Slosson against George W. Glosser and others. Defendants appeal from an order refusing to dissolve an attachment. Affirmed.

Wal. J. Tuska, for appellants. Rhodes & Rhodes, for respondent.

PER CURIAM. Appeal from an order refusing to vacate and dissolve an attachment. The order must be affirmed. The showing made by plaintiff on the motion directly contradicted that of the moving defendant as to the purposes for which the bicycle installment contracts were assigned to plaintiff; the defendant claiming that they were so assigned as security for the debt sued on, and plaintiff's affidavit setting up that they were not taken for that purpose, but that he was simply to take the contracts and collect the installments due on them for defendants, and expressly declined to take them for any other purpose. The evidence was thus substantially conflicting, and it is therefore unnecessary to inquire whether, had the contracts been assigned to secure the debt, they would have constituted such security as would preclude plaintiff from the remedy of attachment, since, upon well-established principles, the finding of the lower court is conclusive, and the order cannot be disturbed. Barbieri v. Ramelli, 84 Cal. 174, 24 Pac. 113.

The further question whether plaintiff held the bond for $1,000 claimed to have been executed by Glosser and two sureties to plaintiff's assignor as security for the defendants' indebtedness, is wholly immaterial, since such security does not prevent the right of attachment. The requirement is that the debt shall not be secured "by any mortgage or lien upon real or personal property, or any pledge of personal property." Code Civ. Proc. § 538. Order affirmed.

114 Cal. 433

## WOLTERS et al. v. HENNINGSAN et al.

(Sac. 99.)

(Supreme Court of California. Oct. 3, 1896.)

CONTRIBUTION—BETWEEN STOCKHOLDERS IN DISTILLING CORPORATION — TAXES PAID UNITED STATES—EVIDENCE.

1. The stockholders in a corporation engaged in distilling being individually liable to the federal government, under Rev. St. U. S. § 3251, for the tax on the product of such corporation, stockholders who are compelled to pay such tax may maintain an action for contribution against other stockholders; but the liability of the defendants in such action is not in the nature of an assessment on their stock, but is based on their joint and several liability for the amount paid by plaintiffs under the act of congress.

2. In an action by stockholders of a corporation against other stockholders for contribution on the ground that plaintiffs were compelled to pay a certain sum to the federal government as taxes on spirits distilled by the corporation, a judgment obtained by the United States against the plaintiffs for such taxes, while not conclusive on the defendants as to the validity or amount of such taxes, is properly admissible in evidence, together with an execution issued thereon and levied on the property of plaintiffs, as evidence that plaintiffs were compelled to pay the amount.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Henry Wolters and others against A. Henningsan and others. Judgment for plaintiffs, and defendant Blasingame appeals. Affirmed.

Sayle & Coldwell, for appellant. C. B. Graham and F. H. Short, for respondents.

McFARLAND, J. Plaintiffs recovered a money judgment against the defendants, and the defendant Blasingame appeals from the judgment. He also gave notice of an appeal from an order denying a new trial, but it seems to be admitted that the notice of the motion was not made in time, and the brief of his counsel asks for a reversal upon the grounds of the insufficiency of the complaint and of the findings.

The plaintiffs and defendants were all stockholders in a certain corporation called the Fruit Vale Wine & Fruit Company, which was engaged in the business of distilling brandy and proof spirits. This action is brought by plaintiffs to enforce contribution from defendants, as such stockholders, on account of money paid by plaintiffs to the government of the United States for certain taxes which said corporation should have paid for the spirits distilled by it. Judgment was rendered against the defendants for $12,158.20, which was proportioned among the defendants in accordance with the number of shares of stock held by each.

The proposition that a stockholder in a corporation engaged in distilling is a person "interested in the use of" the still, etc., owned by the corporation and used in its business, within the meaning of section 3251, Rev. St. U. S., was determined by this court in the case of Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1078, and also that such stockholder is liable to contribution to other stockholders who have been compelled to pay taxes upon the spirits distilled by such corporation. But, as was said in that case: "We must not confound the liability of a stockholder in a corporation, under the law of its creation, with that imposed upon him by the act of congress. His liability under the latter is quite independent of the former, and is just what the act of congress has imposed upon him." When, therefore, certain stockholders of such a corporation have been compelled to pay, and have paid, taxes for which the corporation is liable, they may compel other stockholders to contribute their share of the payment thus made; but this liability is not in the nature of an assessment upon a stockholder under our incorporation laws, but upon the theory that under said section of the Revised Statutes all the stockholders as individuals are jointly and severally liable for the tax.

It is contended by appellant that in the case at bar both the complaint and the findings are insufficient to warrant or sustain the judgment. The complaint contains some long sentences considerably involved and somewhat difficult to follow, and the same may, in some measure, be said of the findings. But, looking through them, we think that enough can be detected to maintain the judgment. There are some averments in the complaint which should not have been there, but they were immaterial, and were not considered by the court in fixing the amount of the judgment. For instance, it is alleged that the officers of the United States government seized and took into its possession the distillery of said corporation, together with all the property connected therewith, including several acres of land, and that, in order to procure a release of said property, it was necessary to pay certain costs incurred on such proceeding, amounting to a considerable sum of money, which the plaintiffs in this case paid; and we see no grounds upon which said costs voluntarily paid by the plaintiffs to release said property could be recovered in this action. Whether or not the plaintiffs could recover that sum of money against the corporation, or against defendants, upon regular assessments made by the corporation, is not a question which here arises, for it is not an obligation created by said section of the United States Revised Statutes. But the court did not consider that item at all in rendering its judgment, and therefore the defendants were not prejudiced by that averment being in the complaint. The United States also brought an action against the plaintiffs in this case for taxes upon spirits distilled by said corporation which it had not returned to the government, and had neglected and refused to pay, and it is averred in the complaint that in that action the government recovered a certain sum of money against the plaintiffs in this present action, who were defendants in that action; and appellant contends that the judgment in the case at bar is founded solely upon said judgment recovered by the United States, and that, as the appellant was not a party to that action, he is not bound by it. We do not understand, however, that the present judgment is based upon said judgment in favor of the United States, but that the latter, together with an execution which was issued upon it and levied on plaintiffs' property, was admitted in evidence merely for the purpose of showing that the plaintiffs in the present action were compelled to pay the amount of taxes which they did pay. We think that the complaint sufficiently shows that the said corporation, during the months of August, September, October, November, and December of the year 1887, distilled a large amount of spirits, upon which it neglected and refused to pay the taxes owing to the government, which taxes the plaintiffs were compelled to pay. The court found that the amount of spirits so distilled, which was not reported, and upon which the taxes were not paid, was 20,500 gallons. The tax due to the government upon said amount of distilled spirits would be in excess of the judgment rendered for said taxes in this case; but the court also found that the amount for which judgment was rendered in the suit brought by the United States, which plaintiffs were compelled to pay and did pay, was the sum of $15,969.80; and this last sum was made the basis of the judgment in this present action. From this last-named sum the court deducted the proportion which should be borne by the plaintiffs and certain other persons who were not made defendants herein, which left the sum of $12,158.20, for which judgment was entered against the defendants in proportion to their shares. Under these circumstances we see no reason for reversing the judgment. The findings sufficiently show that appellant is liable for at least his proportionate share of that part of the delinquent taxes of the corporation which the respondents were forced to pay by the said judgment and execution in favor of the United States. We see no other points which call for special notice. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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114 Cal. 422

## PEOPLE'S SAV. BANK OF FRESNO v. JONES et al. (Sac. 101.)

(Supreme Court of California. Oct. 3, 1896.)

REPLEVIN — WHEN LIES — RIGHT TO POSSESSION.

Where mortgagors of a lot remove a house from it after sale of the lot on foreclosure of the mortgage, replevin by the purchaser to recover the house will not lie before the period of redemption has expired and he is entitled to possession.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Replevin by the People's Savings Bank of Fresno, a corporation, against T. E. Jones and others. From a judgment in favor of plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed.

Sayle & Coldwell and E. S. Van Meter, for appellants. Geo. L. Warlow and H. H. Welsh, for respondent.

BELCHER, C. The defendant T. E. Jones was the owner of two lots of land in the city of Fresno, on which he and his wife, the defendant Annie Jones, executed to the plaintiff two mortgages, one on the 2d day of March, 1892, and the other on the 6th day of May, 1892, to secure payment of certain promissory notes made by them. In April and May, 1893, the defendants caused a frame dwelling house to be erected on said lots, which they thereafter occupied as their place of residence. The house rested on mudsills which were placed on top of the ground. Afterwards plaintiff commenced an action to foreclose its mortgages, and on April 24, 1894, a decree of foreclosure was duly and regularly made and entered, directing the sale of the said lots. By the decree a commissioner was appointed to make the sale; and thereafter, on May 22, 1894, he duly and regularly sold to the plaintiff all the property mentioned in the decree, and on the same day executed and delivered to plaintiff a certificate of such sale. The property sold was not redeemed, and on November 24, 1894, the commissioner executed and delivered to plaintiff a deed for all the property so sold. On November 17, 1894, the defendants, without the knowledge of plaintiff, caused the house erected by them as aforesaid, and which they were then occupying with their family, to be removed about 40 feet to and upon an adjoining lot. Two days later, on November 19th, plaintiff commenced this action in claim and delivery to recover possession of the said house or its value, alleged to be $500, together with damages for its detention. The complaint alleges that on the 17th day of November, 1894, the plaintiff was, and still is, the owner and entitled to the immediate possession of all the following goods and chattels, to wit, one frame dwelling house, etc.; that, on the day named, defendants, without plaintiff's consent, and wrongfully took said goods and chattels from the possession of plaintiff, and still unlawfully withhold and detain the same, to plaintiff's damage, etc. The balance of the complaint is in the usual form. The answer denies all the material averments of the complaint, and sets up that, on the day the complaint was filed, the plaintiff, upon affidavit and undertaking, required the sheriff of the county to take said house from the possession of defendants, and that he did take the same from the possession of the defendant Annie Jones, who is the owner and entitled to the possession thereof, to her damage, etc.; wherefore, judgment is asked for a return of the said property, or for its value, with damages. The case was tried before a jury, and the verdict and judgment entered thereon were in favor of the plaintiff, from which judgment and an order denying their motion for a new trial the defendants appeal.

It is earnestly contended for appellants that the house never became a fixture on the land, and was never subject to the lien of the plaintiff's mortgage, and hence that the plaintiff had no right to recover its possession. This proposition is controverted by respondent, but whether it be sound or not need not be considered, in view of our conclusion upon another proposition.

The law seems to be settled by an unvarying line of decisions that, in order to maintain an action of this kind, the plaintiff must be entitled, at the time the action is commenced, to the immediate possession of the property sought to be recovered. In Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 751, it was held that, "to sustain an action of claim and delivery, the plaintiff must have the right to the immediate and exclusive possession of the property at the time of the commencement of the action." And in Cobbey's work on the Law of Replevin it is said, in section 94: "The right to the possession at the time of bringing the action is essential to a recovery. It cannot be maintained without showing either a general or special property in the plaintiff, together with the immediate right of possession." And again, in section 96, it is said: "An after-acquired interest will not support replevin. The plaintiff must have the exclusive right to the possession at the commencement of the suit. * * * The plaintiff in replevin must prove a right to the possession at the time the action was commenced. In order to maintain an action for the recovery of chattels in specie, the plaintiff must have, as against the defendant, a present, unqualified right to the possession of the chattel in its present form; and hence, if there be any preliminary act or condition precedent to be performed before the unqualified right of possession attaches, the action cannot be maintained." And see the numerous authorities cited. It is settled law in this state that a mortgage of real property does not pass the title to the mortgagee, and no right of possession is conferred by it when not authorized by express terms. Smith v. Smith, 80 Cal. 323, 21 Pac. 4, and 22 Pac. 186, 549; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957. It is true that when a mortgage is foreclosed, and the property sold, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto, subject to redemption; and the certificate issued to the purchaser "is the evidence of a sale whereby, subject to the right of redemption and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is vested in the purchaser, subject to be defeated by redemption." Foorman v. Wallace, 75 Cal. 556, 17 Pac. 682. In case of such a sale the judgment debtor is entitled to remain in possession of the property until the expiration of the time allowed for redemption, and during that period the purchaser has and can assert no right to the possession thereof, though on his application the court may restrain the commission of waste on the property. Code Civ. Proc. § 706; West v. Conant, 100 Cal. 231, 34 Pac. 705. When this action was commenced, the time allowed by the statute for redemption had not expired, and the plaintiff was therefore not entitled to the immediate possession of the property. This being so, the action was prematurely brought, and the court erred in refusing to give the instructions numbered 9, 10, and 11, asked by defendants. The judgment and order appealed from should be reversed, and the cause remanded.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

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(114 Cal. 404)

## CONLIN v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 299.)[1]

(Supreme Court of California. Oct. 3, 1896.)

CONSTITUTIONAL LAW—APPROPRIATION OF MUNICIPAL FUNDS FOR INDIVIDUALS — SPECIAL ACTS.

1. An act of the legislature directing municipal officers to pay to an individual, out of the municipal treasury, a sum of money for which there is no legal and enforceable claim, is a "gift of public money," within the inhibition of Const. art. 4, § 31, and hence is void.

2. Act March 28, 1895 (St. 1895, p. 348), directing the board of supervisors of the city and county of San Francisco to order a certain sum of money paid to C., and the auditor to audit, and the treasurer to pay, said sum, is a special law "regulating county or township business," within the inhibition of Const. art. 4, § 25, and hence is void, whether the amount so ordered paid be a liquidated or unliquidated claim.

3. Such act is also a special law "prescribing powers and duties of officers in cities and counties," within the inhibition of Const. art. 4, § 25, inasmuch as it imposes upon the officers named therein duties different from those to be exercised in other cases, by requiring them to pay the claim without examining into its validity, as they are required to do by general law in all payments of public money.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Petition by John J. Conlin for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to allow a claim. A demurrer to the petition was sustained, and petitioner appeals. Affirmed.

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[1] Rehearing denied.

Rodgers & Paterson and Edward R. Taylor, for appellant. Harry T. Creswell. for respondents.

HARRISON, J. At the last session of the legislature the following act was passed March 28, 1895 (St. 1895, p. 348):

"Section 1. The board of supervisors of the city and county of San Francisco is hereby authorized and directed to order paid to John J. Conlin, or his assigns or legal representatives, the sum of sixty-one thousand five hundred and seventy-seven ($61,577) dollars.

"Sec. 2. The auditor of said city and county of San Francisco is hereby authorized and directed to audit the demand for said sum of money named in section one, and to issue his warrant therefor to John J. Conlin, his assigns or legal representatives; and the treasurer of said city and county is hereby directed to pay said demand and warrant for said sum of money upon presentation therefor.

"Sec. 3. This act shall take effect immediately."

The appellant thereafter presented his claim to the board of supervisors for said sum of money, together with a duly-authenticated copy of said act, and demanded that the same be allowed and ordered paid. The board of supervisors refused to allow the same, and thereupon the plaintiff made application to the superior court for a writ of mandate compelling said board to allow the claim. A demurrer to his petition was sustained by the superior court, and from the judgment entered thereon the present appeal has been taken.

The validity of this act is assailed by the respondents upon the ground that the legislature has not the power to direct the payment of moneys out of the treasury of the city and county of San Francisco, against its will, or without its consent. It is conceded by the appellant that the legislature has not the power to direct or command the municipality to make a gift of its funds, but it is contended on his behalf that the legislature has such control over these funds that it may appropriate them for any public purpose, and that, as courts cannot look outside of the act making such appropriation, but must determine the character of the appropriation from the terms of the act alone, it is to be presumed that the legislature made the appropriation for a public purpose; that if the legislature had the power under any circumstances to pass the act in question, it must be assumed that the circumstances existed in the present case, and authorized its passage. In support of this proposition are cited Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, and Rankin v. Colgan, 92 Cal. 606, 28 Pac. 673. These cases, however, involved the power of the legislature to appropriate money from the state treasury, and did not touch upon the power of the legislature to deal with the moneys in the treasury of a municipal corporation. Assuming, however, that the legislature may appropriate the funds in the state treasury for any public purpose, it does not follow that it has the same power over municipal funds. While the funds in a municipal treasury are in a certain sense public, they are so only for the limited public which has contributed them, but not for the entire state, and the power of the legislature over these funds is not co-extensive with its power over the state funds, but is limited by certain provisions of the constitution.

We are not aware that it has ever been held, and counsel for appellant has not cited us to any authority in support of the proposition, that the legislature has power to appropriate the funds of a municipality to the discharge of an obligation against the entire state, or to direct the payment of such funds for any other purpose than pertains to the municipality itself. Mr. Cooley, in his treatise on Taxation, lays down the rule in the following language: "All the property of a municipal corporation may be assumed to come from taxation. It is public property, but public for the purposes of the municipality, and not for purposes of the state. If, in fact, it has been raised for special purposes, under state authority, the state may compel its proper application. The state must have a power of direction also in cases where municipal powers are so modified as to preclude the contemplated purpose being followed; but it is believed to be an unsound doctrine that the legislature of the state may, for that reason, or any other, apply it to state uses, or even to local uses, against the consent of the people concerned." See, also, Cooley, Const. Lim. (6th Ed.) p. 283 et seq.; Dill. Mun. Corp. § 75. It was never held under the former constitution of this state that the legislature had unlimited control of the moneys in a municipal treasury, or that it could direct their appropriation to other than municipal purposes. Certainly, it was never contended that the legislature could cause such funds to be transferred to the state treasury and be made a part of the state funds; and there can be no distinction in principle between such power and the power to direct their payment for a state obligation or purpose. In Blanding v. Burr, 13 Cal. 351, it was said: "The power of appropriation which the legislature can exercise over the revenues of the state for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town for any purpose connected with their present or past condition, except as such revenues may by the law creating them be devoted to special purposes." In Sinton v. Ashbury, 41 Cal. 525, the act was upheld upon the ground that the purpose for which the money was to be paid was a municipal purpose, and the further ground that "the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of a contract, and, by appropriate legislation, may so control its affairs as ultimately to compel it out of the funds in its treasury, or taxation to be imposed for that purpose, to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it;" and, in giving the opinion of the court, Mr. Justice Crockett said: "I am not aware that any case has gone so far as to hold that the legislature may devote the funds of a municipal corporation to purposes confessedly private, and having no relation to municipal affairs." The statute involved in Creighton v. Manson, 42 Cal. 446, was sustained upon the principle that: "Where an individual has no legal claim in the sense of being capable of an enforcement by judicial proceedings against a municipal government, he has, nevertheless, in equity and justice, in the larger sense of those terms, a right to indemnity and compensation out of the public treasury." The principle by which these cases were governed was fully illustrated in Hoagland v. Sacramento, 52 Cal. 142, where the converse rule was enforced, and it was held that the legislature could not compel a city to pay a claim made against it for which it was under no moral or equitable obligation; saying: "While the legislative power may, as it frequently does, interpose to furnish a remedy or remove an impediment which prevents the enforcement of a legal or equitable right or duty already existing, it cannot, even against a municipal corporation, create a claim without the consent of those who are to be taxed with its payment. Such a procedure, while taking on the form of a statutory enactment, would amount to mere spoliation."

The power of the legislature to appropriate any of the public moneys in the state treasury, or to direct the appropriation of the public moneys of a municipality, in cases like the foregoing, was taken away by the present constitution,[1] and it can now make no appropriation of public moneys for which there is no enforceable claim, or upon a claim which exists merely by reason of some moral or equitable obligation, which the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. Conlin v. Board, 99 Cal. 17, 33 Pac. 753. It was held in this case that the legislature holds the public moneys in trust for public purposes, and under this limitation of the constitution can make no disposal of these funds except in accordance with such purposes; that it has no authority to appropriate public moneys for purposes for which there is no legal or equitable obligation, and can no more direct a municipality to make a gift of the public moneys in its treasury than could the municipality without such direction. As, therefore, the legislature is precluded from directing a gift of municipal funds, and as any appropriation of moneys for which there is not a legal and enforceable claim falls within the meaning of this term as used in the constitution, it follows that, even if it be conceded that the legislature has any control over municipal funds, the only circumstances under which it could direct their payment would be for some municipal purpose, or in satisfaction of some valid claim against a municipality. It must, therefore, be assumed, for the purpose of sustaining the validity of the act in question, that the legislature directed the money to be paid to the appellant in satisfaction of some obligation of the municipality. Such a statute would, however, be in direct violation of the constitutional limitations upon the power of the legislature. Section 25 of article 4 of the constitution declares that the legislature shall not pass any special or local law regulating county and township business, or prescribing the powers and duties of officers in cities and counties, or in any case where a general law can be made applicable. The act in question is both special and local. It is special in that it is applicable to a single individual and to a single transaction. It is local in that by its terms it is applicable to only one place, viz. San Francisco. That it is an attempt to regulate the business of San Francisco is equally apparent. To "regulate," as here used,—a word derived from the Latin word "rego," signifying to guide or direct, through the noun "regula," a rule, —is to prescribe a rule for acting, to direct the mode in which a transaction shall be conducted. The act in question directs the mode in which the money named therein shall be transferred from the city treasury to appellant. It prescribes the exact amount to be paid, directs the board of supervisors to order it paid to the appellant, and the auditor to audit and the treasurer to pay his demand for this amount of money. As the public moneys can be transferred from the treasury to an individual only in connection with some public transaction, and for some public purpose, such transfer is of necessity a part of the public business, and a law prescribing the mode by which the transfer may be effected is a law regulating such business. It is none the less a regulation of business because it is limited to a single transaction. It is as much a regulation of business to prescribe the mode in which a single transaction shall be conducted as to prescribe a rule for conducting all transactions. If the legislature can direct this payment to the appellant, it can also direct the payment of every claim against the municipality, and upon the same principle can direct the payment of any claim against every municipal body in the state. That this would be a regulation of municipal business throughout the state cannot be denied, and that each of the acts authorizing payment would be a part of such regulation and in contravention of the constitution is equally apparent. A law limited to a single transaction is as much within the constitutional limitation upon the power of the legislature as would be a law applicable to more than one transaction, and a rule which would uphold a law limited to a single transaction would necessitate the upholding of a law which embraced any number of transactions less than the entire business of the municipality. A similar question was presented in Williams v. Bidleman, 7 Nev. 68. The constitution of Nevada contained the same provision on this subject as is contained in the constitution of this state, and an act was passed by the legislature directing the county of Lander to pay a certain claim. It was held that the act was within the constitutional provision, and to the contention of counsel that, as the act was limited to a special case, it was not a regulation of business within the meaning of the constitution, the court said: "We think this statute is clearly a regulation of business. Any law prescribing a rule to govern business, or an order or direction for its management, is a regulation of that business, whether it be a limited and temporary law, intended to secure a particular end or object, or a general and permanent law, according to the provisions of which all county affairs are to be conducted." See, also, Montgomery v. Com., 91 Pa. St. 125. Whether the claim of the appellant for which payment is directed is liquidated or unliquidated is immaterial. If it is unliquidated, the legislature is not authorized to determine the amount, and direct its payment against the will or without the consent of the city. Such an act would be to except the appellant from the general law requiring a judicial determination of his claim before he could demand its payment. If it be assumed that the payment is to be made for a public purpose, and in satisfaction of a claim that has been judicially determined to be a valid claim in favor of the plaintiff and against the city, the act is none the less a regulation of the business of San Francisco, and a special law exempting the plaintiff from the general law requiring all claimants against the city to enforce their claims by proceedings in the courts of the state. The act, moreover, prescribes the duties of the several officers named therein, and imposes upon them duties different from those which they are required to perform in all other instances in which the public money is to be paid. In all other cases the board of supervisors are prohibited from ordering the payment of any claim, and the auditor from approving, and the treasurer from paying, the same, unless presented in a particular form, and the auditor before approving, and the treasurer before paying, any claim, are required to examine into its validity, and to satisfy themselves whether the same is a valid charge against the city and county. But by the act in question these provisions of the general law applicable to all other claimants are dispensed with, and the legislature has peremptorily directed these officers to audit and pay the claim without any such examination, and irrespective of the result of whatever examination they may make. The act thus prescribes a special rule for the duties of these officers in this case, and takes from them the right of acting in accordance with the general rule prescribed for all other payments of money. The judgment is affirmed.

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[1] Const. art. 4, § 31, provides that the legislature shall not have power to make any gift, or authorize the making of any gift, of public money to any individual, municipal or other corporation.

We concur: GAROUTTE, J.; VAN FLEET, J.

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114 Cal. 427

## PEOPLE v. TALLMADGE. (Cr. 138.)

(Supreme Court of California. Oct. 3, 1896.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

On trial for theft, an accomplice testified in detail to the stealing by himself and defendant. There was other testimony to connect defendant with the crime. On a motion for new trial, defendant filed an affidavit of the accomplice stating that the testimony he gave on the trial was willfully false, that he had sworn falsely at the suggestion of the district attorney and deputy sheriff, that the deputy promised him that he would give him $200, and that such deputy had refused to pay him the money. Such statements were denied by the deputy and the district attorney, by affidavits. *Held*, that the denial of the motion was not an abuse of discretion.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Walter Tallmadge was convicted of the larceny of hogs, and appeals from the judgment, and from an order denying a new trial. Affirmed.

Power & Alford and Forrest L. Alford, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The appellant was charged with the larceny of a number of hogs, the property of one Bertch, and was convicted of grand larceny. He moved for a new trial, and the motion was denied; and from the judgment and the order denying a new trial he appealed.

The only point pressed by appellant is that the court erred in not granting a new trial upon the ground of newly-discovered evidence. One Harry Lynde was a principal witness against the appellant, and was, according to his testimony, an accomplice. He testified that on or about the 15th of November, at 9 or 10 o'clock at night, he, in company with the appellant, visited the ranch of said Bertch, and drove out of the field 21 or 22 hogs, and took them a few miles to a place where they were corraled that night; that the next night they drove them to a place called "Armona," reaching the latter place about 3 or 4 o'clock in the morning, where the hogs were corraled; that on Sunday morning they loaded them into two wagons belonging to the appellant, from which place they were hauled in said wagons to various places throughout the country, and sold. There was a great deal of other testimony tending to connect the appellant with the larceny of said hogs, and corroborative of the testimony of said Lynde. It was proven by other witnesses that appellant sold portions of the hogs at various places, and he admits that he did so sell them,—his explanation being that he was hired by the said Lynde to haul said hogs from Armona; that he did not know, or have any reason to believe, that they were stolen; and that after he left Armona, and before he sold any of the hogs, he purchased the same from the said Lynde, giving him a certain sum of money, and agreeing to pay the balance at a future time. On the motion for a new trial there was presented an affidavit made by the said Lynde, in which he testified that the testimony which he had given on the trial against appellant was willfully false; that appellant did not participate in the larceny of the hogs, and did not know that they had been stolen; and that he (Lynde) and another person called Epperson had committed the larceny. He gave as the reason for swearing falsely at the trial that the district attorney and the deputy sheriff had told him that they disliked Tallmadge, and that if he (Lynde) would stand in and help to convict him, by swearing that Tallmadge was with him and helped steal the hogs, the charges against Lynde would be dismissed; and, further, that the deputy sheriff promised him that he would also give him, if he would so testify, $200, and that since then the said deputy sheriff had refused to pay him the said sum of money, or any part thereof. These statements as to the district attorney and the deputy sheriff were entirely denied by said deputy sheriff and district attorney, in affidavits filed on the motion.

Applications on the ground of newly-discovered evidence are addressed to the discretion of the trial court, and its action will not be set aside, except for an abuse of such discretion, and the presumption is that the discretion was properly exercised; and it has been repeatedly held by this court that such applications are to be regarded with disfavor. Hayne, New Trial & App. par. 87, and cases there cited; People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Freeman, 92 Cal. 359, 28 Pac. 261. It cannot be said that, as a matter of law, a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony. If that were so, justice would be defeated in many grave cases. Notwithstanding such an affidavit, the appellate court will rest largely upon the discretion of the judge who heard the trial, and will not disturb his ruling except in clear cases of abuse of discretion. The strongest case in favor of appellant's contention is that of Mann v. State, 44 Tex. 642. In that case the appellant was convicted of rape upon the person of a young girl, and without her testimony there was no shadow of a case against the appellant. In her testimony at the trial she first said that the appellant was innocent, but, being examined by direct questions, she finally made statements tending to show the appellant's guilt. Afterwards, upon a motion for a new trial, she made oath that her first statements when on the stand were true, and that she did not fully understand the bearing of the questions which she afterwards answered, and that her answers to those questions were not true. Upon appeal the supreme court held that the motion for a nonsuit ought to have been granted. But its ruling rested upon a consideration of all the circumstances in the case, and the court said: "Looking at the entire case, including the affidavits, it is our opinion that the guilt of the appellant was left too uncertain, and the character of the evidence against him appeared too frail and unreliable, to justify the court in refusing him another trial." There the ruling of the appellate court was not based upon the mere fact that a witness had afterwards testified to perjury at the trial. In fact, there was no perjury, but a mistake, and the testimony of a witness that he was mistaken is certainly entitled to more consideration than a statement that he committed absolute perjury. The court made its ruling after "looking at the entire case," and we have no doubt that a case might arise where an important witness had afterwards testified to having committed perjury, in which this court would hold, looking at the whole case, that a new trial ought to have been granted. But we do not think the circumstances of this case call for such ruling. The case at bar is very similar to that of People v. McGuire, 2 Hun, 269. In that case the court, speaking of a witness who afterwards made affidavit that he had committed perjury at the trial, said: "The affidavit of such a person is not entitled to so much weight as to justify the conclusion that the evidence given by him, and which the jury may have regarded as credible and reliable, was corruptly and willfully false. The conclusion of the jury would rather warrant the presumption that his testimony was truthful, and his affidavit false." Upon the whole, we do not see any reason for disturbing the discretion of the court below. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

114 Cal. 437

## PEOPLE v. CUMMINGS. (Cr. 153.)

(Supreme Court of California. Oct. 6, 1896.)

FALSE PRETENSES—OBTAINING LAND THEREBY.

Under Pen. Code, § 532, providing that any person obtaining "money or property" by false pretenses is punishable to the same extent as for larceny, a person so obtaining land is not punishable.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

James H. Cummings was accused of obtaining property by false pretenses. A demurrer was sustained to the information, and the state appeals. Affirmed.

Atty. Gen. Fitzgerald, for the People. E. M. Morgan and A. J. Morganstern, for respondent.

VAN FLEET, J. Defendant was accused by information of the crime of obtaining property by false pretenses, under section 532 of the Penal Code, the property charged to have been obtained being described as two certain parcels of land. He demurred to the information as not stating an offense. The demurrer was sustained, and the people appeal, the sole question being whether land is such property as to be the subject of the offense sought to be charged. We think the demurrer was properly sustained. Looking at the history of the offense, and the evil which it has always been designed to correct, and regarding as we must the contemporary construction given to statutes of like purpose and effect both in England and the United States, we are satisfied that the provision of the Code was not designed to include an instance of defrauding another of real estate, and consequently that the information did not charge an offense thereunder. The language of the Code defining the offense is: "Every person who knowingly and designedly by false or fraudulent representation or pretenses defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." Similar provisions, varying slightly in verbiage, but having a common purpose, are to be found in the statutes of every state of the Union, so far as our investigation extends, and like their English prototypes, the earliest of which is 30 Geo. II. c. 24, § 1, are the outgrowth and expansion of the old offense of "cheats" or "cheating," as it existed at the early common law proper, and later under the statute of 33 Hen. VIII. §§ 1, 2, "which," as suggested by Mr. Bishop, "is common law with us." These later statutes have been enacted, Mr. Bishop tells us, "to supply defects in the earlier law, which, as trade increased, was plainly seen not to go far enough in the protection of fair dealing against knavery." 2 Bish. New Cr. Law, § 410. Cheating at common law was a fraud perpetrated by means of a false symbol or token, such as selling goods by false weights or measures, or other like act or thing of a character calculated to deceive and defraud the public or the individual to their pecuniary injury, and against which ordinary prudence could not guard. The inadequacy of this offense to meet the demands of advancing methods of trade arose in part from the fact that it did not embrace any act or thing accomplished without the aid of some false token. Mere spoken lies or misrepresentations, or verbal perversions of the truth, of whatsoever nature, employed to defraud, did not constitute the offense; and it was in part to remedy this defect or omission that the statutes creating the offense of false pretenses were enacted, and which, by reason of their wider comprehension of the arts and methods of cheating, have largely superseded the common-law offense. 2 Bish. New Cr. Law, §§ 143–145; 1 Bish. New Cr. Law, § 571.

In their origin, both the common-law and statutory offenses were undoubtedly designed and aimed solely at protecting personal property, and in aid of the laws against larceny and theft. Indeed, they appear to have sprung into being largely by reason of certain defects in the application of the laws against larceny. Among the reasons stated in the statute (33 Hen. VIII.) for enlarging the offense of cheating are that "many light and evil-disposed persons, not minding to get their living by truth, &c., but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels and jewels of other persons for the maintenance of their unthrifty living; and also knowing that if they came to any of the same goods, chattels and jewels by stealth, then they, being thereof lawfully convicted, &c., shall die therefore,—have now of late falsely and deceitfully contrived, devised, and imagined privy tokens and counterfeit letters in other men's names, unto divers persons their special friends and acquaintances, for the obtaining of money, goods, chattels, and jewels of the same persons, their friends and acquaintances; by color whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels, and jewels into their hands and possession, contrary to right and conscience," etc.; and in one of the early statutes relating to false pretenses it is recited that whereas "a failure of justice frequently arises from the subtle distinctions between larceny and fraud," etc.,—one of which distinctions being that when property was obtained by consent of the owner, intending to part with the title, although by the grossest fraud, it would not constitute larceny. And the offense of false pretenses, under the English statutes, has always been construed as largely analogous to, and closely bordering upon, that of larceny, and as applying only to personal property, which was capable of manual delivery, and the subject of the latter offense, and has always been punishable in much the same manner as larceny. Real property under the English law was never the subject of the offense either of cheating or of false pretenses. Being incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty. Since it could not be carried away and dissipated like chattels, although a man might be deprived of his landed estate by means of fraudulent practices and devices, yet the property was bound to remain stationary, and accessible to the reach of the law, and he was relegated to the civil courts for his redress of the wrong.

Our American statutes upon the subject have all followed more or less closely those of England. As indicated, there are slight differences in language, but in substantive purpose and effect they are the same. Some, instead of employing the specific terminology of the English statutes in designating the character of the property made the subject of the offense, have used more general and perhaps more comprehensive terms, such, for instance, as those found in the provision of our Code above quoted. In their interpretation, however, of the purpose and effect of these statutes, the American courts, by reason, no doubt, of the origin of the offense, and in obedience to a well-established rule of statutory construction, have closely followed in a general way that of the English courts; and the statutes of the various states, however general their terms, have been uniformly held to apply only to personal property. In one case from Indiana (State v. Snyder, 66 Ind. 203) this rule seems to have been relaxed to the extent of holding that the fraudulent obtaining of board and lodging by false pretenses was within the statute. But in Wisconsin it was held that such an act was not within the law. State v. Black, 75 Wis. 490, 44 N. W. 635. The language of the Wisconsin statute was quite as general as our Code provision, reading, "Any money, goods, wares, merchandise or other property"; and it was contended, as by the attorney general it is urged here, that this language was sufficiently comprehensive to include any property. But it is there said: "The word 'property' is in many cases construed to include 'things in action, and evidences of debt.' Rev. St. § 4972, subsecs. 3, 4. But the words 'other property,' in the statute quoted, must, under the familiar rule, 'Noscitur a sociis,' be limited to such identical classes of property as are therein previously enumerated; that is to say, 'money, goods, wares, merchandise and other property' of that description." The Indiana case above cited takes the widest departure from the original scope of the offense that has come under our observation. In no case, so far as an extended research discloses, has the offense ever been held to include transactions in land or real estate. In fact, but two instances are cited in which this claim has heretofore been made, and in both it was overruled. The first was in State v. Burrows, 11 Ired. 477, where it is said: "There are three fatal objections to the indictment: (1) Land is not included within the operation of the statute. It is true, the words are very general: 'Money, goods, property or other things of value,' 'or any bank note, check or order for the payment of money, etc.' But they must be construed with reference to the nature of the offense, the mischief intended to be guarded against, and the particular terms used in connection with the general terms. Larceny at common law was confined to 'goods and chattels.' It did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof, and there was no mischief complained of in that regard." And, referring to the fact that the punishment for the offense was the same as that for larceny, it is further said: "Thus, we are furnished with a key whereby to unlock the meaning of the statute. It was justly considered as great a mischief to be defrauded of property by means of a forged or counterfeit paper, etc., as to be deprived of it by means of a felonious taking and carrying away, and the object was to extend the principle to cases where property was obtained in this fraudulent manner. * * * It may be that 'other things of value' was inserted to include corn, wheat, etc., growing and standing ungathered; but it would be a strained construction to make it include the very land, for that is not the subject of larceny at common law, and as extended by the statute. It would be to make the corollary or sequent embrace a subject not embraced by the original proposition, which is bad logic as well as bad law." The other instance arose in Com. v. Woodrun, 4 Pa. Law J. 362, where, discussing the sufficiency of an indictment for cheating in a real-estate transaction, it is said: "There is another objection to this bill of indictment, which to my mind is equally fatal. The subject-matter of the charge laid in it is land, and the title to it. Does not the same reason apply against making real estate the subject of a criminal charge for depriving its owner of it by cheating, as applies against making land, or any portion of it, the subject of larceny? In both cases it is the mobility of the article obtained which makes the transaction a public evil, as it enables the offender to remove or conceal the property from its owner, with himself from public justice. And it strikes me as nugatory to prepare a penalty for obtaining property which the offender cannot pass if obtained by fraud, and which he cannot remove from its actual location. In all legislation against obtaining property by false tokens or cheats, the obtaining real estate thereby, I believe, has never been made the subject of criminal charge and punishment."

Speaking of this offense, in Whart. Cr. Law, at section 1195, it is said: "As will be hereafter seen, under the statutes, as first drafted, only larcenous property is protected. By the statutes now existing in most jurisdictions this limit is obliterated, and the obtaining by false pretenses both of land and of written securities is made indictable." But to the point that land is now the subject of the offense, the single authority cited is State v. Burrows, from 11 Ired., above cited and quoted from, which, as will be noted, holds directly to the contrary. Later on, at section 1204, the same work again adverts to the point in this wise: "As we have seen, property not larcenous was not at first covered by the statutes, and hence the words 'money,' 'goods,' 'property,' have been held not to include * * * land." Here, curiously enough, to support this suggestion is again cited the same case of State v. Burrows. It will be thus observed that this case is cited as supporting directly opposite views of the same question,—an infirmity under which that case can in no manner be said to rest, and the implied suggestion of which was no doubt the result of the merest mistake or inadvertence on the part of the eminent writer or his reviser. In this immediate connection, however, it is further said, "It is otherwise, however, by special statutes, in most jurisdictions." In view of what precedes it, this language is, we think, ambiguous, and liable to be misapprehended. If by it the writer intended thereby to reaffirm the idea previously suggested, that the offense is now held to include land as one of its subjects, his authorities do not support him. The only cases cited to sustain the text are two,—one the case of State v. Snyder, supra, which is simply to the effect that the statute included the fraudulent obtaining of board and lodging; and the other is that of Reg. v. Burton, 54 Law T. R. (N. S.) 765, where it was held that one was properly convicted under the statute for false representations made to obtain food. To this extent, it may be, our own statute would go. Its exact limitations in that respect are not involved, and need not be determined. But from a consideration of its language, and an examination and review of all the authorities that have come to our attention, either from the briefs, or as a result of our own search, we are satisfied that it was not intended that the offense as there defined should take so wide a departure from its universally accepted scope, as theretofore limited and understood, as would be required to include the facts upon which this charge is laid. As suggested in State v. Burrows, supra, the very language of our statute furnishes us a key to its intended limitation, in providing that the offense shall be "punishable in the same manner and to the same extent as for larceny of the money or property so received." Since real estate is not the subject of larceny, this language would be meaningless, in attempting to apply it to the facts alleged in the information. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(114 Cal. 447)

## LIVE-STOCK GAZETTE PUB. CO. v. UNION STOCK-YARD CO. et al.

(S. F. 184.)

(Supreme Court of California. Oct. 6, 1896.)

NEW TRIAL—PRACTICE—REPLEVIN—DAMAGES.

1. Under Code Civ. Proc. § 648, requiring, on motion for a new trial on the ground of the insufficiency of the evidence, that the objection must specify the particulars in which such evidence is insufficient, a bill of exceptions to a decision denying a recovery of damages for the detention of property, setting out the evidence on the issue of damages, and alleging as the particulars wherein the evidence is insufficient that, "the real question before the court being a question of damages claimed by plaintiff for the wrongful detention of his property, and the evidence being wholly undisputed and uncontradicted as to the damage, the decision of the court should have been for such an amount as would compensate the plaintiff," is sufficient to sustain the granting of a new trial.

2. Plaintiff is entitled to recover his actual damages for the wrongful detention of his property, without proving oppression, fraud, or malice on defendant's part.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the Live-Stock Gazette Publishing Company against the Union Stock-Yard Company and others. There was a judgment for plaintiff, and from an order granting it a new trial defendants appeal. Affirmed.

Lloyd & Wood, for appellants. F. Wm. Reade, for respondent.

PER CURIAM. This is an action to recover the possession or value of certain personal property alleged to be wrongfully detained by defendants, and damages for its detention. The court below found, among other things, as follows: That the plaintiff was the owner and entitled to the possession of the property described in the complaint, and that the defendants unlawfully withheld the same from the plaintiff; "that the value of said property is seven hundred and fifty dollars;" "that the plaintiff has not suffered any damage by reason of the detention of said personal property by the defendants, nor have the defendants been guilty of oppression or fraud or malice." And as conclusions of law the court found "that the plaintiff is entitled to the possession of all the personal property described in the complaint, if a delivery thereof can be had, or the value thereof, viz. the sum of seven hundred and fifty dollars, in case a delivery cannot be had, with costs of suit." Judgment was accordingly so entered, and in due time the plaintiff moved for a new trial upon the ground of the insufficiency of the evidence to justify the decision. The motion was made upon a bill of exceptions, which stated that "upon the trial of said cause the following evidence was submitted to the court, and which was all the evidence offered or introduced upon the matter, or relevant to the issue of damages claimed to have been suffered by plaintiff." There was then set out the testimony of six witnesses, which tended to show that the plaintiff had been damaged by the detention in a very considerable sum. Following this evidence was a specification of the particulars wherein the evidence is insufficient to justify the decision, as follows: "The real question before the court being a question of damages claimed by plaintiff for the wrongful detention of its property, and the evidence being wholly undisputed and uncontradicted as to the damage, the decision of the court should have been for such an amount as would compensate the plaintiff." The motion was heard by the successor of the judge who tried the case, and granted "upon the ground that the evidence is insufficient to justify the decision." From that order the defendants appeal.

The only point made for a reversal is that the specification was insufficient to meet the requirements of the statute, and the order of the court was therefore unauthorized. Under our statute, a motion for new trial may be made upon a bill of exceptions or a statement of the case. Code Civ. Proc. § 648. And it is provided as to bills of exceptions that "no particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." We think that under the circumstances of this case the specification should be held sufficient. The bill of exceptions expressly shows that the only question to be raised on the motion for a new trial was as to whether or not plaintiff was entitled, under the evidence, to damages for the detention of the property. The bill includes all the evidence bearing on that question; and the specification points to the sole question professedly involved in the motion, and directs attention to that point, so that the opposite party might see that all the evidence bearing on the issue, and proper to be considered by the court, was set forth in the bill. McCullough v. Clark, 41 Cal. 304; Eddelbuttel v. Durrell, 55 Cal. 279; Newell v. Desmond, 63 Cal. 242; Tromans v. Mahlman, 92 Cal. 5, 27 Pac. 1094, and 28 Pac. 579. We certainly think the specification sufficient in the case at bar, where the court made an order granting the motion for a new trial, and all intendments are in support of the correctness of that order; and we may justly presume, from the facts appearing on the face of the record, that the only issue raised by the motion was fairly and fully presented to the consideration of the court.

It was not necessary for the plaintiff to prove oppression, fraud, or malice. Under such proof he might have been awarded exemplary damages (Civ. Code, § 3294), but without it he was entitled to such damages as would compensate him for all the detriment proximately caused by the wrong complained of (Id. § 3333). The order appealed from is affirmed.

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(5 Cal. Unrep. 469)

## VENTURA & OJAI VAL. RY. CO. v. COLLINS. (L. A. 232.)[1]

(Supreme Court of California. Oct. 3, 1896.)

STOCK SUBSCRIPTION — CONSTRUCTION — PLEADING.

1. A complaint on a stock subscription is not inconsistent because alleging that defendant, by his subscription, agreed to pay a certain amount "when and as it might be demanded," while this promise is not expressed, but merely implied, in the subscription set out as an exhibit.

2. In a stock subscription, by which the subscribers agreed "to take the number of shares set opposite our names respectively, and thereon to pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to B., treasurer of said corporation," opposite the name of each subscriber, under the words "Stock Subscribed," was written "$2,000," and under the words "Amount of Cash" was written "$200 pd." *Held*, that the obligation on the subscription was not limited to the $200, but this amount was to be paid contemporaneously with the subscription, and the balance on call.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the Ventura & Ojai Valley Railway Company against J. S. Collins. Judgment for plaintiff. Defendant appeals. Affirmed.

Blackstock & Ewing, for appellant. Barnes & Selby, for respondent.

VANCLIEF, C. The plaintiff is a corporation organized in accordance with the laws of this state for the purpose of constructing and operating a railroad in this state. Its capital stock, as fixed by its articles of incorporation, is $250,000, divided into 2,500 shares of $100 each, of which shares only 260 had been subscribed prior to the commencement of this action, and 200 of which were subscribed prior to the incorporation. Subsequent to the incorporation, in June, 1892, the defendant subscribed for 20 shares at the price of $2,000, and at the same time paid to plaintiff 10 per cent. of the par value thereof, and on June 15, 1893, paid a call of the corporation for an additional 10 per cent. of the subscription, and on July 13, 1893, paid another call for 10 per cent.; said payments aggregating $600. On June 6, 1895, the corporation made another call on all the subscribers for 40 per cent. of their subscriptions, the defendant's proportion of which was $800. The defendant refused to pay this last call, and thereupon this action was commenced to enforce payment thereof. The defendant's demurrer to the complaint having been overruled, and he having declined to answer the complaint, judgment was rendered against him for said sum of $800, with interest and costs. Defendant brings this appeal from the judgment, upon the judgment roll, and asks a reversal of the judgment on the alleged ground that the court erred in overruling his demurrer.

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[1] Rehearing granted.

The alleged grounds of the demurrer are that the complaint is ambiguous and uncertain, and that it does not state a cause of action. In addition to the facts above stated the complaint contains the following allegations: "(4) That prior to the incorporation of the plaintiff corporation there was actually subscribed to its capital stock for each mile of the contemplated work proposed by said corporation $1,000 per mile, to wit, two hundred shares of stock of the corporation of the par value of $100 each, aggregating $20,000, and thereon there was paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed, the agreement for which is more fully set forth in a copy of the original agreement attached to this complaint, and marked 'Exhibit A,' reference being thereto had. (5) That thereafter, and subsequent to the incorporation of the plaintiff, to wit, on or about the 1st day of June, 1892, defendant herein subscribed and agreed to take twenty shares of the capital stock of said plaintiff corporation, and then and there agreed to pay for the same the sum of $2,000, when and as it might be demanded by said plaintiff, a copy of his (defendant's) subscription to the capital stock of plaintiff corporation being hereto annexed, and marked 'Exhibit A'; and that said defendant, pursuant to said subscription, thereupon and thereafter became and was, and ever since then has been and now is, a stockholder of plaintiff corporation, holding and owning twenty shares of the capital stock of plaintiff corporation of the par value of $100 each; that said defendant has not paid the said sum of $2,000, or any part thereof, except as hereinbelow stated, though often requested so to do by the plaintiff." "(8) That in the management of its business operations and in the construction of its railroad this corporation expended about $16,000, and therein and for its said purposes purchased material, and agreed to pay for the same, and borrowed money, and that the aggregate of its said obligations was about $10,500 over and above the aggregate of amounts received by it from its stockholders. That to provide the funds to pay the indebtedness of said corporation so created in and about its business and in and about the construction of its railroad as hereinbefore stated, plaintiff corporation herein demanded from each and all of the subscribers to its capital stock and stockholders an additional payment of forty per cent. of the amount of their several subscriptions respectively. (9) That on or about the 6th day of June, 1895, plaintiff herein demanded from defendant the payment of the sum of $800, being said forty per cent. of the amount of the capital stock for which defendant had subscribed, as hereinbefore stated, and had agreed to pay, and forty per cent. of the par value of the stock of the plaintiff corporation then held and owned by defendant. (10) That said defendant refused to pay said sum of $800, so demanded by plaintiff herein, or any part thereof, and still refuses to pay the same, or any part thereof, though often requested so to do by plaintiff herein."

The following is a copy of Exhibit A, referred to in the above:

"Exhibit A. Agreement.

"Whereas, for the development of the material interest of the town of San Buenaventura and the territory embraced within the Ranchos Santa Ana and Ojai, it is deemed necessary to have railway communication in and between said town and territory, and in the nature of a street railway; and whereas, a local corporation can best attain such object: Now, therefore, we, the undersigned, hereby agree to and with each other that we will together form a corporation to be known as the Ventura Railway Company, having all the corporate powers that may be deemed necessary or appropriate in the premises. We further agree that we will subscribe to the capital stock of said corporation in and at its organization the sum severally set by us opposite our respective names, and thereon pay in cash ten per cent. in accordance with the law regulating the formation of railway corporations, and upon the subscription hereto of not less than $20,000; that such corporation shall be formed by the subscribers hereto for the purposes suggested herein.

| Subscribers. | Stock Subscribed. | Amount of Cash. |
|---|---|---|
| W. S. Chaffee | $2,000 | $200 Pd. |
| Richard Robinson | 2,000 | 200 Pd. |
| Joseph Hobart | 1,000 | 100 Pd. |
| E. P. Foster | 2,000 | 200 Pd. |
| K. P. Grant | 2,000 | 200 Pd. |
| E. S. Hall | 2,000 | 200 Pd. |
| J. K. Gries | 2,000 | 200 Pd. |
| G. W. Chrisman | 2,000 | 200 Pd. |
| W. H. Wilde | 2,000 | 200 Pd. |
| A. D. Barnard | 2,000 | 200 Pd. |
| A. Bernheim | 1,000 | 100 Pd. |

"Whereas, under and pursuant to the foregoing agreement and subscription, there was incorporated the Ventura & Ojai Valley Railway Company, to the capital stock of which there was subscribed the amounts above named by the parties named respectively: Now, therefore, we, the undersigned, subscribe and agree to take the number of shares set opposite our names, respectively, and thereon pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to A. Bernheim, treasurer of said corporation:

| Subscribers. | Stock Subscribed. | Amount of Cash. |
|---|---|---|
| J. S. Collins | $2,000 | $200 Pd. |
| F. Hartman | 2,000 | 200 Pd. |
| J. R. Thorpe | 2,000 | 200 Pd." |

1. Counsel for appellant contend that the averment in the fifth paragraph of the complaint, that the defendant, by his subscrip-

tion, agreed to pay the sum of $2,000 "when and as it might be demanded," is inconsistent with the subscription itself, as exhibited and made a part of the complaint, because, they say, there is no express promise of Collins, Hartman, and Thorpe, who subscribed after the incorporation, to pay more than 10 per cent. of the $2,000 subscribed by each of them. The pleader evidently attempted to state the subscription contract according to its legal effect; and, if he did so, the alleged inconsistency does not exist. The only question, therefore, to be considered is one of construction of the subscription agreement. Read in the light of the circumstances alleged in the complaint, I think the subscription agreement implies a promise to pay the full sum subscribed upon such demands or calls as should be made therefor by the corporation; and surely whatever is implied in an agreement, though not expressed, may consistently and properly be alleged in a complaint upon such agreement. A subscriber for stock is one who has entered into an express contract to take a certain definite number of shares of the original issue of stock. Cook, Stock, Stockh. & Corp. Law, § 10, and notes. "The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. * * * Formal rules are, for the most part, disregarded." Id. § 52, and notes. "A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect, without proof of any particular consideration. This rule of law is sustained by the great weight of authority. The signing of the subscription paper is an implied promise to pay the subscription." Id. § 71. "As a general rule, a call must be made in order to render a subscription, or any part thereof, due and payable to the corporation. A contract of subscription, unlike other contracts to pay money, is a promise to pay; but, by implication of law, the payment is to be only at such times and in such part payments as may be designated by the corporate authorities in a formal declaration known as a 'call.' In other words, the subscription is a debt payable at a future time. The time when it shall be paid is indefinite until fixed by a call." Id. § 105, and notes. The subscription under consideration is an agreement "to take the number of shares set opposite our names, respectively, and thereon to pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to A. Bernheim, treasurer of said corporation." The amount in cash named is $2,000, set opposite the name of the defendant. It seems manifest that it was not intended by the phrase under the videlicet to limit the $2,000 obligation to 10 per cent. of that sum. The 10 per cent. mentioned was evidently intended to designate merely that portion of $2,000 which was to be paid contemporaneously with the subscription. Indeed, this construction was practically given it by the acts of the defendant in voluntarily paying two additional calls of 10 per cent. each, long after the subscription, and is the only construction which gives effect to all the language of the contract. The construction contended for by counsel for appellant would make the clause under the videlicet repugnant to that which precedes it, which is not allowable in construing a contract if it can be avoided consistently with the apparent object of the contract and the intent of the parties, which object and intent are to be ascertained by a view of all parts of the contract in connection with the circumstances under which it was made, and the subsequent acts of the parties tending to show how they understood it. Even in pleading, where the office and effect of the videlicet has been somewhat diverse, it was never allowed an effect repugnant to that which it purported to explain or define. Am. & Eng. Enc. Law, and authorities cited. That which the videlicet clause is said to qualify and define in this case is perfectly explicit, and could not have been made more so by definition or explanation. Even on the face of the instrument, and exclusive of the circumstances and subsequent acts of the parties, it is apparent that the parties did not intend to say that the agreement to pay $2,000 meant the payment of only 10 per cent. of that sum, but only that 10 per cent. was to be paid at the time of the subscription; and this intent is satisfactorily verified by the subsequent acts of the parties in accordance therewith.

2. It is claimed by appellant that the complaint is ambiguous and uncertain as to whether the action is founded upon the subscription agreement or upon the statutory liability of a stockholder to the creditors of the corporation. But I perceive no ambiguity nor uncertainty in this respect. The action is brought by the corporation, and not by a creditor thereof, and unequivocally counts upon defendant's subscription to the capital stock of the corporation.

3. It is claimed that the complaint does not state a cause of action for the same reasons that it is said to be ambiguous and uncertain, and no other reason is specified by counsel. These reasons having been disposed of, no further consideration of this ground of demurrer is necessary. I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

114 Cal. 396

## LANE v. TURNER. (S. F. 151.)

(Supreme Court of California. Sept. 28, 1896.)

SALE—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE—COUNTERCLAIM—INTEREST.

1. The fact that goods sold are charged on the seller's books to another than the one to whom they are delivered is not conclusive evidence that such other was the real purchaser, but is open to explanation.

2. Where one of two partners in farming operations, who was to furnish, as his contribution to the expense of plowing and seeding the land, seed and feed, the value of which was not to exceed $1,500, furnished seed and feed to a greater amount, and brought assumpsit against his copartner for the value of the excess, items of indebtedness of plaintiff to defendant, arising out of the partnership transactions between them, which were mere unadjusted claims which might be the subject of an accounting, did not constitute proper counterclaims.

3. A vendee of goods is entitled to interest from the time of filing his complaint, in an action for the price, in the absence of an agreement to pay the account at a specified date.

Department 1. Appeal from superior court, San Joaquin county; W. E. Greene, Judge.

Action by Frank E. Lane against R. M. Turner for goods sold and delivered to defendant, and for money paid as freight on the same, by plaintiff. From a judgment for plaintiff, defendant appeals. Modified.

Freeman & Bates, for appellant. J. H. & J. E. Budd and R. M. Fitzgerald, for respondent.

PER CURIAM. Defendant and one John Herd, Jr., formed a co-partnership for the purpose of farming a large tract of land. A memorandum of their contract was in writing, dated August 20, 1891, and one of its provisions was that Herd, as his contribution to the expense of plowing and seeding the land for the first year, would furnish all seed and feed, "such feed in no case to exceed the sum of $1,500." October 3, 1891, Herd assigned his interest in said contract to Lane, the plaintiff, who was a grain dealer at Stockton; such assignment being, in terms, "security for feed, grain, and seed furnished to put the land in." On October 7, 1891, Herd wrote to defendant a letter containing this statement: "I arranged on Saturday last with the Lanes, at Stockton, to provide you, as per agreement, with the seed and feed you require. Therefore kindly write them direct, and they will forward the same." Defendant took the letter to plaintiff, who indorsed thereon: "Accepted. Frank E. Lane." Upon the order of defendant, plaintiff shipped to him, before December 31, 1891, feed to the amount in value of $3,138.38. The purpose of this action is to recover the sum of $1,638.38, the excess in value of the feed thus supplied above that which Herd promised to furnish, and the further sum of $121, cash advanced for freight on the same. The complaint is in the ordinary form for the value of goods sold and delivered, and for money paid to the use of defendant.

In his answer, defendant first denied the allegations of the complaint, and then in a separate paragraph—numbered 4—alleged matters which, if true, showed that plaintiff sold the feed and paid the money in question to and for Herd only. He also pleaded as counterclaims, on information and belief, that in February, 1892, plaintiff succeeded to the interest of Herd in said partnership, and is indebted to defendant on account of certain described transactions of the partnership; and, separately, that plaintiff owes him the sum of $52 for boarding one Harry Lane at plaintiff's request. Plaintiff demurred to the answer and to the counterclaims. The court ordered that "the demurrer to that part of the answer alleging counterclaims—paragraphs 4 and 6—be sustained." At the trial, plaintiff testified that he supplied the feed upon Turner's order, in accordance with the terms of said partnership contract, the written memorandum of which was held by him. Defendant testified that such contract had been changed by oral agreement of himself and Herd, made before the assignment by the latter of his interest thereunder to Lane; that by the terms of such oral modification Herd promised to furnish all the feed, without limitation to $1,500 in amount, as originally provided, and that the land was farmed under the new contract. These statements were positively denied by Herd, testifying for plaintiff in rebuttal. Judgment went for plaintiff, and included $234 for interest on his demands from the time of the commencement of the action to date of judgment,—October 8, 1892, to September 5, 1894.

The principal question before the trial court was one of fact. Herd directed Lane to supply Turner with the seed and feed he required "as per agreement"; and with this direction as part of his arrangement with plaintiff, Turner received the goods. The court, upon conflicting evidence, determined that the agreement thus referred to and incorporated into the contract with plaintiff was the stipulation of the original partnership contract, unchanged as claimed by defendant; consequently defendant was chargeable with notice that Herd's credit for the feed procured from plaintiff was limited to the sum of $1,500, and he was himself liable for what he ordered in excess of that amount. Civ. Code, §§ 2318, 2443. The fact in proof that all the goods were originally charged against Herd on the books of plaintiff was pertinent, but not conclusive, evidence in ascertaining who was the real purchaser, and was open to explanation. Rice v. Heath, 39 Cal. 609.

It is said that the demurrer was improperly sustained to paragraph 4 of defendant's answer. But it was not sustained to the defensive matter there pleaded, and which was really provable under the preceding denials. Most of defendant's evidence at the trial related to the allegations of said paragraph 4, and it is manifest that neither the court nor the parties understood the ruling on the demurrer to be a decision that those matters constituted no defense.

As to the averments of indebtedness of plaintiff to defendant arising out of alleged partnership transactions between them,—mere unadjusted claims, which might be the subject of an accounting,—it is not, and hardly could be, seriously contended that they constitute proper counterclaims in this action. Case v. Maxey, 6 Cal. 276; Haskell v. Moore, 29 Cal. 437. But the counterclaim of $52 for boarding Harry Lane was valid, and the demurrer thereto should have been overruled. Plaintiff concedes this, and consents that the judgment be reduced accordingly.

The court properly allowed interest on the plaintiff's demands from the filing of the complaint. Civ. Code, § 3287; Insurance Co. v. Fisher, 106 Cal. 224, 39 Pac. 758. In this case it was held that, in the absence of an agreement to pay at a specific date for goods purchased, the vendor would be entitled to interest from the time of filing his complaint, the court saying: "At the time he commenced the action his right to recover the open account was vested in him, and was capable of being made certain by calculation, and he was entitled to recover interest thereon from that date." The superior court is directed to modify its judgment by deducting therefrom the sum of $52 as of its date of entry, and, as so modified, the judgment and order denying a new trial are affirmed.

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(114 Cal. 445)

## BUSWELL v. SOUTHERN PAC. CO.

(S. F. 494.)[1]

(Supreme Court of California. Oct. 6, 1896.)

RAILROADS — FRANCHISE TO USE STREETS — CONSTRUCTION OF STATUTE.

In Act May 20, 1861, authorizing municipalities to grant to any railroad company the use of streets for the purpose of reaching an accessible point for a depot, the provision that no company availing itself of the act should use its road "for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city," was inserted to prevent competition between railroad companies covered by the act and local street railways, and not for the purpose of giving the public at large the right to travel free on such railroad within the city limits.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by E. G. Buswell to compel the Southern Pacific Company, by perpetual and mandatory injunction, to allow all persons in the city of Oakland to ride on defendant's trains within the city without compensation. From a judgment for defendant, plaintiff appeals. Affirmed.

C. M. Jennings and Thomas V. Cator, for appellant. Jas. C. Martin, A. A. Moore, and Foshay Walker, for respondent.

GAROUTTE, J. This is an action by plaintiff to compel defendant, by perpetual and mandatory injunction, to grant to all persons in the city of Oakland the right to ride upon defendant's trains on Seventh street within said city without compensation. Upon the 20th day of May, 1861, the legislature of the state of California passed an act giving the power to any county, city, or town to grant to any railroad company now organized, or that might be hereafter organized, under the laws of this state, the use of its streets or highways which were necessary to enable it to reach an accessible point for a depot in such county, city, or town, or to pass through the same, on as direct a route as possible. By such act it was further provided, "Nor shall any railroad company who may avail themselves of the provisions of this section ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city." Defendant secured from the city of Oakland the use of Seventh street for its road, under this act. And the question now presents itself, what is the true construction of the foregoing provision of that act?—it being contended upon the part of appellant that by this provision the defendant company is bound to allow all persons to ride free upon its road between any and all points in the aforesaid city. The defendant is forbidden to use its road "for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another" in the city of Oakland. We are satisfied this provision was inserted in the act for the purpose of preventing competition between railroad companies covered by the act and local street railways within cities, and was not enacted for the purpose of extending to the public at large the right to travel free upon such railroad within the city boundaries. To forbid the defendant company from carrying passengers from one point to another in the city of Oakland for a consideration is not the equivalent of a declaration that the company must carry all passengers between those points without consideration. It would be a very exceptional case which would invoke a rule of construction that the forbidding of the doing of one thing included a command to do another thing. If it had been intended to impose upon this defendant and others similarly situated the burden of carrying within the city limits all people, without charge, the legislature should have, and would have, used more apt language to express such intention. If it had been intended to give the public the right and privilege of riding free upon the railroads referred to in the act, it was an easy matter to have said so, and language in some degree apt for the purpose would have been used, but here there is no such language. If such was the purpose of the legislature,—if the right of the public to ride free was the consideration which actuated the city in granting the use of its street to the defendant,—why was anything said in the provision about street railroads? For upon such construction they are totally foreign to the question with which the legislative mind was dealing. If the provision we have quoted was inserted in the act for the benefit of street railroads, by preventing competition,—as we think is apparent,—a construction of the provision giving all the people the right to travel free would be directly antagonistic to the legislative intention, and accomplish the very object the legislature was trying to prevent by the enactment. Again, it is insisted that defendant is a common carrier, and as such is bound to carry all passengers who present themselves; but this can only be so when the carrier is entitled to charge a reasonable compensation for the carriage. We are clear that the intention of the lawmaking power in the enactment of this statute was not such as is contended for by appellant. We find nothing further in the record demanding our consideration. For the foregoing reasons the judgment is affirmed.

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[1] Rehearing denied.

We concur: VAN FLEET, J.; HARRISON, J.

(114 Cal. 418)

## HARRIS v. GIBBINS. (Sac. 98.)[1]

(Supreme Court of California. Oct. 3, 1896.)

COUNTY SUPERVISORS—CONTRACTS.

A board of county supervisors, under its power to supervise the official conduct of all county officers and direct prosecutions for delinquencies, may employ an expert to examine the books and accounts of county officers.

Department 2. Appeal from superior court, Modoc county; C. L. Claflin, Judge.

Application by G. F. Harris for mandamus to I. W. Gibbins. Judgment for defendant. Petitioner appeals. Reversed.

G. F. Harris, in pro. per. John E. Raker, for respondent.

McFARLAND, J. The board of supervisors of Modoc county, upon the recommendation of the grand jury, employed the appellant as an expert to examine the books and accounts of the county officers of said county at an agreed compensation of five dollars per day. He faithfully performed his duties under said employment, and made his report to the board. He duly presented to said board his itemized claim for his services, in the sum of $105, which was the just amount due him under the contract, and the claim was by said board regularly approved and allowed. But the respondent, who is county auditor of said county, refused to draw his warrant for said allowed claim, or any part of it, whereupon appellant commenced this proceeding in the superior court to obtain a writ of mandate commanding said respondent to draw such warrant. The case was submitted in the court below upon a demurrer to the petition, and the court rendered judgment in favor of respondent, and dismissing the writ. From this judgment petitioner appeals.

The only question involved is whether or not appellant's claim is an account "legally chargeable against the county," and this depends upon the solution of the question, did the board have legal authority to employ the appellant for the purpose above stated? The board of supervisors constitute the general governing body within the domain of local county governmental affairs; and, while their jurisdiction is confined within the limits marked by the statutory law by which such jurisdiction is granted, still it includes, not only the powers expressly enumerated, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly or impliedly prohibited. And we think that authority to employ the appellant for the purposes set forth in the petition in the case at bar is necessarily implied from the powers specifically given the board in the county government act. St. 1893, p. 346 et seq. It is there provided (section 1) that counties "are bodies corporate and politic, and as such have the powers specified in this act, and such other powers as are necessarily implied." It is also provided that—speaking of a county—"its powers can only be exercised by the board of supervisors, or by agents or officers acting under their authority, or authority of law." Section 2. It is also provided that a county—acting, of course, through its board of supervisors—has power "to make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers." Section 4. It is further provided (section 25) that the board of supervisors shall have jurisdiction and power "to supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county charged with the assessing, collecting, safe-keeping, management or disbursement of the public revenue; see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary require them to renew their official bonds, make reports and present their books and accounts for inspection," and (same section, subd. 35) "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the legislative authority of the county government." The foregoing provisions of the law fully warranted the board to employ the services of the petitioner in order to obtain the information necessary to enable it to discharge the duties enjoined on it in the matter of the supervision of county officers, directing prosecutions against them for delinquencies, if necessary, etc. The county government act requires many things of the supervisors which they could not wholly accomplish personally, or do manually with their own hands. It is difficult to conceive how a board of supervisors, in its capacity as a body corporate and politic, could expert books, or be an expert accountant, and yet the experting of books seems to be necessary to that supervision of county officers which the law expressly imposes upon such board. Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted, without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted. Of course, a different rule applies where, from the nature of the act to be done, or the language used in the grant, it is apparent either that the power is to be exercised and the duty performed entirely by the personal exertions of the officer or agent named, or that he is to be limited to the means and agencies enumerated in the law by which the power is granted. There is nothing in the decision of the case of Modoc Co. v. Spencer, 103 Cal. 498, 37 Pac. 483, which conflicts with the views above expressed. Indeed, it is in clear accord with the principle above stated, as above limited. The decision of that case rested upon the maxim "Expressio unius est exclusio alterius"; it being there held that, the cases in which the board of supervisors might employ counsel being enumerated in the statute, power to employ counsel in other cases was impliedly excluded. The judgment is reversed, with direction to the superior court to grant the writ of mandate as prayed for in the petition.

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[1] Rehearing denied.

We concur: TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 476

## HAYFORD v. WALLACE. (Sac. 84.)

(Supreme Court of California. Oct. 6, 1896.)

FRAUDULENT CONVEYANCES—INSOLVENT TRUSTEES — QUIETING TITLE — WHO CAN MAINTAIN ACTION—EQUITABLE OWNER—EVIDENCE.

1. Land conveyed to a father in trust for his minor son, who pays the consideration with money earned by himself, or given to him by the father, who is then solvent, is not subject to the lien of subsequent judgments against the father, so as to render his voluntary conveyance of the land, after becoming insolvent, fraudulent as to his creditors.

2. Land which had been conveyed in trust for the sole use of the minor son of one of the trustees was, after the minor reached his majority, conveyed by the joint deed of the father and son to the mother, in consideration of love and affection, the second trustee not joining in the conveyance. *Held* that, as the purpose of the trust had ceased on the son's becoming of age, his equitable title passed to the grantee, so far as to enable her to maintain suit to quiet title against all persons except the holders of the legal title.

3. In an action to quiet title, where defendant set up that the deed of plaintiff was made to defraud the grantor's creditors, among whom was defendant, an offer by defendant to prove by the grantor, on cross-examination, that while the latter was insolvent he sold certain other land to another person for a nominal consideration, with a view of defrauding his creditors, was properly refused as not legitimate cross-examination.

4. Error in rejecting evidence is cured by its subsequent admission.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by Abbie A. Hayford against Emeline Wallace to quiet title. Defendant answered, setting up that the conveyances to plaintiff were fraudulent, and filed a cross complaint to quiet title to the same lands. A decree was rendered quieting plaintiff's title to one part of the land, and quieting defendant's title to another portion, and both parties appealed from orders denying their motions for new trials. On defendant's appeal. Affirmed.

Wallace & Wallace and Henley & Costello, for appellant. John M. Fulweiler and Ben. P. Tabor, for respondent.

SEARLS, C. This is an action by Abbie A. Hayford to quiet her title to certain parcels of land situate in Placer county. Defendant, by her answer, denied the title of plaintiff, and in apt terms averred that the land was the property of W. B. Hayford, the husband of plaintiff, who in December, 1886, was insolvent, and in contemplation of insolvency, and for the purpose of defrauding his creditors, without consideration other than love and affection, on the 7th day of December, 1886, executed a deed of conveyance of certain of the lands to his wife, the plaintiff, and that afterwards, and on the 8th day of November, 1889, under like circumstances, with a like intent and upon a like consideration, he, the said W. B. Hayford, executed another deed of conveyance to the plaintiff of the remainder of the land and premises in the complaint described. Plaintiff is averred to have had full notice of the facts. Defendant was, as is alleged, at the date of said deeds a creditor of said W. B. Hayford to the extent of more than $2,500. Other facts tending to show the conveyances fraudulent are alleged, but need not be noticed here. Defendant also interposed a cross complaint, in which she showed that subsequent to such conveyances she procured judgment against W. B. Hayford upon a portion of the indebtedness due her from him, and issued execution, under which a levy was made upon such lands, a sale had, and the lands purchased by her, and that in due time she received a sheriff's deed for all of said lands, and thereby became the owner thereof, and prays that her title thereto may be quieted. Plaintiff answered the cross complaint, and denied all fraud, etc. The cause was tried by the court, written findings filed, and a decree was entered thereon quieting the title of plaintiff to the parcel of land described in the deed of November 8, 1889, and quieting the title of defendant to the parcels of land described in the conveyance of December 7, 1886. Each of the parties moved the court for a new trial as to so much of the issues as were adverse to her, and, their several motions having been denied, each of the parties has appealed from the orders. This case (No. 84) is on defendant's appeal.

So far as this appeal is concerned, we may dismiss consideration of the deed of 1886, as the findings relating thereto are in favor of appellant, and she is not assailing them. Turning to the deed of November 8, 1889, we find the findings and conclusions of law are assailed by appellant upon various grounds, the more important of which are: (1) The deed of November 8, 1889, is either void or voidable for the reasons: (a) That the testimony showed that W. B. Hayford was insolvent at the date thereof; and while the court found that he was insolvent in December, 1886, it failed to find upon the issue of such insolvency in 1889, when the deed of the last-mentioned date was executed. (b) That the testimony and findings show that W. B. Hayford and E. W. Moore held the property in trust for W. M. Hayford, the son of W. B. Hayford, and that, as said Moore did not join in the deed to plaintiff, it is void under sections 860 and 870 of our Civil Code. (c) The consideration of the deed is love and affection.

If the father, W. B. Hayford, held as a trustee, the deed is void for want of proper execution by the proper parties. On the other hand, if the father had a beneficial interest in the property, it is void because the father was in debt, and could not make a voluntary conveyance.

The following statement of facts, as found by the court, or illustrated by the evidence, is essential to a correct understanding of the points made by appellant: On the 17th day of May, 1882, one J. R. Johns, being the owner thereof, by grant, bargain and sale deed, conveyed to one E. W. Moore and to W. B. Hayford, in trust for W. M. Hayford (his son, then of the age of, say, 17 years) the tract of land in question, consisting of 80 acres of land. The consideration of the deed was $400, of which sum the infant son paid one-half, viz. $200 of his own money, which the evidence shows he earned by selling fruit, etc., at the railroad depot, Colfax, and which he had deposited in bank at Sacramento. E. W. Moore paid his half of the purchase money. W. M. Hayford, the infant, entered into possession of the land so purchased, and paid his share of the expense of improving and cultivating the same, amounting to a large sum of money. It is quite apparent, we think, from the testimony, that the parties did not understand that any trust relation existed, except as to the undivided half of W. M. Hayford, the minor. The conveyance, however, is worded in part as follows: "This indenture, made the 17th day of May, 1882, between J. R. Johns, of Amador county, state of California, party of the first part, and Elisha W. Moore, of Beaver county, state of Pennsylvania, and W. B. Hayford, in trust for W. M. Hayford, a minor, parties of the second part, for and in consideration of the sum of $400, * * * doth grant, bargain, sell, and convey unto the parties of the second part and their heirs and assigns forever," etc. There is in the deed no other indication of a trust, save in the foregoing quotation. On the 8th day of November, 1889, the minor, W. M. Hayford, who was at the last-mentioned date 24 years of age, united with his father, W. B. Hayford, the latter of whom is described as "trustee," in a conveyance of the undivided one-half of the said 80 acres of land to the plaintiff herein. Love and affection are mentioned as the consideration of the conveyance, which is in the usual form of a grant, bargain and sale deed. There is not in the pleadings any allegation, nor was there any evidence tending to show, that W. B. Hayford was insolvent prior to 1886. The appellant here was not a creditor of Hayford until 1885. When, on the 17th day of May, 1882, Johns conveyed the property in question to Moore and W. B. Hayford in trust for W. M. Hayford, a minor, the effect of that conveyance was (conceding that the whole estate, and not one-half thereof, was intended to be held by the grantees for the benefit of the minor, as claimed by appellant) to vest the title in Moore and W. B. Hayford, for the sole benefit of the minor. Appellant contends that as the minor lived at the time with his parents, and as there was no evidence that W. B. Hayford had relinquished his right to the earnings of his son, the $200 paid by the latter is to be regarded as the money of the father. We think, when the father permitted his son to engage in the business of selling fruit, receiving and banking the proceeds in his own name, and, without objection, permitted him to pay it out as the consideration for land purchased for his benefit, it was sufficient evidence that the father had assented to the ownership of the money by the son, as found by the court. The question is of no practical importance, however, in the determination of the case, for the reason that W. B. Hayford, being, so far as appears, entirely solvent at that date (1882), might with the utmost propriety give to his minor son the modest sum of $200 to enable the latter to purchase land with which to engage in the fruit and vineyard business. In either aspect of the case, then, the minor son had, as against his father, the entire beneficial interest in the land, with only the naked title in the father, or in the father and Moore. W. B. Hayford never had any interest in the land to which the lien of appellant's later judgment could attach, or which in 1886, when he became insolvent, or at any time thereafter, he could convey in fraud of his creditors, or of any one except his cestui que trust. A bankrupt may continue to discharge his duty as a trustee, and trust property in his possession does not go to his assignee or to his creditors. Perry, Trusts & Trustees, §§ 345–358. Under these circumstances, the insolvency of said Hayford in 1889, when he united with his son in a conveyance to the respondent here, becomes a false quantity in the problem, and it was not necessary to find thereon.

The deed of November 8, 1889, is a joint one by W. B. Hayford, trustee, and W. M. Hayford, as parties of the first part, and, in consideration of love and affection, conveys the undivided one-half of the 80 acres of land theretofore, and since 1882, held in trust for W. M. Hayford, to Abbie A. Hayford, her heirs and assigns. W. M. Hayford, as before stated, had reached his majority. The entire object of the trust, viz. to hold the legal title during the minority of said W. M. Hayford, had been accomplished. "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases." Civ. Code, § 871. It is true, the naked legal title was vested in W. B. Hayford, or in him and Moore. It is equally true that, as a rule, two or more trustees must join in a conveyance of the legal title. But W. M. Hayford, having at the date of his conveyance a perfect equitable title, could convey the same; and, having done so, his grantee, the respondent here, became and is vested with such equitable title, and by virtue thereof is in a position to command a conveyance of the legal title, if desired. As such holder of the equitable title, respondent is in a position to maintain an action to quiet her title against the defendant and all persons except the holders of the legal title. Orr v. Stewart, 67 Cal. 275, 7 Pac. 693; Smith v. Brannan, 13 Cal. 107; Wilson v. Madison, 55 Cal. 5.

The alleged error of the court in refusing to permit defendant to prove by W. B. Hayford, on cross-examination, that while he was insolvent, to wit, on December 3, 1886, with a view of defrauding, hindering, and delaying his creditors, etc., he sold to Jacob H. Neff 972 acres of land for the nominal consideration of $500, cannot be maintained for the reasons: (1) It was not legitimate cross-examination. (2) For the reason that as he did not own any interest in the tract of land here in dispute at that time, and had not for years prior to the time he is averred to have become insolvent, it was wholly irrelevant and immaterial. (3) And for the further reason that the court at a later period in the trial permitted this very proof. We recommend that the order appealed from be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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114 Cal. 458

## GOLINSKY et al. v. ALLISON et al.

(Sac. 118.)

(Supreme Court of California. Oct. 7, 1896.)

POWER OF ATTORNEY—CONSTRUCTION—RATIFICATION OF ACT OF AGENT.

1. A power of attorney to an agent authorizing him to "superintend" property of his principals, and to "preserve, manage, sell, and dispose of" the same, and to "manage, work, sell, and dispose of" other property, did not confer authority on the agent to execute a promissory note in the name of his principals, or to mortgage their property to secure the same, though the note was given in settlement of an antecedent debt contracted by the agent in the management of the property.

2. Under the provision of Civ. Code, § 2310, that a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, the fact that principals made no objection to the execution of a mortgage by an agent in their names, to secure a prior indebtedness contracted by the agent, will not constitute a ratification of the act, it not appearing that they had knowledge of the fact until action to foreclose was brought.

Department 1. Appeal from superior court, Shasta county; Edward Sweeney, Judge.

Action by Golinsky and others against Allison and others. Judgment for plaintiffs, and defendants appeal. Reversed.

C. P. Robinson, L. D. McKisick, and T. M. Osmont, for appellants. Clay W. Taylor and J. Chadbourne, for respondents.

HARRISON, J. The plaintiffs brought this action to foreclose a mortgage upon certain property—mining claims and other real estate—situate in the county of Shasta. The mortgage, and also the promissory note for which it was given as security, were executed to the plaintiffs by the defendant Barron for himself and as the attorney in fact of his co-defendants, Allison and Sackett. The power of attorney from Allison and Sackett to Barron, under which these instruments were executed, gave him authority "to superintend all our property in Shasta county, and state of California, known as the 'Snyder Mine,' and all other mines acquired by us by purchase or otherwise, and also all water rights and mill property; and to preserve, manage, sell, and dispose of any and all of the said mines, mills, or other property in such manner as he shall deem meet and proper and for our best interest; and also to locate mill sites, town sites, mining claims, and water rights, and take all the necessary legal steps or proceedings to accomplish the same, and manage, work, sell, and dispose of any and all of them to our best advantage." The court held that the authority given by this power of attorney was sufficient to authorize the execution of the note and mortgage, and rendered judgment in favor of the plaintiffs. The defendants have appealed.

A power of attorney, like any other instrument, is to be construed according to the natural import of its language; and the authority which the principal has conferred upon his agent is not to be extended by implication beyond the natural and ordinary significance of the terms in which that authority has been given. The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal. By the above letter of attorney given by Allison and Sackett to Barron, he had authority to "superintend" the property of his principals, and to "preserve, manage, sell, and dispose of" the same, and also to locate mill sites, mining claims, and water rights, and "to manage, work, sell, and dispose of them." A power to sell and convey real estate does not authorize the attorney to mortgage it. Jeffrey v. Hursh, 49 Mich. 31, 12 N. W. 898; Wood v. Goodridge, 6 Cush. 117; Brown v. Rouse, 93 Cal. 237, 28 Pac. 1044. For an exhaustive discussion of the subject, see Campbell v. Association, 163 Pa. St. 609, 30 Atl. 222, 224. "The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication, from his authorizing a sale of his lands, that he intends that his agent may, at discretion, charge him with the responsibilities and duties of a mortgagor." Jeffrey v. Hursh, supra. In Billings v. Morrow, 7 Cal. 171, it was held that an attorney who was authorized to "superintend" the real and personal estate of his principal had no authority to make a sale of the property. There is clearly no power conferred by the above instrument to execute a promissory note in the name of the principals, or to mortgage their property to secure its payment. The authority to "preserve and manage" the property, or to "manage and work" it, cannot, by any reasonable construction, be held to include an authority to mortgage it, and is inconsistent with the idea of imposing a personal charge upon the principals, except for such expenses as may be incurred in its preservation and management. It was shown that the promissory note in question was given for money paid out by the plaintiffs to the workmen in the mines, and also for merchandise purchased for the mines, upon the order of Barron, and the respondents contend that this was within the authority given to Barron to preserve and manage the mining claims, and formed a sufficient consideration for the execution of the promissory note. It does not appear at what time the money was paid or merchandise furnished for which the note was executed, but it was shown that it had all been paid and furnished prior to its execution. The note and mortgage were, therefore, executed in consideration of an antecedent obligation, and not for the purpose of preserving or managing the property. The money and merchandise thus furnished by the plaintiffs would doubtless have formed a sufficient consideration for the execution of the promissory note by Allison and Sackett; but, unless they had given to Barron authority to execute the note for them, they could not be held liable for its payment, even though they had derived an advantage by reason of the consideration upon which he had executed the note; and, even if they could have been held liable for the moneys so paid and the merchandise so sold upon his order, they had not given him any authority to bind them for the payment of interest thereon at the rate of 1½ per cent. per month, or to secure the same by a mortgage. The testimony of Sackett that neither he nor Allison ever objected or found fault with the giving of the mortgage, did not constitute a ratification of its execution by Barron. Civ. Code, § 2310. It did not appear that the execution of the mortgage was known by either Allison or Sackett prior to the commencement of the action. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 494

## In re SILVAR'S ESTATE. (S. F. 331.)

(Supreme Court of California. Oct. 7, 1896.)

ADMINISTRATORS — APPOINTMENT OF STRANGER— REVOCATION OF REQUEST BY HEIR—APPEAL.

1. Code Civ. Proc. § 1379, having authorized a court to appoint a stranger as administrator of an estate upon the written request of one who would himself be entitled to letters of administration, where such request and a renunciation have been filed by a petitioner, and proceedings for his appointment have been instituted, the heir will not be permitted to revoke it without reason.

2. Where an order refusing to permit an heir to withdraw a request for the appointment of another as administrator of an estate is based on conflicting testimony, it will not be reversed on appeal.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Application for the appointment of Joseph L. Enos as administrator of the estate of Silvar, deceased. From an order granting the petition, Antonio Silvar appeals. Affirmed.

Frank B. Josephs, Delmas & Shortridge, Edw. A. Holman, and Edw. H. Shaw, for appellant. Lindsay & Cassin, for respondent.

PER CURIAM. A petition for letters of administration upon the estate of the above-named decedent was filed in the superior court by Joseph L. Enos, who stated therein that he had been requested by Antonio Silvar, the brother of the deceased, to act as administrator of the estate, and accompanied his petition with the written renunciation by said Antonio of his right to letters of administration upon the estate, and a request to the court to appoint Enos as such administrator. Prior to the day set for hearing the petition, Antonio filed a revocation of his said renunciation, and a petition that he might himself be appointed administrator of the estate, and also filed an opposition to the appointment of Enos, upon the ground of his incompetency. The petitions were heard together, and the court granted that of Enos, and ordered letters of administration to be issued to him. From this order Antonio has appealed.

The court found "that the revocation of the waiver of said Antonio of his right to act as such administrator, and his request for the appointment of said Enos, as stated in the findings herein, was without reason in fact, but such revocation was solely on the ground that said Antonio had changed his mind in relation thereto"; and, as a conclusion of law, found "that said revocation by said Silvar was not authorized in law, and was for that reason void." The principal grounds urged upon the appeal are that the request of Antonio for the appointment of Enos was obtained by fraud, and was made upon the agreement by Enos that he would withdraw whenever Antonio should so wish, and that since making the request Enos had manifested such hostility to the rights of Antonio as to justify the withdrawal of his request. The evidence upon these several questions of fact was sharply conflicting at the trial, and we are therefore precluded from disturbing the conclusions of the court thereon. The statute (Code Civ. Proc. § 1379) authorizes the court to appoint a stranger as administrator, upon the written request of one who would himself be entitled to letters of administration; and in Re Kirtlan's Estate, 16 Cal. 161, it was held that after having made such request, and encouraged the petitioner to go to the expense and trouble of applying for the office, the heir would be estopped from withdrawing his renunciation. See, also, In re Bedell's Estate, 97 Cal. 339, 32 Pac. 323. The order is affirmed.

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114 Cal. 462

## In re BULLARD'S ESTATE. (S. F. 564.)

(Supreme Court of California. Oct. 7, 1896.)

APPEAL—DISMISSAL — NECESSARY PARTIES — PROBATE PROCEEDINGS.

1. An appeal from an order approving the report of an administrator, by a contestant, on the ground that the report contains a claim improperly allowed against the estate, will not be dismissed because no notice of appeal was served on the claimant, where it does not appear that such claimant was a party to the proceeding below.

2. The fact that an order may have been made by a court in a probate proceeding without having before it necessary parties constitutes no ground for the dismissal of an appeal from such order.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal from an order approving the report of the administrator of the estate of Bullard, deceased. Motion by respondent to dismiss the appeal. Denied.

Geo. D. Collins, for appellant. H. H. McPike and Tobin & Tobin, for respondent.

HARRISON, J. The administrator of the estate of the above-named decedent rendered to the superior court his account of the administration of said estate for settlement, and in connection therewith reported a claim against the estate, in favor of the Hibernia Savings & Loan Society, which had been presented and allowed by him, for the sum of $1,816.25, and afterwards approved by the judge, and filed in the court. On the hearing of the settlement of said account one of the heirs of the decedent contested the allowance of this claim, and excepted to the account in this respect; but his exception was overruled, and the account was settled and allowed. In his appeal from this order the notice of appeal was served upon the administrator alone, and the motion is now made to dismiss the appeal upon the ground that the notice of appeal was not served upon the claimant; that the claimant is in reality the adverse party, without whose presence this court has no jurisdiction to review the order appealed from.

In Re Delaney's Estate, 110 Cal. 563, 42 Pac. 981, it was held, in reference to the appeal then before the court, that the executor was the only adverse party upon whom it was necessary to serve the notice of appeal from the order settling his account, for the reason that he was the only party adverse to the contestant in the matter then appealed from. It was not held, nor was it stated as a rule of procedure, that, in every appeal from an order settling the account of an executor, he is the only adverse party upon whom the notice of appeal must be served. In an appeal from such order, as in any other appeal, whenever it appears that there are others affected by the appeal, whose interests are adverse to the appellant, their presence in the appellate court is necessary to give that court jurisdiction to review the matter appealed from. It is only the record upon the appeal, however, which can be examined for the purpose of ascertaining who are adverse parties to be served with the notice of appeal. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103. "And the record which is to be considered for that purpose is the record of the proceeding in which the appeal is taken." In re Ryer, 110 Cal. 556, 42 Pac. 1082. It does not appear from the bill of exceptions in the present case that the Hibernia Savings & Loan Society was in any respect a party to the proceedings in the superior court from which the present appeal is taken, and unless it was a party thereto it was not necessary to serve the notice of appeal upon it.

The suggestion by the respondent that the superior court had no jurisdiction to pass upon the contestant's exception to the allowance of its claim, for the reason that no citation had been issued to the claimant, and that the claimant had had no opportunity to be heard upon the exception, is unavailing as a reason for dismissing the appeal. It was held in Re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082, that while a failure to serve the adverse party with notice of the intention to move for a new trial might be a reason for denying the motion in the superior court, and might upon an appeal, if such service was necessary, be a ground for affirming or reversing the order appealed from, it does not deprive this court of jurisdiction to hear the appeal, or constitute a ground for its dismissal. See, also, Herriman v. Menzies (Cal.) 44 Pac. 660. The principles applicable to an appeal from an order denying a new trial are applicable to the present appeal. The motion is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 481

## ASCHA et al. v. FITCH. (Sac. 115.)

(Supreme Court of California. Oct. 6, 1896.)

MINING LIEN CLAIM—SUFFICIENCY—ACTION TO ENFORCE—NONSUIT.

1. Under Code Civ. Proc. § 1187, which requires the claimant of a lien for labor performed on a mining claim to file for record his claim, containing a statement, among other things, of "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," a lien claim which fails to state by whom the claimant was employed is fatally defective.

2. A claim for lien, after describing the mining claim, stated that F. was the owner of the claim, "the said lien being held and claimed for and on account of work and labor performed by me as a miner for said F. on said mining claim" for a period definitely stated, "under an agreement with said F.," etc. *Held*, that such claim stated by whom the claimant was employed, as required by Code Civ. Proc. § 1187.

3. Such claim of lien contained a sufficient statement of the "terms, time given, and conditions of the contract," as required by statute.

4. Where the precise words of the statute have not been used by the claimant of a lien for labor done on a mining claim, but substantially equivalent expressions have been resorted to, it is a sufficient compliance with the statute.

5. In an action to enforce a lien for labor done on a mining claim, where it appears that the claim for lien is insufficient because it fails to state by whom the claimant was employed, the claimant is entitled to a personal judgment against defendant for the amount due him, and it is error to grant a motion for nonsuit.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Nathan Ascha and others against C. S. Fitch to enforce three several liens, one in favor of each of the plaintiffs, on the Gold Nugget mining claim. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Warren & Taylor, for appellants. Herbert R. Raynes and L. F. Coburn, for respondent.

SEARLS, C. This action is brought to enforce three several liens, one in favor of each of the plaintiffs, for labor performed upon the Gold Nugget mining claim, situate in the county of Siskiyou, Cal. The three plaintiffs united in the action, as under section 1195 of the Code of Civil Procedure they may properly do. At the trial the liens were severally offered in evidence. To their introduction, and to the introduction of each of them, counsel for defendant objected, "upon the grounds that it is incompetent, irrelevant, immaterial, and, further, that it does not comply with section 1187 of the Code of Civil Procedure, which section provides what these claims of lien shall contain. It is not verified, as provided by law it shall be. It does not contain the name of the person by whom this man was employed. It does not contain a statement of the terms, time given, or conditions of the contract." The court sustained the objection, to which ruling counsel for plaintiffs duly excepted. Thereupon counsel for plaintiffs rested, and on motion of defendant's counsel a nonsuit was granted. These several rulings were relied upon by the plaintiffs in a motion for a new trial, and from an order denying such motion they appeal.

There was proof of the performance by plaintiffs of the labor for defendant upon the mining claims, and of the filing of the liens in due time, and the first question involved relates to the sufficiency of the several liens and of the affidavits thereto. We are of opinion that the ruling of the court in excluding the lien of George F. Ascha, one of the plaintiffs, was correct. Under section 1187 of the Code of Civil Procedure, the lien claimant is required to file for record his claim, containing a statement, among other things, of "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," etc. The lien filed by said George F. Ascha states that C. S. Fitch is the owner and reputed owner, but fails to state by whom he was employed. This was a fatal omission. Wood v. Wrede, 46 Cal. 637. Different considerations apply to the other two liens. They are substantially alike, and we set out one in full, with the affidavit attached thereto, as a type of the other. It is as follows:

"Know all men by these presents, that I, L. F. McCoy, of Sawyer's Bar, Siskiyou county, state of California, do hereby give notice of my intention to hold and claim a lien, by virtue of the statute in such case made and provided, upon that certain real estate in said Siskiyou county, in Liberty mining district, and known as the 'Gold Nugget Mining Claim'; that C. S. Fitch is the owner and reputed owner of said mining claim, the said lien being held and claimed for and on account of work and labor performed by me as a miner for said C. S. Fitch upon said mining claim for the period of thirty-six days from the 10th day of April, 1894, up to and including the 30th day of May, 1894, under an agreement with said C. S. Fitch, for an agreed per diem of $2.50, amounting in the aggregate to the sum of $90; that by the terms of said agreement I was to receive my pay at the end of each and every week; that I have received for said work and labor the sum of $16, and no more, leaving a balance still due, owing, and unpaid to me of the sum of $74; that thirty days have not elapsed since the performance of said work and labor. L. F. McCoy.

"State of California, County of Siskiyou—ss.: On this 23d day of June, 1894, personally appeared L. F. McCoy, who, being by me first duly sworn, on his oath says that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing to him from the said C. S. Fitch, for the work and labor aforesaid, the sum of $74, after deducting all just credits and offsets. L. F. McCoy.

"Subscribed and sworn to before me this 23d day of June, 1894. [Seal.] John S. Hughes, Notary Public for Siskiyou County, Cal."

From the foregoing notice it will be observed that the claimant states, among other things: (1) That the owner and reputed owner of the mining claim is C. S. Fitch. (2) That the lien is claimed on account of labor performed by claimant upon the mining claim for said C. S. Fitch. (3) That it was performed under an agreement with said C. S. Fitch, for an agreed price of $2.50 per day, payable at the end of each week. (4) That he has received for such work a given sum, and no more, leaving a balance of $74 due and owing. (5) The affidavit states that said sum of $74 is still due and owing him, after deducting all just credits and offsets.

To say that A. performed labor for B. does not necessarily imply that B. employed him; but to assert that A. performed labor for B. under an agreement with the latter as to the rate of wages and time of payment is to allege substantially that A. was employed by B. The notice of lien contained a sufficient statement of the "terms, time given, and conditions of the contract." It is true that a mechanic's lien is purely a statutory creation, and that he who would avail himself of its benefits must show a substantial compliance with the terms of the statute. It by no means follows, however, that courts should give to the statute a construction tending, by its technicality, to fritter away, impair, or destroy the benign objects aimed at in its adoption. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. But we are not called upon to hold the claimant to a rigid technicality as to the manner of performance; and where it appears that the precise words of the statute have not been used by the claimant, but that other and substantially equivalent expressions have been resorted to, it will be deemed a sufficient compliance with the requirements of the law. In this view of the case, the liens of L. F. McCoy and Nathan Ascha were sufficiently explicit to entitle them to be admitted in evidence, and their exclusion was erroneous.

2. The order granting defendant's motion for a nonsuit was erroneous. The lien of C. F. Ascha, as before stated, was without validity, but, upon the evidence disclosed by the record, he was entitled to a personal judgment against the defendant for the amount due him. Morris v. Wilson, 97 Cal. 644, 32 Pac. 801; Lacore v. Leonard, 45 Cal. 394; Code Civ. Proc. § 580. We recommend that the order denying a motion for a new trial be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a motion for a new trial is reversed, and a new trial ordered.

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5 Cal. Unrep. 485

## KELLEY v. SERSANOUS, County Treasurer.

(Sac. 166.)

(Supreme Court of California. Oct. 6, 1896.)

EVIDENCE—BURDEN OF PROOF.

In an action to compel a county treasurer to pay a warrant, plaintiff alleged that under a contract with the county he had collected certain money due it, for which his compensation was to be 50 per cent.; that he presented his claim to the supervisors, who allowed it; that the auditor drew a warrant, and that the treasurer refused to pay it. The answer denied any agreement with plaintiff except a certain written contract, substantially as alleged by plaintiff. The answer averred that such contract was ultra vires and void, denied that plaintiff rendered any services under the contract, and alleged that the county from which the money was collected had instituted an action to recover it back, and that the same was still pending. The contract with plaintiff did not, on its face, appear to be ultra vires or void. *Held*, that the pleadings made a prima facie case in favor of plaintiff, and the burden of proof was on defendant to show facts, if any existed, to defeat the case thus made.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; Frank Moody, Judge.

Petition by K. E. Kelley for a writ of mandate to compel J. F. Sersanous, treasurer of Glenn county, to pay a warrant drawn on said treasurer by the county auditor, and payable to petitioner. From a judgment in favor of defendant, petitioner appeals. Reversed.

John T. Harrington, for appellant. George D. Dudley, for respondent.

SEARLS, C. Writ of mandate to compel the defendant, as treasurer of the county of Glenn, to pay a warrant for $811.36, drawn upon the said treasurer by the county auditor, and payable to petitioner. Defendant had judgment in the court below, from which judgment plaintiff appeals.

At the trial the plaintiff or relator read to the court his petition and the answer thereto, and rested his case. Thereupon defendant declined to introduce any evidence, and the cause was submitted to the court, and thereafter it filed written findings, specifying that the "contract alleged and set out in the answer of the defendant, and alleged as the contract upon which the claim of the plaintiff and relator is based, is ultra vires and void." The question involved in the case is this: Under the pleadings, upon whom did the burden of proof rest? Had the plaintiff moved the court for judgment upon the pleadings, he would, in effect, have admitted that all of the averments of the answer were true. Ward v. Flood, 48 Cal. 46; Fleming v. Wells, 65 Cal. 339, 4 Pac. 197; People v. Johnson, 95 Cal. 474, 31 Pac. 611; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231. He did not, however, thus move the court, but contented himself with submitting his case upon the admissions of the pleadings, upon the theory that under such pleadings the burden of proof was cast upon the defendant. The following is a summary of so much of the pleadings as are important for the purpose in view. The petition for the writ of mandate shows, among other things: (1) Defendant is treasurer of Glenn county. (2) That on the 15th day of November, 1892, the board of supervisors of Glenn county, being advised that said Glenn county had divers claims and demands against the county of Colusa, entered into an agreement with petitioner whereby they employed him, as an attorney at law, to collect the same, by action at law or otherwise, for the use of Glenn county, and for his compensation he was to receive 50 per cent., or one-half, of all he should collect. (3) That he performed services under said agreement, whereby there was paid into the state treasury, for the credit of Glenn county, in November, 1894, on account of railroad taxes, under what is known as the "Reassessment Act," in cases where former assessments were void, etc., the sum of $1,622.72. The 4th, 5th, 6th, 7th, and 8th paragraphs of the petition, all of which are by the answer and findings of the court admitted and found to be true, are statements in apt words and proper form of the making and filing with the clerk of petitioner's claim for one-half of the sum collected, viz. for $811.36, duly verified, etc.; the consideration thereof by the board of supervisors, and the allowance thereof by said board, and an order for its payment; the drawing of a warrant therefor by the auditor in his favor on the common fund; the presentation thereof to the county treasurer, and the indorsement thereon by the treasurer, "Not paid, for the want of funds;" that on June 13, 1895, there were in the treasury funds to pay said warrant, and demand of payment thereof, and refusal of the treasurer to make such payment. The answer denies that there was any agreement with petitioner except a certain written contract, which is set out in hæc verba, and which, not being denied, as provided by section 448 of the Code of Civil Procedure, is to be taken as admitted. This contract, which is duly executed and approved by the district attorney, recites that the board of supervisors of Glenn county, by and with the advice and consent of the district attorney, agrees and contracts with K. E. Kelley that all debts, dues, and demands within the province and power of the board against the county of Colusa, growing out of the division of Colusa county and the formation of Glenn county, and due to said Glenn county, are turned over to Kelley for collection, and he is authorized to sue therefor in the name of Glenn county, and to take all necessary steps to recover the same. Kelley is to pay all costs and expenses, and to give a bond to hold Glenn county harmless therefrom. Suit to be brought on or before May 1, 1893, and to be diligently prosecuted, unless a satisfactory settlement is reached before the last-named date. Kelley to receive one-half of all sums collected (except school moneys); the other half to be turned over to Glenn county. The answer avers this contract "so entered into by the board of supervisors was ultra vires and void." The answer sets up other defenses, among which are: (1) That it denies, on information and belief, that Kelley rendered any services under the contract, but that the sum of $1,622.72 was apportioned to Glenn county by the state board of equalization on account of back taxes collected from a railroad company upon its road extending through said Glenn county. (2) That Colusa county claims this identical money from Glenn county, has instituted an action to recover the same, which is pending and undetermined, etc.

In McGowan v. Ford, 107 Cal. 177, 40 Pac. 231, it was held, in substance, that where it is averred in the petition, and not denied, that the board of supervisors allowed the claim, and ordered a warrant drawn therefor, and that a warrant was regularly drawn by the auditor, and delivered to the petitioner, it must be presumed that official duty in allowing and issuing the warrant was regularly performed, and the burden of proof is upon the treasurer to show that he was justified in refusing payment, and it does not rest upon the plaintiff to show, by affirmative proof, that the board of supervisors had jurisdiction to issue the warrant, merely because the averments of the answer show that the board of supervisors had no jurisdiction to allow the claim. McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113, and Colusa Co. v. De Jarnett, 55 Cal. 375, are to like effect. This doctrine is subject to the exception that, if it appears on the face of the claim that it is one over which the board of supervisors had no jurisdiction, or that they acted in excess of their jurisdiction, the auditor may refuse to draw his warrant in payment of the claim, or, having done so, the treasurer may refuse payment. Linden v. Case, 46 Cal. 171; Merriam v. Board, 72 Cal. 518, 14 Pac. 137; Carroll v. Siebenthaler, 37 Cal. 193; McFarland v. McCowen, supra. There is no brief on file on behalf of defendant, and, if the contract set out in the answer is ultra vires the powers of the supervisors, we fail to see wherein. It is substantially such a contract as was upheld in Lassen Co. v. Shinn, 88 Cal. 510, 26 Pac. 365. We are of opinion that the due allowance of the claim by the board of supervisors for the services of petitioner as an attorney (the fact that he is an attorney at law is not denied), and the presentation to the treasurer of a warrant therefor in favor of petitioner, issued in due form by the auditor, when there were funds in the treasury applicable to the payment thereof, made a prima facie case in favor of the petitioner; and, these facts being admitted, the burden of proof was cast upon the treasurer to show facts, if any existed, to defeat the case thus made. It follows that the judgment should be reversed, and a rehearing had.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and a rehearing had.

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5 Cal. Unrep. 489

## HAYFORD v. WALLACE. (Sac. 79.)

(Supreme Court of California. Oct. 6, 1896.)

GIFT—FRAUDULENT CONVEYANCES—INSOLVENCY OF GRANTOR—EVIDENCE.

1. A voluntary promise on the part of a husband to assign a life insurance policy to his wife, without delivery of possession of the policy, does not constitute a gift to the wife, so as to serve as a valuable consideration for a note subsequently given by the husband to the wife for the proceeds of the policy, which were collected and used by him.

2. On the issue as to the solvency of the grantor at the time of a voluntary conveyance, there was evidence that he was a member of a firm whose books showed assets considerably in excess of liabilities, but that the firm shortly afterwards assigned for the benefit of creditors, and that the assignee, after seven years, had been unable to reimburse himself for money advanced to pay firm debts; that judgment was rendered against the grantor on an individual debt, which he compromised for 50 per cent.; that he owed several thousand dollars in individual debts, and that he owned an interest in a land speculation, the value of which was placed by witnesses at between $20,000 and $30,000, but which proved worthless. *Held*, that a finding that the grantor was insolvent was warranted.

3. An assignment of error that the findings do not support the judgment cannot be considered on appeal from an order denying a new trial; an appeal from the judgment is necessary.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by Abbie A. Hayford against Emeline Wallace. There was a judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

Wallace & Wallace and Henley & Costello, for appellant. John M. Fulweiler and Ben. P. Tabor, for respondent.

SEARLS, C. Action to quiet title to separate parcels of land conveyed to appellant by separate deeds. Defendant, as a defense and by way of cross complaint, averred the tract of land involved in this appeal was conveyed to plaintiff, who is appellant, by W. B. Hayford, her husband, November 7, 1886, without other consideration than love and affection; that at said date said W. B. Hayford was insolvent, and that defendant was a creditor of said Hayford, and that she secured a judgment, under which the land was sold, and she claims title under a sheriff's deed, etc. Defendant also pleaded actual fraud on the part of Hayford, and knowledge thereof on the part of his wife. Defendant had a decree in her favor as to the land conveyed to plaintiff December 7, 1886. Plaintiff moved for a new trial, which was refused, and this appeal is from the order of refusal. The court found, among other things: (1) That W. B. Hayford, the husband of plaintiff, on the 7th day of December, 1886, conveyed the land in question to the plaintiff, who entered into possession. (2) That the only consideration for the conveyance was love and affection, and there was no valuable or money consideration therefor. (3) That at the time of such conveyance W. B. Hayford was insolvent, and unable to pay his debts, and among his creditors at that time was the defendant, Emeline Wallace, to whom he was indebted in the sum of $2,500 upon two promissory notes of $1,250 each. (4) Hayford did not execute the deed to his wife in contemplation of insolvency, or to hinder, delay, or defraud his creditors. (5) Plaintiff did not know, at the date of the execution of the deed, that her husband was insolvent, and did not accept the deed with knowledge of any fraudulent intent on the part of her husband.

The second of the foregoing findings is assailed upon the ground that the evidence is insufficient to justify the finding "that love and affection was the only consideration for the deed, and that no valuable nor money consideration was paid therefor." It is true, there was evidence tending to show that W. B. Hayford, who was a merchant at Colfax, and a member of the firm of Hayford, Perkins & Co., held a policy of insurance upon his life, payable, about 1883, to his then wife, or, in case of death, to said Hayford. His wife died, and he intermarried with the plaintiff and appellant in 1876. The plaintiff testified that the first year of their marriage her husband told her of the policy, and said when it was paid she should have the money, but that when it was paid he wanted to use the money, and promised to give her his note, with interest at 10 per cent. This was in 1883, and on April 10, 1886, he gave her a note for $2,000, which was the consideration for the deed in question. Hayford himself testified that he assigned the policy to his wife, and that she kept it until it was due, in 1883, when she delivered it to him for collection, and that he neglected to give her a note, as he had promised, until 1886. On the other hand, there was testimony tending to show that this insurance policy was pledged to Mr. Wallace, the husband of defendant, as security for a debt due him from said Hayford, and remained in his hands until his death, and until it was due, in 1883, when it was delivered to Hayford by order of the respondent, as representative of her deceased husband, and the money collected and paid over to her in satisfaction of the debt, or a portion of it, owing by said Hayford. This involved a contradiction of the statement that the policy was delivered by Hayford to his wife, and retained by her. The court evidently believed the statement of Mrs. Emeline Wallace. In this view the policy did not constitute a gift to the plaintiff for want of delivery of possession, and did not serve as a valuable consideration for the note of April 10, 1886, made by Hayford to plaintiff. Again, according to all the statements, the policy of insurance was for $1,800. Hayford paid in premiums, after the alleged gift to his wife, the sum of say $900 from his own money, and then gave his wife a note for $2,000 on account thereof. There are a variety of minor circumstances disclosed by the record tending in the same direction, and which serve to create such a conflict in the evidence as to preclude our interposition to set aside the finding upon the ground that it is not supported by the evidence.

2. Appellant also attacks the third finding, wherein it is found that W. B. Hayford was at the date of the execution of the deed to his wife (December 7, 1886) insolvent and unable to pay his debts, and that among his creditors was defendant, whom he owed $2,500, etc. Upon this issue there was testimony tending to show that the firm of Hayford, Perkins & Co., in December, 1885, and December, 1886, owed some $35,000 to $40,000, and was possessed of assets in lands, buildings, book accounts, notes, etc., sufficient to meet all their liabilities and leave a balance of say $25,000 to $28,000; that Hayford owed several thousand dollars in individual debts, but had an interest in a colony known as "Chicago Park," which, in the opinion of witnesses, was worth, in 1886, from $20,000 to $30,000. This Chicago Park enterprise, it is easy to see, was a speculative business, with valuations fixed at "boom prices," and which was a disastrous failure, becoming worthless as an investment. There is no pretense that any considerable portion of the land was or could be sold in 1886 at any price. Hayford was sued for some $2,200, and a judgment obtained against him for that amount, which he was able to and did compromise for $1,100. He admitted that he was pushed by his creditors, and did not pay; and, notwithstanding the favorable showing as to assets, the stubborn fact remains that in the same month that Hayford conveyed the land in question to his wife, viz. December, 1886, the firm of Hayford, Perkins & Co. assigned all their property to one Egbert, for the benefit of their creditors; that said Egbert advanced $17,000 of his own funds to pay firm debts, and up to the time of trial of this cause (November, 1893) had not been able to reimburse himself from the firm assets for the money thus advanced, while Hayford had gone through insolvency. In the face of this testimony it is futile to argue against the sufficiency of the testimony to uphold the finding of insolvency on the part of W. B. Hayford on December 7, 1886.

3. Appellants further contend that the findings do not support the judgment. This question is not involved in an appeal from an order denying a motion for a new trial. Errors in the conclusions of law, drawn from the facts as found and in the judgment entered thereon, are not errors of law occurring during the course of the trial, but subsequent thereto, and can only be taken advantage of by an appeal from the judgment. Shepard v. McNeil, 38 Cal. 74; Martin v. Matfield, 49 Cal. 42; Jenkins v. Frink, 30 Cal. 595. An error of the trial court in rendering conclusions of law which are not supported by the findings is an error which should be reviewed by a direct appeal from the judgment, and is not a "decision against law," for which a new trial should be granted. Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; In re Doyle, 73 Cal. 565, 15 Pac. 125; Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527; Kirman v. Hunnewill, 93 Cal. 526, 29 Pac. 124; Brison v. Brison, 90 Cal. 323, 27 Pac. 186. Simmons v. Hamilton, 56 Cal. 493, which seems to hold a contrary doctrine, was concurred in but by two judges, and has not been followed.

A number of exceptions were taken at the trial to the admission and exclusion of evidence. We have examined them with care, and find them either groundless or not of sufficient importance to warrant a reversal. To discuss them at length would occupy much space, and, as they contain no novel questions, would be productive of no good. We recommend that the order appealed from be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

5 Cal. Unrep. 496

## PEOPLE v. FUGITT. (Cr. 199.)

(Supreme Court of California. Oct. 13, 1896.)

CRIMINAL LAW—NEW TRIAL—APPEAL.

Action of the trial court in granting a new trial in a criminal case on the ground that the verdict was not supported by the evidence, which, though ample, was conflicting, will not be disturbed.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Thomas F. Fugitt was convicted of grand larceny, and from an order granting a new trial the people appeal. Affirmed.

W. F. Fitzgerald, for the People. E. J. Emmons and F. M. Graham, for respondent.

PER CURIAM. Defendant was convicted of grand larceny in stealing a certain described steer. He moved for a new trial upon various grounds, and, among others, he claimed that the verdict of the jury was not supported by the evidence, and also that the court misdirected the jury as to matters of law. The motion for a new trial was granted, and this appeal is by the people from such order. The order of the court granting the new trial is a general order. While we are satisfied there was ample evidence to support the verdict, yet the evidence was directly and substantially conflicting upon the main issues involved, and, such being the fact, we will not disturb the action of the trial court in granting a new trial. For the foregoing reasons, the order appealed from is affirmed.

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114 Cal. 522

## RITZMAN v. BURNHAM. (L. A. 95.)

(Supreme Court of California. Oct. 12, 1896.)

JUSTICE OF THE PEACE—JUDGMENT—VALIDITY.

The erroneous action of a justice of the peace in denying a motion for a change of venue on affidavit of prejudice on the part of the justice does not render the judgment void, so as to enable the defendant to recover in trover for the sale of his property on execution issued on such judgment.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. W. Ritzman against F. E. Burnham. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Wm. E. Cox, for appellant. George A. Gibbs, for respondent.

TEMPLE, J. This is an action brought to recover damages for the conversion of certain horses. Defendant recovered judgment, and plaintiff appeals.

Among other reasons given by the respondent why the judgment should not be reversed is the claim that the complaint states no cause of action. As I think the claim must be sustained, it will not be necessary to mention other points. The complaint is not in the usual form for conversion, but proceeds with the narration of certain alleged facts. After an interesting narrative, which does not concern this case, it states that defendant sued plaintiff before a justice of the peace for the conversion of a horse, buggy, and harness; that while that action was pending this plaintiff—defendant in that case—moved the court for a change of venue on an affidavit stating that he believed he could not have a fair trial before the said justice by reason of the interest, prejudice, and bias of the said justice. Thereupon the said justice of the peace overruled the said motion for a change of venue, and, over the objection of the defendant in that case,—plaintiff here,—proceeded to try the cause, and rendered judgment for the plaintiff in that case against this plaintiff for $195 and costs of suit. It is then averred: "That afterwards, on the —— day of November, 1893, a so-called execution was issued by said justice on said void judgment to the constable of said township, directing him to levy on and sell the property of said defendant in that action (plaintiff herein) to satisfy said so-called judgment and costs, and said constable, at the instance and request and direction of the said Burnham, caused a so-called levy and sale of five horses, the property of this plaintiff; that the said Burnham ratified said sale, and received the proceeds thereof, and converted the said horses and the said money received from a sale thereof to his own use, without right or authority of law, and over the objection of this plaintiff." The complaint contains no other averment of any conversion, and manifestly the conversion averred is simply the sale by the constable under execution duly issued upon the judgment recited, and plaintiff claims that it was a conversion, on the ground that the judgment against him was void. It is also obvious that the ground upon which appellant claims that the judgment rendered against him by the justice was void is that the motion for a change of venue ousted the justice of jurisdiction. No authority for any such proposition is cited, and I presume none could be. It may be admitted that the statute is mandatory, and that, if the defendant in that action had remained and contested the case, he would not thereby have waived his objection, but might have procured a reversal for such error on appeal; but it does not follow that all subsequent proceedings were without jurisdiction. People v. Hubbard, 22 Cal. 35, is an authority to the contrary. The proceeding for the transfer of a cause from a state to a federal court is not a proceeding for a change of venue, and the effect of filing the affidavit and bond is declared by the law of congress. Cases under that law have no bearing on this case. The judgment was, therefore, not void, and the complaint states no cause of action.

Another point is that the case was appealed by the plaintiff from the justice court to the superior court, where the appeal was dismissed for some technical defect in the appeal. It is claimed that this dismissal was an affirmance. Had the judgment appealed from been entirely void, I do not suppose such a dismissal would have made it a valid judgment, but, as it was merely erroneous, such dismissal did have the effect of putting it beyond attack for any error which could have been availed of by the appellant on that appeal. For these reasons, the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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(114 Cal. 464)

## In re EGGERS' ESTATE. (Sac. 195.)

(Supreme Court of California. Oct. 7, 1896.)

ADMINISTRATOR—WHO ENTITLED TO APPOINTMENT—RELATIVES OF DECEDENT.

Under the provision of Code Civ. Proc. § 1365, that relatives of a decedent shall be entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof, a second cousin of a decedent, who left surviving him a father and brother residing in Germany, not being entitled under the statute to succeed to any part of the personal estate, is not entitled, as against the public administrator, to appointment as administrator.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; Frank Moody, Judge.

Several petitions by A. Cartenberg and by J. O. Johnson, public administrator, for appointment as administrator of the estate of Theis Eggers, deceased. From an order denying the petition of Johnson, and appointing Cartenberg, Johnson appeals. Reversed.

Charles L. Donohoe and Geo. D. Dudley, for appellant. Seth Millington and H. B. Sanders, for respondents.

BELCHER, C. Theis Eggers died, intestate, in the county of Glenn, of which he was a resident, on the 7th day of October, 1895, leaving a small estate consisting of personal property. On the 15th of November following, A. Cartenberg filed in the superior court of that county his petition praying that letters of administration on the estate of said deceased be issued to him. Thereafter, on the 25th of the same month, J. O. Johnson, public administrator of the county, filed opposition to the appointment of Cartenberg as administrator, and his petition praying that letters of administration on the estate be issued to him. The two petitions were heard at the same time, and on December 30, 1895, the court denied the petition of the public administrator, and ordered letters of administration on the estate to be issued to Cartenberg. From that order the public administrator has appealed.

The Code of Civil Procedure (section 1365) provides: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order: * * * (7) The next of kin entitled to share in the distribution of the estate. (8) The public administrator." And the Civil Code (section 1386, subds. 2, 3) provides that if the decedent leave no issue, nor husband or wife, the estate goes to his father and mother in equal shares; and, if either be dead, then the whole goes to the other; and, if there be neither issue, husband, wife, father, nor mother, then the estate goes in equal shares to the brothers and sisters of the decedent.

It was proved at the hearing that Cartenberg, to whom letters were ordered to be issued, was a second cousin of the deceased; that the deceased had no other relatives in this country; but that his father and a brother were living at Hamburg, in Germany. Under this showing, it is clear that Cartenberg was not entitled to succeed to the personal estate of the deceased, or any portion thereof. He was therefore not entitled, as against the public administrator, to letters of administration on the estate, and the court erred in granting his petition. In re Carmody, 88 Cal. 616, 26 Pac. 373; In re Davis' Estate, 106 Cal. 453, 39 Pac. 756. The decision in Anderson v. Potter, 5 Cal. 64, cited and relied upon by respondent, is based upon a statute the language of which has been materially changed by the Code, and is therefore not in point.

The suggestion in the brief of respondent that, since the appeal in this case was perfected, the appellant has removed from Glenn county, thereby vacating his office as public administrator, cannot be considered on this appeal. The order appealed from should be reversed, and the cause remanded for further proceedings.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded for further proceedings.

McKEANY v. BLACK. (S. F. 500.)

(Supreme Court of California. Oct. 7, 1896.)

APPEAL—NOTICE.

Where, in an action, judgment is taken by default against one of the defendants on appeal, such defendant is not an adverse party, so as to require service of notice of appeal on him.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action between McKeany and Black. From the judgment, McKeany appeals. Motion to dismiss denied.

George W. Langan and C. C. Hamilton, for appellant. Jesse W. Lilienthal, for respondent.

PER CURIAM. Upon the authority of Randall v. Hunter, 69 Cal. 80, 10 Pac. 130, the motion to dismiss the appeal is denied.

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(114 Cal. 494)

FORTAIN v. SMITH et al. (S. F. 327.)

(Supreme Court of California. Oct. 10, 1896.)

CONSTITUTIONAL LAW — SPECIAL PRIVILEGES — PLEADING—TENANT IN COMMON—RIGHT TO MAINTAIN ACTION.

1. Pol. Code, § 2853, providing that "no toll bridge or ferry must be established within one mile immediately above or below a regularly established ferry or toll bridge" unless certain facts exist making it necessary for public convenience, is not in contravention of Const. art. 1, § 21, prohibiting the granting of special privileges or immunities which shall not on the same terms be granted to all citizens, nor of article 4, § 25, subds. 19 and 25, prohibiting the passage of local or special laws granting any special or exclusive right, privilege, or immunity, or chartering or licensing bridges or ferries. The statute is general, and its provisions applicable alike to all citizens standing in the same relation thereto.

2. An allegation in a complaint that the plaintiff has acquired the interest of a co-tenant in a ferry franchise, and is the sole and exclusive owner thereof, is a sufficient allegation of ownership. The consent of the board of county commissioners, where necessary to the transfer of such franchise, is a mere probative fact, not necessary to be pleaded.

3. A tenant in common of a ferry, who is in sole possession, may maintain an action to protect the property from injury by enjoining the maintenance of another ferry within the limit prohibited by law.

Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by Charles Fortain against Julius Smith and others. Plaintiff appeals from an order dissolving a temporary injunction. Reversed.

A. J. Bledsoe, for appellant. Ford & Burnell, for respondents.

VAN FLEET, J. Action to restrain and enjoin defendants from maintaining a ferry. The complaint alleges that the board of supervisors of Del Norte county, in July, 1891, granted to plaintiff and one William T. Bailey a franchise to establish and maintain a public toll ferry at a certain point on Klamath river, in said county, on the line of travel between that county and the county of Humboldt, said franchise to run for a period of 20 years from the granting thereof; that in accordance with the franchise so granted the ferry was duly established in the year 1891; that thereafter, and prior to the 1st of January, 1895, plaintiff became the sole owner of said ferry and franchise by purchase from Bailey of all the latter's rights and interest therein, and that ever since he has remained such owner, and has maintained, operated, and conducted said ferry, and has expended large sums of money in equipping the same with boats and other apparatus, etc.; that in August, 1895, the defendants wrongfully and without authority established a ferry for the carriage of passengers and freight on said river contiguous to and within one mile of plaintiff's said ferry, and have since, without right or authority, maintained such unauthorized ferry, and have continued to carry freight and passengers across said river, in violation of plaintiff's rights; that these acts of defendants have operated and do operate to draw from plaintiff's ferry a large portion of the custom of the traveling public, and have resulted in greatly diminishing plaintiff's business and the value of his said franchise, and have inflicted upon plaintiff injury which is beyond pecuniary estimation; that the defendants threaten to continue the operation and maintenance of their said ferry; and that such acts, if permitted, will wholly destroy the value of plaintiff's franchise and property, and inflict upon him irreparable injury, for which grievance he has no adequate remedy at law. The prayer was that defendants be restrained from maintaining their ferry at any point on said river within the distance of one mile from plaintiff's ferry. The complaint was verified, and upon it the court granted a temporary injunction. Defendants demurred to the complaint as not stating a cause of action, and upon the same ground moved the vacation of the injunction. The court sustained this motion, and dissolved the injunction, and plaintiff appeals from such order. The notice of appeal also includes an appeal from the order "sustaining defendants' demurrer to plaintiff's complaint"; but, as such order can only be reviewed upon appeal from a final judgment, the effort to have it reviewed in the manner here sought is ineffectual. The only question is whether the complaint states a cause of action, it being tacitly conceded that, if it does, the order vacating the injunction was erroneous.

Section 2853 of the Political Code provides: "No toll-bridge or ferry must be established within one mile immediately above or below a regularly established ferry or toll-bridge, unless the situation of a town or village, the crossing of a public highway or the intersection of some creek or ravine renders it necessary for public convenience." In view of the provisions of this section, we are unable to perceive wherein the complaint is lacking in the statement of any fact material to the relief sought. In fact, the formal sufficiency of the complaint, with an exception to be hereinafter noted, is not questioned, but it is contended that the provisions of section 2853, above quoted, are unconstitutional and void, because it contemplates and authorizes the granting of special privileges within the prohibition of article 1, § 21, and article 4, § 25, subds. 19 and 25, of the constitution of this state. But the statute contravenes neither of these provisions. The first provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." The second provides: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * (19) Granting to any corporation, association or individual any special or exclusive right, privilege or immunity. * * * (25) Chartering or licensing ferries, bridges or roads." The statute in question grants no privileges or immunities which "upon the same terms shall not be granted to all citizens"; nor is it in any sense a special law, but is general, and operates alike upon all standing in the same relation thereto. Nor are the privileges it authorizes in any way obnoxious to the spirit or intent of the constitution or laws, or open to the objection of authorizing monopolies. The granting of such franchises under proper restrictions, such as are found in the Political Code, and in the exclusive enjoyment of which the grantee is to be protected within reasonable limits, is not antagonistic to the provisions of the constitution cited, or any others that have been called to our attention, nor to any rule of public policy of which we are aware. Nor does the enjoyment by the grantee of such right, of the limited immunity from the encroachment of others, which is contemplated under the statute, in any respect lend to the privilege granted the semblance of monopoly. The theory upon which such rights are granted is to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people; and a reasonable protection of those who hazard their private means in thus ministering to the public need is in the interest and direction of good government by encouraging enterprise.

It is contended that the complaint is defective in not alleging the consent of the board of supervisors to the alleged acquisition by plaintiff of the interest of Bailey in the franchise; that a franchise is a personal trust, which does not admit of substitution or assignment, without the consent of the granting power. But, if it was necessary to allege and prove this fact, we regard the allegations of the complaint as sufficient—certainly as against the general ground of objection assigned—to admit of such proof. The averment is: "That thereafter, and prior to the 1st day of January, 1895, plaintiff purchased and acquired all the right, title, and interest of the said Bailey in and to the said franchise and ferry, and ever since has been, and now is, the sole and exclusive owner," etc. The ownership of the franchise is the ultimate fact. The steps by which such ownership was acquired—as, for instance, the consent of the board, if necessary—would constitute mere probative matter not necessary to be alleged. But, in our opinion, the plaintiff can maintain the action without showing sole ownership of the franchise in himself. He is at least a tenant in common in the property, and in the sole possession thereof, and in such capacity has a right to maintain an action to protect such property from injury or destruction. 2 Am. & Eng. Enc. Law, § 1136. The order dissolving the injunction is reversed.

We concur: GAROUTTE, J.; HARRISON, J.

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(5 Cal. Unrep. 495)

## SANTA CRUZ BUTCHERS' UNION v. I X L LIME CO. (S. F. 416.)

(Supreme Court of California. Oct. 10, 1896.)

EVIDENCE—PROOF OF AGENCY—DECLARATIONS OF ALLEGED AGENT.

Declarations of one that he is agent of another are not admissible to prove the agency, nor to bind the alleged principal, until proof of the agency has first been made.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by the Santa Cruz Butchers' Union against the I X L Lime Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. J. Burt, for appellant. Spalsbury & Burke, for respondent.

PER CURIAM. The action was to recover for merchandise alleged to have been sold to defendant, the theory of plaintiff being that the goods were sold and delivered through one B. Cerf, acting as defendant's agent. Without first requiring proof of the agency, the court, against defendant's objection, admitted the testimony of several witnesses as to declarations by Cerf of his authority to represent the defendant, and that they supposed he was defendant's agent, because he was at the time acting as superintendent of the lime works, which defendant had theretofore been conducting. This evidence was wholly hearsay, and clearly inadmissible; and, as it was in great part all the evidence upon which the finding of Cerf's agency was based, its admission was manifestly prejudicial. It was necessary that plaintiff first establish the fact of agency before the declarations of such agent were admissible to bind defendant. Grigsby v. Water Works Co., 40 Cal. 396; Smith v. Insurance Co., 107 Cal. 432, 437, 40 Pac. 540. Neither the statement of M. Cerf that Baruch Cerf was the superintendent, nor the letter from Blochman & Cerf, were shown to emanate from any one authorized to bind the defendant, and were not, therefore, conclusive of defendant's liability. Judgment and order reversed.

114 Cal. 466

### PEOPLE ex rel. GESFORD v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 426.)

(Supreme Court of California. Oct. 8, 1896.)

MANDAMUS TO COMPEL ENTRY OF JUDGMENT—JUDICIAL ACTION.

In proceedings, in the nature of quo warranto, for ouster from office for acceptance of a pass from a railroad company, and for the imposition of the statutory fine, the imposition of which is left to the discretion of the trial court, defendant orally pleaded not guilty. *Held*, that the action of the trial court in sustaining such plea as sufficient, on the ground that the case was essentially criminal in its nature, was judicial, and therefore mandamus would not lie to compel the entry of a judgment of ouster as for a default. Harrison, Temple, and Henshaw, JJ., dissenting.

In bank. Petition by the people of the state of California, by the attorney general, on the relation of C. Gesford, against the superior court for the city and county of San Francisco, and Hon. A. A. Sanderson, one of the judges thereof. Denied.

Garrett W. McEnerney, for appellants. R. B. Carpenter and John M. Wright, for respondents.

McFARLAND, J. This is an original petition filed in this court for a writ of mandamus to compel the respondents to render judgment in favor of petitioners, as plaintiffs, in a certain proceeding pending in the court of respondents, in which the petitioners here were plaintiffs, and one M. R. Higgins defendant, in accordance with the prayer of the complaint in said proceeding. The complaint in said case of People v. Higgins, in which said Gesford was relator, contained two counts. In the first count it was charged substantially that the said Higgins had intruded himself upon the office of insurance commissioner, and that, for certain reasons given in said complaint, he had no title to said office. In the second count it was charged substantially that said Higgins had accepted and was using a free pass, issued by a certain railroad company, over the roads operated by it in this state, and that he had therefore forfeited the said office of insurance commissioner. In the prayer of the complaint judgment was asked that said Gesford be declared to be entitled to said office; that said Higgins was not entitled to, but had forfeited, the same; and that he (Higgins) be fined in the sum of $5,000. Higgins demurred to the complaint. His demurrer was sustained as to the first count, without leave to amend, and the demurrer was sustained as to the second count, with leave to amend; the demurrer to the second count apparently being sustained upon the ground that the averment that Higgins had received said pass was made upon information and belief, whereas it should have been made positively. The plaintiffs afterwards amended the second count by inserting a positive averment of the receipt of said pass. Thereupon the defendant in said case (Higgins) orally pleaded that he was not guilty of the offense charged, which plea was entered upon the minutes of the court. Notwithstanding said plea, the plaintiffs in said case procured the clerk to enter a default of the defendant; and thereafter the plaintiffs in said action (petitioners here) applied to the respondents (the said court and the judge thereof) for a judgment in accordance with the prayer of their complaint, and the court refused to enter said judgment or any judgment. Thereupon they filed the present petition in this court, asking that said respondents be "commanded, upon said default and the papers and pleading in this cause, to enter a judgment in favor of these petitioners, as plaintiffs in said action, for the relief demanded in the complaint."

It is our opinion that the petition should be denied. It is argued very strenuously by counsel for respondents that, after the demurrer had been sustained to the first count of the complaint in People v. Higgins, the case was then simply a proceeding to have defendant's title to an office declared forfeited for certain alleged misconduct, and to have him punished by a fine; that this proceeding was then (whatever its form) essentially criminal in its nature; and that, therefore, the plea of not guilty was sufficient. No doubt, the proceeding was quasi criminal. It is true that the mere acceptance of a pass is not itself a crime; but one who holds an office and a pass at the same time may be subjected, by a proceeding like the one here under review, to a severe criminal punishment. It is, at least, doubtful if he could be compelled to give evidence against himself. See Thurston v. Clark, 107 Cal. 285, 40 Pac. 435, and cases there cited. But whether or not his said plea of not guilty was a proper and sufficient plea is a question not here before us. That question was passed upon judicially by the court; and, if it committed an error in deciding that question, such error cannot be reviewed on mandamus. The case is quite similar in principle to that of People v. Pratt, 28 Cal. 166. In the latter case the plaintiffs moved the trial court to enter a judgment dismissing the action at their costs, and the defendant opposed the motion upon the ground that he had a counterclaim. The court denied the motion, and plaintiffs applied to this court for a mandate commanding the lower court to enter such judgment. They contended that the alleged counterclaim could not be legally made in the action, and that it had been withdrawn by a certain stipulation. This court, in denying the writ, said: "Both of these propositions were denied by the defendant, and, in deciding them, the court acted judicially, not ministerially; and, having denied them according to the best of his ability, a mandamus does not lie to compel him to reverse his decision and render a different one. [Citing authorities.] This writ lies to compel a subordinate judicial tribunal to proceed and exercise its functions when it has neglected or refused to do so; but, when the act to be done is judicial or discretionary, the writ cannot direct what decision or judgment shall be rendered, nor can it be granted after the inferior tribunal has acted for the purpose of reviewing its decision. * * * To review errors is not the office of the writ of mandamus." This language merely states a principle well established, and frequently declared by this court. Many of the authorities on the subject are cited in the opinion of the court in Strong v. Grant, 99 Cal. 100, 33 Pac. 733, 734, which was a petition for a writ of mandamus commanding the superior court to dismiss a certain criminal action pending therein. The writ was denied, and this court said: "The rule is so well established that it may be said to be universal that the writ of mandamus cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion." The rule there stated applies to the case at bar as clearly as to any of the numerous cases to which it has been applied by this court. By their motion for judgment the petitioners invoked a judicial decision, and such decision cannot be reviewed on mandamus. This is clearly not a case where, upon an undisputed default, the law specially enjoins upon the clerk or the court the ministerial duty of entering a certain specifically defined judgment. All the questions here involved are disputed questions, calling for the exercise of a judicial discretion. What kind of a judgment should or could this court, by writ of mandate, command the respondents to enter? Moreover, under any view, the petitioners had, by appeal, "a plain, speedy, and adequate remedy, in the ordinary course of law," and therefore mandamus does not lie. As was said in People v. Pratt, supra: "If the court has committed an error in denying the plaintiff's motion, the same can be reviewed on appeal, which is a speedy and adequate remedy in the ordinary course of law, within the meaning of the four hundred and sixty-eighth section of the practice act." If, when the case of People v. Higgins shall have come on for trial, the plaintiffs therein shall elect to submit it on a motion for judgment on the pleadings, and the court shall decide against them, and render judgment for defendant, an appeal will be the natural and regular remedy; and if the defendant therein shall continue to stand upon his present plea, and refuse to ask leave to amend, he must incur the hazard of what this court may finally decide in the premises if the case shall come here regularly on appeal. The issuance of the writ of mandamus would forever preclude any defense upon the merits.

Under the above views, it is unnecessary to inquire what similarity there is between the proceeding of People v. Higgins and the old writ of quo warranto. The prayer of the petition is denied, and the writ dismissed.

We concur: VAN FLEET, J.; GAROUTTE, J.

BEATTY, C. J. I concur in the judgment denying the writ. The action of the clerk in entering a default after the court had accepted the oral plea of not guilty was entirely nugatory. The question whether the defendant was in default or not was a question for the court, and not for the clerk, to decide. The court decided—erroneously, it may be conceded—that the proceeding was criminal, and that an oral plea entered on the minutes was sufficient. The motion for judgment was therefore a motion for judgment on the pleadings, and, it may also be conceded, was erroneously decided; but I do not understand that mandate is the proper remedy in such a case. The proper course for the relator, if he was confident of his position, was to submit the case for decision and final judgment on the pleadings, and, if the judgment went against him, to appeal.

HARRISON, J. (dissenting). The attorney general commenced an action in the superior court in the name of the people of the state, on the relation of Henry C. Gesford, against M. R. Higgins, alleging that he was unlawfully holding and exercising the office of insurance commissioner. In addition to the statement of the cause of action, the complaint also set forth the facts showing the claim of Gesford to the office, and prayed judgment that the defendant be excluded from the office, and Gesford be put in possession thereof. The cause of action was set forth in the complaint in two counts, and the defendant demurred to each of these counts, and also demurred to the complaint as a whole, upon the ground that several causes of action were improperly united. The court sustained the demurrer to the first count without leave to amend, and also sustained the demurrer to the second count, but gave the plaintiff leave to amend the same. Under the leave thus given, the plaintiff filed an amendment to this count, and thereupon the attorney for the defendant appeared in court and tendered the following oral plea: "The defendant pleads that he is not guilty of the offense charged," upon which the following entry was made in the minutes of the court: "In this action the defendant's attorney, Mr. Carpenter, appeared for his client, M. R. Higgins, and pleaded that said Higgins is not guilty of the offense charged." Thereafter, at the request of the plaintiff, the clerk entered the default of the defendant for his failure to appear and answer the complaint as amended; and the plaintiff applied to the court for the relief demanded in the complaint, but the judge thereof denied the said application, and refused to give any relief whatever, or to recognize the said default as being properly entered, upon the ground that the action herein was a criminal cause, and that a plea of not guilty was proper to the complaint as amended herein. The present application is made by the plaintiff for a writ of mandate commanding the respondent to entertain the application of these petitioners for the relief demanded in the complaint, and to enter a judgment in their favor as therein demanded. The respondent, in his answer, avers that he has already entertained the application of the plaintiff and has denied the same.

The order sustaining the demurrer to the first count of the complaint, without leave to amend, was equivalent to a judgment that the plaintiff was not entitled to any relief based upon that count; and the subsequent amendment to the second count had the effect to make that count as thus amended the only complaint in the action, and the sole basis of the relief sought by the plaintiff. The action was brought under section 803, Code Civ. Proc., which provides: "An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state." Such an action is a civil action, whether it be regarded as authorized by the above section of the Code, or as a proceeding instituted under the provision in the constitution giving to the superior court jurisdiction to issue writs of quo warranto. In People v. Perry, 79 Cal. 105, 21 Pac. 424, the court said of a similar action brought under the above section: "This is a proceeding substantially equivalent to that by quo warranto. It is the same as quo warranto, with something added." See, also, People v. Bingham, 82 Cal. 238, 22 Pac. 1039; People v. Pease, 30 Barb. 588; People v. Thacher, 55 N. Y. 525. Mr. High, in his treatise on Extraordinary Legal Remedies, says (section 710): "The tendency of the courts in modern times being to regard an information in the nature of a quo warranto in the light of a civil remedy invoked for the determination of civil rights, although still retaining its criminal form and some of the incidents of criminal proceedings, the better doctrine now is that pleadings should conform as far as possible to the general principles and rules of pleading which govern in ordinary civil actions." As a civil action authorized by the Code of Civil Procedure, it is subject to the rules of pleading given in that Code, section 421 of which declares: "The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code." And, by section 422, the only pleadings allowed on the part of the defendant are the demurrer to the complaint and the answer. The provision in section 446, that every pleading must be subscribed by the plaintiff or his attorney, and of section 465, that all pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney, render it necessary that all pleadings shall be in writing or printed, and preclude a party from making any oral pleading whatever. There is no ground for considering that the present action is instituted under the provisions of section 772 of the Penal Code, or that it is to be regarded as criminal in its nature. The superior court can act under that section only when it has received an accusation in writing, alleging that the officer has charged and collected illegal fees, or has refused or neglected to perform the official duties pertaining to his office. The only grounds alleged in the complaint herein are the failure to file a sufficient bond, and the subsequent acceptance and use of a free pass granted to him by the Southern Pacific Company, a railroad corporation operated within this state; and of neither of these acts can there be predicated any turpitude or neglect of official duty. The people have prescribed certain conditions under which its officers may exercise the functions of the offices to which they have been elected or appointed, and have declared that in certain cases they shall no longer hold such offices, one of which is the acceptance of a free pass from a railroad or other transportation company. Const. art. 12, § 19. The acceptance of such a pass has no more of the elements of a criminal nature than would the acceptance by an officer of a lucrative office under the United States, or the absence from the state by a judicial officer for more than 60 days, or the voluntary removal from the county for which the officer was elected, either of which acts would be a ground for declaring that he could no longer exercise the office. See People v. Leonard, 73 Cal. 230, 14 Pac. 853.

Under a writ of quo warranto, or an information in the nature of a quo warranto, the defendant was required either to disclaim or justify. The state was not required to make any showing, but the onus was upon the defendant to establish his right to a judgment in his favor. He was required either to deny that he was in the exercise of the office, or to allege facts sufficient to show that he had the right to exercise the office. People v. Crawford, 28 Mich. 88; High, Extr. Rem. § 716. A plea of not guilty was insufficient, and not to be regarded as a defense. Attorney General v. Foote, 11 Wis. 14; Com. v. McWilliams, 11 Pa. St. 61. Even in Illinois, where the proceedings are required to be in many respects in analogy to criminal proceedings, it is held that "the defendant must either disclaim or justify. If he disclaims, the people are at once entitled to judgment. If he justifies, he must set out his title specially. It is not enough to allege generally that he was duly elected or appointed to the office, but he must state particularly how he was elected or appointed. He must show on the face of the plea that he has a valid title to the office. The people are not bound to show anything. The information calls upon the defendant to show by what warrant he exercises the functions of the office, and he must exhibit good authority for so doing, or the people will be entitled to judgment of ouster." Clark v. People, 15 Ill. 213. And although the complaint under the procedure authorized in this state need not have alleged the facts constituting the usurpation or illegal exercise of the office by the defendant, but would have been sufficient by merely alleging that he is unlawfully exercising the office (Palmer v. Woodbury, 14 Cal. 43), leaving his right to such exercise to be pleaded in his defense, yet these allegations in the complaint herein being material and relevant to the issue, and not having been denied, the facts thus alleged must be held to be admitted by him. People v. Knox, 38 Hun, 236. If the defendant is in default in answering or pleading to the information, he is regarded as confessing all its allegations, and the court must thereupon proceed to judgment of ouster forthwith. High, Extr. Rem. § 739. As, therefore, the defendant herein was in default by reason of his failure to make any answer to the allegations in the complaint, the plaintiff was entitled upon such default to a judgment, and the court should have entertained its application therefor, and rendered judgment in its behalf.

It is unnecessary to determine whether the relator has any right to the office held by the defendant. If the defendant is rightfully in the exercise of the office, the relator can have no right thereto; and, if the defendant has no right to the office, it is immaterial to him whether the office is vacant, or to be held by the relator. People v. Abbott, 16 Cal. 358. The attorney general is authorized to bring the action upon the complaint of a private party, and it is not necessary that it appear from his complaint, or be shown to the court, that such relator is entitled to the office (People v. Bingham, 82 Cal. 238, 22 Pac. 1039); and, although the court may determine the right of the relator to the office (Code Civ. Proc. § 616), it is not required to do so (People v. Phillips, 1 Denio, 388; High, Extr. Rem. § 757). Nor will a defective averment of the relator's right defeat the right of a state to a judgment of ouster against the defendant. State v. Palmer, 24 Wis. 63.

The refusal of the court to grant the application of the plaintiff "upon the ground that the action herein was a criminal cause, and that a plea of not guilty was proper to the complaint as amended herein," was not a judgment in the action or the exercise of any judicial discretion, but was a refusal to recognize the existence of the default, and to proceed in the case in the only mode then remaining for its action. The default of the defendant in failing to answer the complaint was an admission by him of the truth of the facts alleged in the complaint, and should have been treated with the same effect as if these facts had been found by the court upon competent evidence. The plaintiff thereby acquired the right to a judgment that the defendant was unlawfully exercising the office, and that he be excluded therefrom; and the refusal of the court to recognize this right, and to give this judgment to the plaintiff, was a refusal to perform an act which, from the nature of its functions, it was required to perform. The court had ceased to have any opportunity for the exercise of judicial discretion in the case, but the entry of this judgment had become an absolute duty on its part, which, in case of its refusal, it may be compelled to perform. Where a verdict or finding of facts authorizes a particular judgment, as an inevitable conclusion of law therefrom, and permits no other judgment, there is no place for the exercise of judicial discretion, and the court may be compelled by mandamus to cause such judgment to be entered. Russell v. Elliott, 2 Cal. 245; People v. Sexton, 24 Cal. 78; Wood v. Strother, 76 Cal. 545, 18 Pac. 766; Johnston v. Superior Court, 105 Cal. 666, 39 Pac. 36; Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871; Hensley v. Superior Court, 111 Cal. 541, 44 Pac. 232; Lloyd v. Brinck, 35 Tex. 1; Cortleyou v. Teneyck, 22 N. J. Law, 45; State v. Whittet, 61 Wis. 351, 21 N. W. 245; Insurance Co. v. Wilson, 8 Pet. 291; High, Extr. Rem. § 235; 2 Spell. Extr. Relief, § 1407; Merrill, Mand. § 189. Whether, in addition to such judgment, a fine shall be imposed upon the defendant, is by the express terms of section 809, Code Civ. Proc., left to the discretion of the superior court; but the right to exercise its discretion in this particular does not limit or qualify its duty to enter the judgment of ouster; and, although it cannot be controlled in the exercise of this discretion, it may be compelled to proceed to its exercise. The discretion given to the court is not to determine whether it will act, but is limited to the mode in which it will act, and in such cases mandamus will lie to compel a court to act and exercise the discretion given to it. Jacobs v. Board, 100 Cal. 121, 34 Pac. 630; 2 Spell. Extr. Relief, § 1394; High, Extr. Rem. § 24. In my opinion, the application for the writ should be granted.

We concur: TEMPLE, J.; HENSHAW, J.

114 Cal. 161

## JURGENS v. NEW YORK LIFE INS. CO.

(S. F. 283.)

(Supreme Court of California. Oct. 3, 1896.)

In bank. Petition for rehearing. Denied.

For opinion in division, see 45 Pac. 1054.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from some of the conclusions of the court in this case, and, therefore, from the order denying a rehearing before the court in bank. It will be observed that the decision does not go upon the ground that the plaintiff was not in fact defrauded. On the contrary, it assumes that he was defrauded, but holds that he could not rescind by his own act without tendering a release by his wife of her interest in the policy. I think this is probably a sound construction of the statute. Civ. Code, § 1689. But if plaintiff could not effect a rescission by his own act without putting the defendant in statu quo, it does not follow that he could not compel a rescission by an action instituted for that purpose. The present action, it is true, is not in form an action to rescind, and that is not the relief prayed. The complaint proceeds upon the theory that a rescission was effected by the act of the plaintiff, and merely prays judgment for the amount of premium paid. But, assuming, as the opinion does, that the plaintiff was really defrauded, his complaint states facts sufficient to warrant a judgment of rescission,—facts, in other words, sufficient to constitute a cause of action,—though not sufficient to warrant the specific relief sought by the prayer. In this respect, however, the complaint was amendable, and the omission to make Mrs. Jurgens a party was waived by the failure to demur.

As to the rights of Mrs. Jurgens, it made no difference whether she could or could not be compelled to release her interest in the policy. If she could be compelled, in an action to rescind, to release her interest, she was a necessary party to such action only for the protection of the defendant, and the defendant could, by failing to demur to the complaint for nonjoinder, waive the advantage of a decree binding upon her. If she could not be compelled to release her interest, that would not have been a reason for denying a rescission. It is only in cases of mere mistake that rescission cannot be adjudged without putting the party against whom it is adjudged in statu quo. Civ. Code, § 3407. A party who has secured an advantage over another by fraud cannot avoid rescission upon the ground that he has involved himself in obligations to third parties. Masson v. Bovet, 1 Denio, 69; Hammond v. Pennock, 61 N. Y. 145.

114 Cal. 551

## SIEBE v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 537.)

(Supreme Court of California. Oct. 17, 1896.)

OFFICER — ASSESSOR — INADEQUATE ASSESSMENT — CRIMINAL LIABILITY FOR.

Pen. Code, § 772, authorizing the superior court to entertain an accusation made under oath by a private citizen against an officer within its jurisdiction, charging him with having collected illegal fees, or with having refused or neglected to perform his official duties, does not confer jurisdiction to entertain such an accusation charging an assessor with having assessed certain property at a sum below its full value; such act, if corruptly done, being "willful and corrupt misconduct in office," subjecting the officer to indictment, and, if not, being of a judicial nature, and one for which he is not amenable to the penal laws.

In bank. Petition by Siebe for a writ of prohibition to the superior court, city and county of San Francisco. Peremptory writ granted.

E. S. Pillsbury, for petitioner. A. J. Clunie, for respondent.

PER CURIAM. The petitioner herein was elected to the office of assessor for the city and county of San Francisco at the general election in 1894, and qualified for said office in the succeeding January, and has since acted as such assessor. Prior to the 1st day of July, 1895, as such assessor, he assessed the property of the Market-Street Railway Company, a corporation organized under the laws of this state, and having property in said city and county, for the fiscal year ending July 1, 1895, at the sum of $3,883,866. On the 11th of May, 1896, an accusation in writing against him was presented to the superior court of San Francisco, alleging that the value of the property of said corporation at the time of such assessment was $17,500,000, and that the petitioner, "for the purpose and with the design of enabling said Market-Street Railway Company to evade taxation for the fiscal year ending July 1, 1895, upon the full cash value of said property, willfully and knowingly failed and neglected to, and did not, assess the said property of said Market-Street Railway Company for the purpose of taxation for said fiscal year at its full cash value, but with said object and purpose then and there assessed the same at the value of but $3,883,866, and that no other, further, or additional assessment of said property for said fiscal year was made." Thereupon the superior court appointed the 18th day of May, 1896, as the time at which it would hear the said accusation and the evidence offered in support of the same, and directed a citation to be issued to the petitioner to appear at that time. On that day he appeared before the court, and objected to its jurisdiction to hear or act upon the said accusation, and requested the court to dismiss the same. The court, however, denied his request, and set the matter down for hearing on the next day. Upon the application of the petitioner an alternative writ of prohibition was issued out of this court, directing the respondents to show cause why they should not refrain from further proceedings upon the said accusation. The return to the writ is in the nature of a demurrer to the application.

Section 772 of the Penal Code authorizes the superior court to entertain an accusation made under oath by a private citizen against an officer within its jurisdiction, charging him with having collected illegal fees, or with having refused or neglected to perform the official duties pertaining to his office, and, unless the accusation charges the officer with a violation of his official duty in respect to one or other of these particulars, the court has no jurisdiction in the matter. In the present case the petitioner was not accused of having neglected or refused to assess the property of the Market-Street Railway Company, for it is alleged in the accusation that he did assess it at a given amount, but that this amount was less than its actual value, and that such assessment was made "for the purpose and with the design of enabling said Market-Street Railway Company to evade taxation for the fiscal year commencing July 1, 1895." If the assessment was made with such purpose, it was not a "refusal or neglect" to perform his official duties, but a "willful and corrupt misconduct in office," for which he might have been presented by the grand jury, under the provisions of section 758 of the Penal Code. If, on the other hand, the assessment was made in the ordinary exercise of his official duty, and without any corrupt or illegal motive, his act though pertaining to the executive department of the government was of a judicial nature, for which he is not amenable to the penal laws of the state. See Clunie v. Siebe (Cal.) 44 Pac. 1064. It is ordered that a peremptory writ issue as prayed for.

BEATTY, C. J., not participating.

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114 Cal. 481

## GRIFFIN v. DINGLEY, County Clerk.
(S. F. 706.)

(Supreme Court of California. Oct. 8, 1896.)

ELECTIONS—CERTIFICATE OF NOMINATION—FILING—LEGAL HOLIDAY—LIMITATION.

Under Pol. Code, § 1192, as amended (St. 1895, p. 303), which provides that "certificates of nomination required to be filed with the county clerks, or with the clerk or secretary of the legislative body of any city or town, shall be filed not more than fifty nor less than thirty days before the day of election, when the nomination is made by a convention," where the last day on which the certificate could be filed, ordinarily, falls on Sunday or a legal holiday, the certificate must be filed on the day before, to be in time.

In bank. Application by P. H. Griffin for a writ of mandate commanding A. S. Dingley, county clerk of Stanislaus county, to receive and file a certificate of nomination. Denied.

A. Hewel and C. A. Stonesifer, for petitioner. John E. Richards, for respondent.

PER CURIAM. The respondent is the county clerk of Stanislaus county, and on the 5th day of October, 1896, the petitioner presented to him, for filing, a certificate, duly authenticated by the proper officers, of the nomination by the county convention of the Democratic party of that county, held September 7, 1896, of certain candidates for public offices to be filled by the electors of that county at the coming general election. The respondent refused to file the same, alleging as a reason therefor that that day was a holiday, and also because the same was not presented for filing within the time required by law. The petitioner again presented the certificate to him on the 6th day of October, with the request that it be filed; but the respondent again refused to file the same, for the reason that it was not presented to him for filing within the time required by law. The present application is for a writ of mandate, commanding the respondent to receive and file the said certificate.

Section 1192 of the Political Code, as amended in 1895 (St. 1895, p. 303), provides: "Certificates of nomination required to be filed with the county clerks, or with the clerk or secretary of the legislative body of any city or town, shall be filed not more than fifty nor less than thirty days before the day of election, when the nomination is made by a convention." It is contended by the petitioner that under this provision the 4th day of October was the last day on which the certificate could be filed, but that, as that day was Sunday, by virtue of sections 12 and 13 of the Political Code he was entitled to file it on the next day that was not a holiday, and, as the 5th day of October was a legal holiday, his presentation of the certificate to the respondent on the 6th was in time, and that the respondent should have filed it. We are of the opinion, however, that these provisions of the Political Code are inapplicable. Section 12 provides that a holiday shall be excluded when it is the last day of the time "in which" any act provided by law is to be done; and section 13 refers to an act which is appointed to be done "upon" a particular day. In the present case, however, the statute does not fix the day upon which or the time within which the certificate is to be filed, but declares that it shall be filed "not less" than 30 days before the day of election. To hold that it could be filed 28 days before the day of election would be in manifest disregard of the provisions of the statute. The application for the writ is denied.

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114 Cal. 498

## CHAPIN v. WILLCOX, Auditor. (Sac. 114.)

(Supreme Court of California. Oct. 10, 1896.)

COUNTIES — OFFICERS — ANNUAL COMPENSATION—PER DIEM AND MILEAGE—LIMITATION.

County Government Act 1893 (St. 1893, p. 499, § 204, subd. 15), fixing the compensation of county officers in counties of the forty-second class, provides that "supervisors shall receive seven dollars per diem, and twenty-five cents per mile in traveling to and from their respective residences to the county seat. All of which compensation in the aggregate shall not exceed four hundred dollars per annum each." *Held*, that no one member can draw more than $400 compensation for all services in any one year as per diem and mileage.

Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Petition by one Chapin for a writ of mandate commanding one Willcox, auditor of Madera county, to issue him a warrant upon the county treasury for compensation as county supervisor. An alternative writ was issued, and defendant demurred to the petition. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. H. Larew and J. S. Larew, for appellant. Miles Wallace, for respondent.

HARRISON, J. The plaintiff is one of the supervisors of the county of Madera, and the defendant is the auditor of that county. On February 8, 1895, the board of supervisors allowed the account and claim of the plaintiff, in the sum of $487.80, as a balance on mileage as supervisor of said county, and ordered said claim paid; and the plaintiff thereupon made a demand upon the defendant, as auditor of the county, that he issue to him a warrant upon the county treasury for that amount. The defendant refused to issue the warrant, and the plaintiff filed in the superior court his affidavit and petition for a writ of mandate commanding the auditor to draw the warrant. An alternative writ was issued thereon, and, the defendant having appeared and demurred to said petition, his demurrer was sustained, and judgment entered against the plaintiff. From this judgment the plaintiff has appealed.

The determination of this case depends upon the construction of subdivision 15 of section 204 of the county government act of 1893 (St. 1893, p. 499). The first clause of said section and said subdivision are as follows: "Sec. 204. In counties of the forty-second class the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: * * * (15) Supervisors shall receive seven dollars per diem, and twenty-five cents per mile in traveling to and from their respective residences to the county seat. All of which compensation in the aggregate shall not exceed four hundred dollars per annum each." It is contended by the appellant that the limitation of $400 in the last sentence of the section applies only to the per diem, and that in addition thereto he is entitled to 25 cents for each mile that he has traveled in going to and from his residence to the county seat,—in the present case alleged by him to be 2,208 miles, during the years 1893 and 1894. The respondent contends, on the other hand, that the $400 compensation allowed to members of the board of supervisors includes both per diem and mileage; that is to say, that no one member can draw more than that amount for all services in any one year, both as per diem and mileage. The provision which is made for the compensation of supervisors in counties of the forty-second class differs in its language from that made for these officers in counties of any other class, and is to be determined by a construction of the language that has been employed. In some counties supervisors receive a fixed, annual salary, without any provision for mileage, while in others mileage to a limited amount is allowed them. In some they receive a per diem, without any limitation upon its amount, and a mileage not to exceed a certain amount; and in some there is a limit upon each, while in others the limit is upon the per diem alone. Of those that receive a per diem and mileage, there is in some a limitation upon one, and in some a limitation upon the other, and in some a limit upon neither. The provision for these officers in the forty-second class differs from all the others in that the limit to the entire compensation is made definite and precise. After determining that the basis upon which their compensation is to be fixed shall be a per diem and mileage, and fixing the amount of each of these elements, the legislature has declared that "all of which compensation in the aggregate shall not exceed four hundred dollars per annum each," thus leaving little, if any, room for construction. It would be difficult to express in more explicit language that the entire amount which a supervisor in this class of counties shall receive in any one year for the services required of him by law, or by virtue of his office, is $400. Traveling to and from his residence to the county seat is as much a part of the services required of him as is the sitting in the council chamber of the board, and the compensation for these services has been fixed by the legislature in the foregoing language. If the legislature had merely said, "all of which compensation" shall not exceed $400 in any one year, both the per diem and the mileage would have been included, since "all" is a term of number, which includes the several items making up the basis of the compensation; but, as if to make its purpose more clear, the legislature has added that all this compensation shall not, "in the aggregate," exceed $400 per annum. The term "aggregate" implies a plurality of units, whose total amount it represents. It is defined in the Century Dictionary as "a sum, mass, or assemblage of particulars; a total or gross amount; any combined whole, considered with reference to its constituent parts." And in the above section these units are the per diems and the number of miles traveled, the total amount of which shall not exceed $400 per annum. Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488, is inapplicable, as in that case the provision was that the superintendent of schools, in addition to his compensation, should receive the actual traveling expenses incurred by him, whereas there is no provision of that nature applicable to the appellant, nor is his claim based upon any expenses incurred by him. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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114 Cal. 516

## ELMORE v. ELMORE. (Sac. 144.)

(Supreme Court of California. Oct. 12, 1896.)

PLEADING—ALLEGATION AND PROOF—VARIANCE—MOTION FOR NONSUIT—WAIVER OF ERROR.

1. Under a complaint by the administratrix of a deceased wife against her surviving husband, alleging that he purchased certain real estate and personal property therein described with money of his wife, and as her agent and trustee, and praying a conveyance of such property, the court is not authorized to render a personal judgment against the defendant on a finding that he did not purchase such property as alleged, but that he received a certain sum of money from his wife; such finding being a variance.

2. A defendant does not waive an erroneous ruling on a motion for nonsuit by the introduction of evidence after the motion is overruled, unless, in so doing, he supplies the defects in plaintiff's case, upon which the motion was based.

3. An objection on the ground of a variance may properly be raised by motion for a nonsuit, though defendant did not object to the admission of the evidence.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Susan B. Elmore, as administratrix of the estate of Sarah F. Elmore, deceased, against James G. Elmore. Judgment for plaintiff, and defendant appeals. Reversed.

C. C. Wright and W. N. Rutherford, for appellant. T. A. Coldwell and P. J. Hazen, for respondent.

McFARLAND, J. The court below rendered an ordinary money judgment in favor of the plaintiff, and against the defendant, for the sum of $6,500, together with costs; and the defendant appealed from the judgment, and from an order made denying his motion for a new trial.

We think that the judgment must be reversed, and a new trial ordered, because neither the complaint nor the findings sustain the judgment entered. The cause of action, if any, established by the findings is wholly different from the one averred in the complaint. The allegata and the probata do not agree. It is averred in the complaint that the deceased, Sarah F. Elmore, was the wife of the appellant; that during her lifetime and during the coverture she received certain property from the estates of her deceased parents, which was mostly in the form of money; that she furnished this money to the appellant, as her agent and trustee to purchase lands and some personal property for her; that, in pursuance of such trust, he did purchase large tracts of land, and improved the same, with her said money, which said lands so purchased are specifically described in the complaint; that he took the conveyances of said lands in his own name; and that he to some extent mingled said moneys of the said wife with community property, so that it had become difficult to state exactly what her interest was in the lands so purchased; but that, according to the plaintiff's information and belief, at least one-half of the said described lands, and one-half of certain personal property, was bought by the appellant, and is held by him as trustee for the said deceased wife. The prayer of the complaint is for judgment that appellant account for all the purchases he had made, as aforesaid; that all the property described in the complaint be decreed to be the separate property of the said deceased wife; and that the appellant be decreed to convey to plaintiff, as administratrix of the said deceased wife, all the real property described in the complaint, and also transfer to her all the personal property described. The court found that the said deceased wife, Sarah F. Elmore, inherited and received from the estates of her parents the sum of $6,500. It further found, however, that she did not furnish said money, or any part thereof, to the appellant, as her agent and trustee, with which to purchase lands, and that defendant did not, as her agent and trustee, purchase any land; that the lands described in the complaint were not purchased by appellant, or held by him in trust for the use of said deceased wife; that there was no understanding or agreement that the defendant should hold the title to said lands for said Sarah as her agent and trustee; that she did not furnish appellant any money or property with the understanding or on the condition that he should invest the same in land for her; and that the personal property described in the complaint was not purchased by defendant as trustee or agent of the said Sarah, or with her funds; and that defendant does not hold the same as trustee of said Sarah. Nevertheless, the court entered a personal judgment against appellant for the said sum of $6,500. But this was rendering judgment upon a cause of action not set up in the complaint, and not warranted by the averments of the complaint; and it, therefore, cannot be sustained either upon principle or authority. Chetwood v. Bank (Cal.) 45 Pac. 704; Reed v. Norton, 99 Cal. 617, 34 Pac. 333; Mondran v. Goux, 51 Cal. 151; Tomlinson v. Monroe, 41 Cal. 94; Hayne, New Trial & App. § 115, and cases there cited.

Respondent contends that appellant waived the point of a variance between the complaint and the evidence, because, having made that point in a motion for a nonsuit, he afterwards introduced evidence in the case. This position, however, is not tenable. Appellant moved for a nonsuit upon the express ground that there was no evidence tending to prove that appellant held certain lands and property which he had purchased with the separate money of the deceased wife as her trustee; and the motion for a nonsuit should have been granted. The point thus made on the motion for nonsuit was not waived by the mere fact that the appellant afterwards introduced some evidence in the case. No such rule obtains in this state. The rule upon the subject is simply this: that if, after a motion for a nonsuit for want of testimony upon any material point has been erroneously overruled, the defendant proceeds and supplies the defect by evidence which he himself introduces, then the error committed in overruling the nonsuit is cured; but if the motion for a nonsuit should have been granted, and no evidence is afterwards introduced by the defendant which changes the status of the case, then he can avail himself of the error committed in the refusing of the nonsuit. The case of Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316, cited by respondent, goes only to the extent above indicated. The rule is properly stated in Hayne, New Trial & App. § 118, as follows: "If the motion for nonsuit be improperly denied, it may happen that the defendant's evidence will supply the defects in plaintiff's case pointed out on the motion for nonsuit. In such case the error of denying the motion is cured." The rule is stated in several of the adjudicated cases in this state. For instance, in Smith v. Compton, 6 Cal. 25, the court, after saying that it was necessary to make certain proof in order to sustain the plaintiff's case, said: "This was not done in the opening, and the defendant was entitled to a judgment of nonsuit. The defendant, however, after his motion was denied, introduced evidence which enabled plaintiff to supply the defect in his case, and, by so doing, waived the objection." Again, in Winans v. Hardenbergh, 8 Cal. 293, the court said: "The only exception taken by appellant in the court below was to the refusal to instruct the jury, as in case of nonsuit, upon the close of plaintiff's testimony. If this were an error, it was cured by the introduction of evidence on the part of defendants which supplied every omission in plaintiff's case, and conclusively established his right to recover." So, in Association v. Willard, 48 Cal. 614, the court say: "The motion for a nonsuit should have been granted. The answer denies that the defendant ever ousted or ejected the plaintiff from the premises, and the plaintiff failed to prove the ouster; but the defendant afterwards supplied the defect by proving that he had remained in possession ever since the execution of the lease above mentioned. The production of that evidence cured the error." By the motion for nonsuit the appellant distinctly raised the point insisted on here, and thereby called the attention of both court and counsel to it; and therefore he is not within the rule frequently announced here that a party will not be allowed to raise an objection in this court for the first time. And, as he introduced no evidence tending to supply any omission in the evidence of the respondent, the motion for a nonsuit occupies the same position now as it did in the court below when made there.

The motion for a nonsuit was the proper method by which to raise the said question of variance. In Hayne, New Trial & App. § 115, it is said: "In all of the foregoing cases, except McCord v. Seale [56 Cal. 262], objection on account of the variance was taken in the court below, either by objecting to the admissibility of the evidence or by motion for a nonsuit. A variance may be taken advantage of in either of these modes, and the defendant is not precluded from moving for a nonsuit on the ground of variance by reason of his failure to object to the admissibility of the evidence." And the text is amply supported by the authorities cited. See Johnson v. Moss, 45 Cal. 515; Farmer v. Cram, 7 Cal. 135; Tomlinson v. Monroe, 41 Cal. 94; and cases cited in Hayne, New Trial & App. § 115. In many of the cases the defendant had introduced evidence after the denial of the motion for a nonsuit, which evidence, however, did not cure the failure of plaintiff to make out his case. See Farmer v. Cram, supra. Moreover, the point under review was also raised by the specification that the court in its conclusion of law erred as follows: "The court erred in its conclusion of law which reads as follows: 'That plaintiff is entitled to a judgment against defendant for the sum of sixty-five hundred dollars and costs of suit.' On the contrary, the action is not for a money judgment, but to establish a trust in land."

The foregoing views make a new trial necessary. The court rested its judgment upon the finding that the $6,500 received by the deceased wife from her parents' estates was used by appellant in paying off a certain mortgage, building a house, and in farming operations, and in household expenses, and that "the same was so received by defendants as the agent and trustee of said Sarah"; and we must not be understood as holding that such finding was justified by the evidence. However, this and other questions in the case need not be now considered. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HENSHAW, J.

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114 Cal. 526

## MURPHY v. CLAYTON. (No. 15,914.)

(Supreme Court of California. Oct. 13, 1896.)

ADMINISTRATORS—RIGHT TO PROPERTY SOLD BY DECEDENT.

A sale of chattels by decedent, though not accompanied by delivery, having been valid against him and his heirs, and therefore his administrator, recovery thereof by the purchaser from the administrator cannot be defeated, under Code Civ. Proc. §§ 1589, 1590, providing that, when there is a deficiency of assets in the hands of an administrator, he shall sue for, and may recover, for the benefit of creditors, property conveyed by decedent in fraud of creditors; it not appearing that the claims against the estate which had been allowed by the administrator, or are evidenced by judgment, exceed the assets in his hands. 43 Pac. 613, affirmed. Beatty, C. J., and Van Fleet, J., dissenting.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Ann Murphy against Edward W. Clayton. Judgment for defendant, and plaintiff appeals. Reversed in department (43 Pac. 613), and defendant appeals. Decision in department affirmed.

Geo. W. Lewis and J. H. Campbell, for appellant. Kittredge & Kraft, for respondent.

PER CURIAM. After due consideration of this cause in bank, we are satisfied with the conclusion reached and the opinion rendered when it was in department (43 Pac. 613); and for the reasons given in said opinion the judgment awarding the defendant the possession of the animals mentioned in the fifth finding is reversed, with directions to the superior court to enter judgment upon the findings in favor of the plaintiff for the possession of said animals, or for the value thereof as found by the court, in case a delivery thereof to the plaintiff cannot be had.

BEATTY, C. J. I dissent. Section 3440 of the Civil Code reads as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers and incumbrancers in good faith subsequent to the transfer." The property of a person dying intestate passes to his heirs, but it passes to them subject to the control of the probate court, and to the possession of an administrator for purposes of administration. Civ. Code, § 1384. The purposes of administration embrace the payment of expenses of administration, family allowance, and the debts of the decedent. For these purposes the administrator is vested with power to sell the estate, and to apply the proceeds. He is a trustee for the creditors. The estate of the decedent has devolved upon him in trust for their benefit. There can be no question that he comes within the very terms of the section above quoted (Francisco v. Aguirre, 94 Cal. 185, 29 Pac. 495), and still less that he is within the spirit and policy of the law. Up to the moment of a man's death, his creditors may secure their debts by attachment of any personal property he may have sold without delivering it to his vendee. As soon as he dies this remedy is taken away, but there is no reason why they should be deprived of all remedy; and the law which enables the administrator to retain possession of such property for the purpose of applying its proceeds, if necessary, to the payment of debts, is far more equitable, at the same time that it is less burdensome, than the law which permits an attachment in the lifetime of the vendor. But even if an administrator is not one upon whom the estate of the vendor devolves in trust for others, within the meaning of section 3440, still he represents creditors exactly as a sheriff does who seizes goods of a fraudulent vendor on execution, and he may justify upon the same grounds.

The sale of the horses in controversy here was therefore void as to the defendant, and the only question is whether he was nevertheless obliged to relinquish the possession of them on demand of the plaintiff. The contention of appellant is that he could not refuse her demand unless all the facts existed which an administrator is required to aver and prove in order to maintain the action authorized by section 1589, Code Civ. Proc., for the recovery of property fraudulently conveyed by the decedent in his lifetime. But this is a conclusion which by no means follows. The law does not encourage useless litigation, and therefore does not authorize the administrator to commence an action for which there is no apparent necessity. He cannot sue to recover assets for the estate, unless it appears that there is an actual deficiency of assets. But when he has property in his hands which was in the possession of the intestate at the time of his death, and which has regularly devolved upon him,—property which, if necessary, is applicable to the purposes of administration,—it is his duty to retain the possession until it appears that it will not be needed. The burden of proof and of allegation on the question of necessity rests, and properly rests, on the party commencing the action. If the administrator, when he commences an action to recover assets, must show a necessity for their recovery, by parity of reasoning the party who seeks by an action to deprive him of assets should at least be required to show that they will not be needed for purposes of administration. And even then his action would be unnecessary, for he could obtain all the relief to which he is entitled by petition to the probate court. If he shows in that forum that he has a title to property in the hands of the administrator which is good against distributees of the estate, the court might, as in case of partial distribution, authorize the administrator to deliver it to him if it can be safely done, and if such relief could not be granted it would at least not order such property sold for purposes of administration until the other estate had been exhausted. Then upon distribution it would either be delivered to him, or he would be left free to assert his title against the distributee to whom it was allotted. In short, if such property is not needed for purposes of administration the vendee of the decedent has an ample remedy without this action; if it is needed for purposes of administration, he has no right to the property. His position with respect to such property is no better than that of an heir, with respect to unsold property of the intestate. It is his, if not needed for the payment of debts; and, like the heir, he should wait till that fact is ascertained.

Appellant contends that the answer of the defendant is not sufficient to enable him to prove his defense. The answer alleges everything that it was necessary for the defendant to prove, or for the court to find. It shows that he is administrator of Daniel J. Murphy; that the horses in controversy belonged to Murphy in his lifetime, and remained in his possession to the day of his death. The burden of proving ownership of the horses was on the appellant. If she had proved a good title, derived from some other source than Daniel J. Murphy, the facts alleged in the answer would not have constituted a defense to the action. But when she proved, as she was obliged to do in order to make title, that the horses had belonged to Daniel J. Murphy in his lifetime, then the facts alleged in the answer and found by the court constituted a complete defense. It was no part of the defendant's case to prove that without these horses there would be a deficiency of assets.

I concur: VAN FLEET, J.

114 Cal. 537

KENT et al. v. WILLIAMS et al. (Sac. 102.)

(Supreme Court of California. Oct. 14, 1896.)

LIENS—MARSHALING OF SECURITIES—VENDOR RETAINING TITLE.

1. A vendor who retains title to property sold until payment of the purchase money shall be made has an express lien thereon, which is not waived by the taking of a lien on other land as collateral security.

2. A junior mortgagee of such land may compel him to exhaust the property sold before resorting to the collateral security.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by D. G. Kent and G. M. Bruce against W. M. Williams and others. There was a judgment for plaintiffs, and a new trial was granted, and plaintiffs appeal. Affirmed.

Frs. E. Spencer, for appellants. H. C. Campbell and George A. Nourse, for respondents.

McFARLAND, J. Judgment was rendered for plaintiffs, but on motion of the defendant the San Francisco Savings Union a new trial was granted. From the order granting a new trial the plaintiffs appealed. The action was brought to foreclose what is alleged to be a mortgage executed by the defendant Williams to the plaintiffs upon certain property in Fresno county. The main facts in the case are these: On the 12th day of April, 1888, the plaintiffs, being the owners of certain real property in Oakland, Alameda county, made a written contract with defendant Williams by which they agreed to sell him said property for the sum of $22,500, for which Williams gave them his note, payable on or before April 12, 1891, and plaintiffs agreed to give to said Williams a conveyance of said property upon the payment of the full amount of said note. The said written contract contains this clause: "The said party of the second part [Williams] agrees to deposit with the First National Bank of Oakland, California, a deed in escrow, in favor of said parties of the first part, of an undivided one-quarter interest in seventeen hundred and thirty acres, covering the greater portions of sections 21, 28, and 33 in township 13 south, range 23 east, in Fresno county, California, and apply the proceeds of all sales of said land to the payment of said promissory note." Williams paid $500 upon said note, and, by agreement of the parties, went into possession of the said property in Oakland, agreeing to pay for the use of the same $60 a month until the note was paid. He afterwards failed to pay any other portion of the note, abandoned possession of the said property in Oakland, and became insolvent. This action is brought to enforce what plaintiffs claim to be a lien on the lands in Fresno county for the payment of said note, without any offer to first enforce any lien which they may have upon said property in Oakland. The said written contract was recorded in Fresno county, and it appears as a fact that the said deed which Williams agreed to execute was executed, and deposited with the said First National Bank in escrow, and was afterwards delivered by said bank to the plaintiffs. After the recording of said contract, but before the recording of said escrow deed, and on the 10th day of January, 1889, the defendant Williams, with others, borrowed from the defendant the San Francisco Savings Union the sum of $16,000, and, as security therefor, executed to said Savings Union a deed of trust upon certain specifically described lands in Fresno county, which are claimed by plaintiffs to be a part of the lands agreed to be conveyed to them in said contract between them and Williams.

It does not appear upon what grounds the new trial was granted, but the respondents, in support of said order granting the new trial, contended mainly—First, that the description of the land contained in said contract is entirely too vague, indefinite, and uncertain to give any constructive notice to a subsequent incumbrancer; and, second, that in any event the plaintiffs, having a lien upon two different pieces of property, to only one of which the lien of the respondent attached, should have resorted first to that upon which they had an exclusive lien, to wit, the property in Oakland. We think that this second position is clearly tenable. The doctrine of the marshaling of assets, under which, if one creditor has a lien on two funds, and another a lien on only one of them, the former must first proceed against that upon which the latter has no lien, is not only fully established by general authority, but is also expressly declared in sections 2899 and 3433 of the Civil Code. The lien which plaintiffs had upon the property in Oakland was not waived by the taking of collateral security on the land in Fresno. Where the owner of land contracts to sell it, and to give a conveyance upon the payment of the purchase money, and retains the title in himself, he is sometimes spoken of as holding a vendor's lien, and he may proceed to sell the property for the payment of the purchase money in like manner as if he had conveyed the title. But as was said in Avery v. Clark, 87 Cal. 625, 25 Pac. 919: "Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title, he cannot be said to have any implied lien upon the land. The security which he has then for the purchase money is created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien, existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by the assignee. Taylor v. McKinney, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves." Therefore in the case at bar the lien which the plaintiffs reserved on the property in Oakland was not waived by taking the collateral security on the land in Fresno, and the respondent had the clear right to demand that the plaintiffs should first proceed upon their security on said Oakland property. Of course, this rule applies only where the holder of a senior security would not be prejudiced by it, but here it would be clearly inequitable to allow the plaintiffs to retain the property in Oakland, and entirely defeat the junior lien of the respondent upon the property in Fresno. The above view makes it unnecessary, for the purposes at least of this present action and the order appealed from, to consider other points argued by counsel. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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5 Cal. Unrep. 497

## CANNON v. McGREW et al. (S. F. 448.)

(Supreme Court of California. Oct. 15, 1896.)

APPEAL—REVIEW — SUFFICIENCY OF EVIDENCE — HARMLESS ERROR.

1. A finding of the trial court based on conflicting evidence will not be reviewed on appeal.

2. Exceptions based upon the rulings of the trial court as to the admission of testimony will not be considered on appeal, in the absence of anything to show that the appellant was prejudiced thereby.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by one Cannon against McGrew and others to restrain the obstruction of an alleged right of way. There was judgment for defendants, and plaintiff appeals. Affirmed.

C. S. Farquar, for appellant. Haskell & Meyer and D. R. Gale, for respondents.

PER CURIAM. The plaintiff is the owner of certain lands adjoining those of the defendants, and claims to have a right of way through and over the lands of the defendants from his own land to the county road. The present action was brought by him to restrain the defendants from obstructing said right of way; the plaintiff alleging in his complaint that they threaten and intend to close and lock certain gates across the same, and prevent him from passing or repassing thereon, or in any manner using the same. The defendants in their answer deny that the plaintiff has the right of way claimed by him, or any right of way or easement over their lands, and upon the trial of this issue the court found in favor of the defendants; finding as a fact that the use of the way over the defendants' land by the plaintiff had at all times been by the permission or license of the defendants and their predecessors in interest, and had never been adverse to them. The evidence of the respective parties upon this issue was directly in conflict, and the finding of the court thereon is not open to review.

Exceptions were taken at the trial to certain rulings of the court upon the admission of evidence, but, as the evidence in respect to which these rulings were made was of such a nature that a different ruling could not have changed the result, it is unnecessary to consider whether they constituted technical error. The judgment and order are affirmed.

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5 Cal. Unrep. 516

## SPENCE v. WIDNEY et al. (L. A. 6.)

(Supreme Court of California. Oct. 16, 1896.)

TRUSTS — DEATH OF TRUSTEE — APPOINTMENT BY COURT—DELAY IN FULFILLMENT—WHAT CONSTITUTES ABANDONMENT—PUBLIC CHARITIES—PERPETUITIES.

1. Plaintiff's testator granted lands in trust to six trustees, to be sold, etc., with the approval of any four of them, and the fund derived therefrom to be used for founding an astronomical observatory. Before anything had been done to carry out the trust, three of the trustees died. *Held*, that under Civ. Code, §§ 2288, 2289, providing that on the death of one of several cotrustees the trust survives to the others, and that the superior court in the county in which the property is situated may appoint other trustees of the trust, the trust did not terminate as impossible of fulfillment. McFarland, J., dissenting.

2. Plaintiff's testator granted land in trust to six trustees, the fund derived therefrom to be used in founding an astronomical observatory in connection with a university. Lenses were ordered, but it was found that the income was insufficient to pay for them. With the consent of the grantor the lenses were sold, and it was decided to wait until prices could be realized for the lands which would enable the trust to be accomplished. *Held*, that under the circumstances a delay of three years in taking further steps to carry out the trust was not unreasonable.

3. In such case the deed provided that the observatory should be located on Wilson's Peak, or some other suitable site on the Sierra Madre range, to be selected by the consent and approval of the grantor, who was also one of the trustees. *Held*, that the death of the grantor before any selection was made did not defeat the execution of the trust. McFarland, J., dissenting.

4. The sale of the lenses and the delay in selecting a site for the observatory cannot, in the absence of any express declaration to that effect, be construed as an abandonment of the trust. McFarland, J., dissenting.

5. A trust for the founding of an astronomical observatory in connection with a university, "to be owned, controlled, and managed by said university," will not be construed as a trust for

a private corporation, and therefore void, in the absence of anything to show whether the beneficiary is an educational institution for the benefit of the public, or conducted for mere private ends.

6. Nor will the trust be declared void as creating a perpetuity unless it appear that the beneficiary is a mere private enterprise, and not a public charity.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Anna M. Spence, executrix of the last will of E. F. Spence, deceased, against J. P. Widney and others, to set aside a conveyance in trust. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Cochran & Williams (Henry Bleecker, of counsel), for appellants. Bicknell & Trask and Chapman & Hendrick, for respondent. Albert M. Stephens, for intervener.

PER CURIAM. The plaintiff, as the executrix of the last will of E. F. Spence, deceased, brought this action to have canceled and set aside a certain conveyance made on January 22, 1889, by said E. F. Spence to M. M. Bovard, E. F. Spence, H. Sinsabaugh, J. P. Widney, P. M. Green, and R. M. Widney, "as trustees of an express trust," upon the ground that the conveyance was void from the beginning, and the further ground that the purposes for which it was made had been abandoned, and the trusts thereby created had become impossible of execution. The court below found the facts and gave judgment as prayed for, from which, and from an order denying a new trial, the defendants appeal.

The conveyance was of certain lots of land in the city of Los Angeles, to be held in trust as follows: "To sell and convey or mortgage the same at such time and for such price and on such terms as said second parties, or any four of them, may deem best. The proceeds to be used in purchasing and setting up in first-class working condition the best set of astronomical instruments and telescope that can be purchased with said funds, to be used and known as the 'Spence Observatory of the University of Southern California,' to be owned, controlled, and managed by said university. The rents, income, and profits of said property prior to sale shall be received and collected by M. M. Bovard, one of said trustees, and from same he shall pay taxes, insurance, and such other expenses as may occur in the care and management of said premises, and interest on any mortgage that may be placed thereon. The surplus of said income shall be the property of said M. M. Bovard for his own use and benefit for his services herein. Said observatory to be located on what is known as 'Wilson's Peak,' in the county of Los Angeles, state of California, or some other suitable site in the mountains of the Sierra Madre range, to be selected by the consent and approval of E. F. Spence. In case said property, or the proceeds thereof, shall not be used as herein stated, the said proceeds (except the rents as hereinbefore provided) shall revert to and vest in the said grantor, or his legal representatives." The trust thus created was accepted by all of the six trustees and by the University of Southern California. On April 8, 1889, the six trustees, in writing, authorized Alvin Clark & Sons, of Boston, to contract with M. Mantois, of Paris, for the purchase and delivery of lenses for a 40-inch telescope, at the price of 80,000 francs, to be paid as follows: 20,000 francs to be paid when the first lens should be delivered to and accepted by Clark & Sons in Boston; 20,000 francs more when the second lens should be delivered to and accepted by them; and the remaining 40,000 francs one year after the second payment is due; and it was stipulated that there should be no extra allowance for shortening the time on the work, as the trustees preferred that the work should not be hurried.

The first lens was constructed and sent on to Clark & Sons in Boston, and, for the purpose of raising money to make the first payment, the trustees borrowed from the State Loan & Trust Company of Los Angeles the sum of $5,500, for which they gave their promissory note, and a mortgage on the trust property to secure payment of the same. Of the money so raised 20,000 francs were sent on to Paris to meet the first payment. Subsequently the second lens was completed and sent on to Clark & Sons, and a demand for the second payment was made. There was no money in the hands of the trustees to make that payment, and, to determine what should be done, Dr. J. P. Widney, who was then the president of the university, held a consultation with Mr. Spence. After discussing the matter, and considering the difficulty of then raising more money, it was agreed that the lenses were more expensive than was contemplated by the deed of trust, and that it would be better to sell them, and commence over again, and make such contract as the trust property would carry out. Accordingly, with the advice and consent of Mr. Spence, Dr. Widney notified Mr. Clark that they would not go on with those lenses, but would sell them, and purchase afterwards such lenses as the property would pay for. Shortly after this arrangement, on September 19, 1892, Mr. Spence died, and prior to his death two of the other trustees, M. M. Bovard and H. Sinsabaugh, had died. The three surviving trustees, on November 19, 1892, sold the lenses to the University of Chicago for a considerable sum over what had been expended for them, and with the money received they paid, among other things, the note and mortgage to the State Loan & Trust Company. During the lifetime of Bovard and Spence the business of the trust was managed largely by them, but mainly by Bovard. After the death of

Spence the surviving trustees continued in possession of and cared for the trust property, paying taxes and insurance, and awaiting a favorable opportunity to sell it to the best advantage before taking steps to contract for new lenses and otherwise carry out the trust. On September 7, 1893, the plaintiff commenced this action against the three surviving trustees and the University of Southern California. At that time the places of the deceased trustees had not been filled, the trust property had not been sold, and no definite site for the location of the observatory had been selected. The case was tried in March, 1894, and the court found, among other things, "that the accomplishment of the objects set forth in said trust deed had become impossible, and that said objects and purposes have long since been abandoned, and nothing whatever has been done towards the execution of the said trust for more than three years." It is upon this finding that the judgment rests. This finding is assailed as not justified by the evidence, and whether it is so justified or not is the principal question presented for decision.

1. After a careful inspection of the record, we are unable to find any evidence which, in our opinion, can be said to justify the finding that the accomplishment of the objects of the trust had become impossible. It is true that three of the six trustees were dead, and that the deed required the concurrent action of at least four. But sections 2288 and 2289 of the Civil Code provide that on the death of one of several co-trustees the trust survives to the others, and that the superior court of the county where the trust property is situated may appoint other trustees, and direct the execution of the trust. And section 2268 of the same Code provides that, where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. Here the deed did provide that a less number than all might act, and when it was made the grantor must be presumed to have known the law, and also that some of the trustees named might die, and, if so, that their places would be filled by the court, with power in the new board to discharge the duties imposed on the original appointees. And in the provision of the deed we see nothing to indicate that the grantor intended to or did confer upon the trustees named by him any discretionary powers of such a personal character that they could not be exercised by trustees appointed by the court. And the fact that no steps had been taken to have new trustees appointed certainly does not show that the execution of the trust had become impossible. There does not appear to have been any immediate necessity for filling the vacancies, as the three remaining trustees were able to manage and look after the property, and were not then ready to sell or mortgage the same.

It is also true that the big lenses had been sold, and the trust property had not been sold, and no new lenses had been contracted for. It appears that the lenses were sold with the consent and approval of the trustor. No definite time was fixed for the sale of the property or the erection of the observatory, and, under the circumstances shown, the delay does not seem to have been unreasonable. So, too, it is true that the observatory had never been located on Wilson's Peak, and no other site for it was ever selected "with the consent and approval of E. F. Spence," and it does not appear that the trustees had acquired any right to establish an observatory on Wilson's Peak, or on any suitable site in the mountains of the Sierra Madre range. But it does not follow that a suitable and desirable site for the observatory on Wilson's Peak may not yet be selected, and the right thereto acquired. The suggestion of counsel for respondent that there is room enough on that peak for the establishment of "one hundred and fifty to five hundred observatories" only tends to show that there can be no great difficulty in acquiring a site. So the suggestion that, in the absence of a showing to the contrary, all the land on the peak must be presumed to be government land, is no valid argument in support of respondent's position; for, if true, it would seem to be by no means impossible to acquire a site. But, assuming that the location cannot be made on Wilson's peak, still it does not follow that a suitable site cannot be selected and used on some one of the adjacent peaks. The fact that Spence died before the selection, and therefore it cannot be made with his consent and approval, will not defeat the execution of the trust. When a trust exists, and all the trustees are dead, the court will appoint other trustees, and direct the execution of the trust (section 2289, Civ. Code), and in a case like this another site may be selected by the consent and approval of the court.

2. The next question is, had the objects and purposes of the trust been abandoned? We find no evidence in the record tending to show that they had. Under our Code "a trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested." Section 2258, Civ. Code. And, as such trustee, he has no power to abandon a trust, except as declared therein, for he is "a general agent for the trust property," and "his acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal" (section 2267, Id.); and every act of the trustee, in contravention of the trust, is absolutely void. Section 870, Id. "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued." Section 2280, Id. The law seems, therefore, to be well settled that a trustee

cannot abandon a trust without the consent of the cestui que trust, for, as said in Perry on Trusts (section 268, 4th Ed.): "If a person has once accepted the office, either expressly or by implication, it is conclusive; and he cannot afterwards, by disclaimer or renunciation, avoid its duties and responsibilities." Aside from the fact that the trustees had sold the large lenses which were first made, and had delayed to select a site for the location of the observatory and to contract for other lenses, there is no evidence showing that they ever intended to or did abandon the trust. On the contrary, the evidence is clear and undisputed that they had at all times intended to go ahead with the work, and were waiting only for a favorable time and circumstances to accomplish the end proposed. So, also, there is no evidence showing that the university, as beneficiary, ever consented to the abandonment of the trust. On the contrary, the only evidence introduced upon the subject is that it never did so consent, but insisted and relied upon its execution, and that when this action was commenced it employed counsel to defend it.

3. Respondent contends that the deed is void ab initio, because the trust created thereby is a mere private trust for the benefit of a corporation, and not a trust for charity. It is well established that a trust for the promotion of education or science, such as the establishment of a school or a chair in a university, is a trust for charity, as that term has been interpreted in modern jurisprudence. Jackson v. Phillips, 14 Allen, 539; Perry, Trusts, § 687; Pom. Eq. Jur. § 1023. This does not embrace, however, trusts for the benefit of such institutions as are strictly private, and conducted for mere private gain (Pom. Eq. Jur. § 1023); but the institution must be public, or for the benefit of some portion of the public (Attorney General v. Soule, 28 Mich. 153). In this case the trust is to establish with the proceeds of the trust property an observatory, "to be used and known as the 'Spence Observatory of the University of Southern California,' to be owned, controlled, and managed by said university." But there is an entire absence from the pleadings, and findings as well, of anything to indicate the character or purposes of the beneficiary, other than that to be inferred from its name, excepting only the fact that it is a corporation duly incorporated under the laws of the state. Whether it is a school or educational institution, and, if so, whether it is for the benefit of the public, or run for mere private ends, nowhere expressly appears. That it was such an institution as would support the trust seems to have been tacitly conceded in the court below, and the point that it is not such is made here for the first time. But, as there is nothing in the record from which the fact is made to appear, and as we are aware of no presumption for or against the competency of the beneficiary to take the use, the question of the validity of the deed in this respect cannot be determined upon this record. The question, however, being one upon which the validity of the deed may turn, it will be the duty of the court below upon another trial to find expressly upon the fact. Since trusts are not favored in the law, the burden will be upon the party seeking to sustain the trust to show that it is within the exception of the statute.

4. The further contention that the deed is void because the accomplishment of the trust would require the creation of a perpetuity, is fully met, if the beneficiary shall be found to be a charity, by the decision in Re Hinckley's Estate, 58 Cal. 457, where it was held that trusts for perpetual charitable uses are not in conflict with the constitution of the state, nor with those provisions of the Civil Code which prohibit perpetuities; and, further, that perpetuities prohibited by the common law do not include trusts for charitable uses. And see In re Robinson's Estate, 63 Cal. 620; People v. Cogswell (Cal.) 45 Pac. 270.

The judgment and order are reversed, and the cause remanded for a new trial.

BEATTY, C. J., not participating.

McFARLAND, J. I dissent. I see no sufficient reason for disturbing the judgment. Waiving the point made by respondent that the alleged trust was void from the beginning because it is not taken out of the category of perpetuities by being a charity, and other points going to its intrinsic invalidity, I think that the findings that the accomplishment of the purposes of the trust has become impossible, and that said purposes have been abandoned, are just conclusions from the facts. In fact, the evidence does not present a single existing monument to mark any effort to carry out the purpose of the trust; and, so far as the accomplishment of that purpose is concerned, the situation is the same to-day as it was the day Mr. Spence executed the deed. All that the trustees have apparently done has been to collect the rents from the trust property, and take care of said property, and to make some money on the purchase and sale of a couple of lenses,—which money does not seem to be now on hand. Shortly after the execution of the deed—on April 8, 1889—the trustees authorized Clark, of Boston, to contract with a party in Paris for disks for a 40-inch telescope at a certain price, part payments to be made at different times. In order to make the first payment, the trustees mortgaged the trust property to the State Loan & Trust Company. When the second payment became due there was no money to meet it. Two lenses were then in the possession of Clark, of Boston. Nothing was done towards making the second payment. It was apparent that the trust property was not of sufficient value to carry out the scheme, which contemplated one of the largest telescopes ever made. One of the witnesses, who was a trustee and president of the university, testified that he asked Mr. Spence if it would not be better to sell the lenses, and commence again with such a contract as the property would carry out; and that he said, "I think it would." But before his death he wrote a letter to the said witness, in which is the following: "In a conversation once had with you regarding the sale of the glass, it was my mind always that the purchasers should erect it somewhere near here. I fear that you did not so understand it. When I deeded the property, I hoped, of course, that I would have nothing more in the way of business to attend to except to designate the site. It seems now that the trustees will have trouble in raising the money to pay for the glass, something like $18,000. I would not be satisfied with any smaller glass in connection with the university. If Raymond, Lowe, or Clark would guaranty to erect it upon some one of our peaks, I think I would favor liberal terms with either of these men. If you think none of these points are advisable, it might be well to redeed the property back to me, and I will pay the price of the glass as per contract, and await further developments or future combinations, whereby we may yet be successful in securing for the university that object which we have so long cherished." Nothing further was done before his death; and about two months after that event the three remaining trustees, or one or more of them, sold their interest in the lenses which had arrived in Boston to the Chicago University for $9,500, and closed out the contract which Clark had made for them. With part of this money they satisfied the mortgage given to the State Loan & Trust Company; so that they then stood as they did at the beginning, except that, as they had paid only $3,912 on the lenses, they made a profit on that transaction. The three remaining trustees have taken no further steps to carry out the purpose of the trust; they have not asked to have other trustees appointed; they have selected no site; they have, as the testimony of one of them shows, admittedly abandoned Wilson's Peak as a site, because there is no road there, and to either construct a road or to transport materials by a bridle path would be impracticable. The most that can be said on the subject in their behalf is that perhaps at some indefinite period in the future, if the trust property shall become more valuable, and Prof. Lowe shall complete a railroad to the summit of another mountain, they might possibly erect some kind of an observatory at some point on the latter mountain.

Moreover, how can this trust be now executed so as to carry out the purpose of the trustor? The clear purpose was to erect a first-class observatory. This is apparent from the language of the deed and from the acts of the parties. The trustees recognized that purpose when they entered into a contract for the purchase of lens for a 40-inch telescope,—said to be larger than any heretofore constructed; and the trustor declared that he would not be contented with a smaller one, and suggested that the property be deeded back to him. It was found that the trust property was entirely insufficient in value to accomplish that scheme. Again, the site was to be approved by the trustor; and that is impossible, for he is dead. Furthermore, special confidence was evidently placed in the persons named as trustees, of whom the trustor himself was one, and the concurrence of four of them was necessary to important and essential acts, and particular powers were given to Trustee Bovard; but three of the trustees, including Bovard, are dead, and there are not four left.

It is contended that at least one of the difficulties caused by the death of the trustees may be obviated under section 2287 of the Civil Code, which provides that the superior court may appoint a trustee when there is a vacancy, and the declaration of trust provides no method of appointment. That section is a mere statement of the power which courts of equity have always exercised in proper cases. A court of equity will not allow a trust to fail solely for want of a trustee; that is, if the purposes of a trust and the wishes of a trustor can be carried out by the appointment of a trustee, the court will make such appointment, even though no trustee at all had ever been appointed by the trustor. But where, as in the case at bar, the trustor has himself selected the persons who are to execute the trust, and has evidently placed special personal confidence in them, with a reasonable expectation that the material parts of the trust would be executed during their lives, and no steps have been taken towards such execution, and no equitable rights have grown up under their acts, there a court will not undertake to substitute strangers for the chosen agents of the trustor. In Re Hinckley's Estate, supra, this court said: "If it is determined that a peculiar personal trust and confidence were intended, new trustees will not be appointed," citing authorities. "In such cases the appointment of new trustees is refused when it appears from the will that the testator intended that none but the persons by him named should be intrusted with the power." And in the case at bar all the circumstances point to a personal confidence reposed in the persons selected to carry out the trust. The fact that no successors were provided for is itself significant, although, of course, not conclusive; but there can be no doubt that such special confidence was reposed in at least two of the trustees,—Bovard and the trustor himself,—and they are both dead. Would a court undertake to substitute strangers for these two, when there are no equities in favor of the named beneficiary, or any other person, arising out of any valuable consideration? It must be remembered that this was a purely voluntary trust, and that no complications have arisen by any attempt to execute it. Moreover, under such circumstances, where the purposes of the trust have failed, and cannot be accomplished according to the intent of the trustor, new trustees will not be appointed to carry out some plan other than the one which he designed. In such case the property reverts to the trustor or his estate. 1 Perry, Trusts, § 160; Easterbrooks v. Tillinghast, 5 Gray, 21; Keith v. Copeland, 138 Mass. 303. And, as we have before stated, no observatory such as the trustor contemplated can be erected, and no site can be selected in the manner provided by the deed.

Under the foregoing views, other findings assailed by appellants are immaterial. In my opinion, the judgment and order appealed from should be affirmed.

114 Cal. 548

## WHELAN, Sheriff, v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 294.)

(Supreme Court of California. Oct. 15, 1896.)

SHERIFF—WRITTEN INSTRUCTIONS AS TO EXECUTION—RIGHT OF INSPECTION—POWER OF COURT TO ORDER.

1. A writing giving instructions to a sheriff, by the attorney for a judgment plaintiff, as to the enforcement of an execution, is not a public record, or matter in the sheriff's office, which, under Pol. Code, § 1032, is open to public inspection, but a private writing for the guidance of the sheriff, of which he is not compelled to grant an inspection to the defendant or his attorney.

2. A court has no jurisdiction to grant an order to compel a sheriff to permit a judgment defendant or his attorney to inspect the instructions given him by the attorney for the plaintiff as to the enforcement of the execution.

Department 1. Petition by Whelan, sheriff, for a writ of certiorari to the superior court of the city and county of San Francisco, and for the amendment of an order of said court. Annulled.

Reddy, Campbell & Metson, for petitioner. Osgood Putnam, for respondent.

HARRISON, J. An execution in the action of Dupuy v. Riley was placed in the hands of the petitioner, as sheriff of the city and county of San Francisco, and certain written instructions in reference thereto were given him by the attorney for the execution creditor. The attorney for the execution debtor made a demand upon the sheriff that he be allowed to inspect these instructions, and, having been refused, obtained an order from the superior court directing the petitioner, as such sheriff, to grant him an inspection thereof. The petitioner now seeks a review of this order, and that the same be annulled, on the ground that it was not within the jurisdiction of the court.

It is contended on behalf of the respondents that the court had authority to make the order by virtue of the following provision of section 1032 of the Political Code: "The public records and other matters in the office of any officer are at all times during office hours open to the inspection of any citizen of this state." The instructions given by the attorney to the sheriff for the enforcement of a writ of execution which he delivers to the sheriff are in the nature of the private directions from a principal to his agent. The sheriff is an officer of the court for the purpose of executing its process, but in the manner of its execution he is the agent of the party who places the process in his hands, and, subject to the provisions of the statutes, is under his direction as to the mode in which it is to be executed. These directions may be oral or in writing, and are only the private directions from the attorney to that officer for his guidance in the execution of the writ. They may be accepted and acted upon by the sheriff, if given only orally, with the same effect as if they were in writing, and will be equally binding upon the party who has given them. Section 102 of the county government act (St. 1893, p. 373) provides that "no direction or authority by a party or his attorney to a sheriff in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing and signed by the attorney of the party, or by the party if he has no attorney." This provision, however, is for the protection of the sheriff, and may be demanded or waived by him. If, when charged with neglect or omission in the execution of the writ, he would excuse or discharge himself therefrom by reason of having acted under the direction of the party, he must show that such direction was given in writing, but the instruction thus given is still the private direction of the attorney. It does not by reason of being in writing become a "public record," or any other public matter, in the office of the sheriff. The "other matter" referred to in section 1032, which a citizen is entitled to inspect, is matter which is "public," and in which the whole public may have an interest. Neither is such written instruction a public writing, within the meaning of section 1892, Code Civ. Proc. These "public writings" are defined in section 1888, Id., and by section 1894 are divided into four classes, none of which includes the instructions of an attorney to a sheriff for the execution of process. Section 1889, Code Civ. Proc., declares that all other writings are private. The order is annulled.

We concur: GAROUTTE, J.; VAN FLEET, J.

(114 Cal. 612)

## NORTHROP v. KNOTT. (Sac. 106.)

(Supreme Court of California. Oct. 24, 1896.)

EVIDENCE — RECEIPT — BURDEN OF PROOF AS TO PAYMENT—DEMAND ON DEPOSITARY.

1. In an action by an administrator to recover money alleged to have been placed by his decedent in the hands of defendant as a loan or deposit, a receipt signed by defendant for a sum of money from the decedent is admissible in evidence, though it does not state the purpose for which the money was received, such purpose being provable by parol.

2. The possession by an administrator of a receipt from defendant to his decedent for money casts on defendant the burden of proving its repayment.

3. Under Civ. Code, § 1823, providing that a depositary shall not be bound for the delivery of a deposit until demand made, a demand by an administrator on a depositary for the effects of his decedent, coupled with a statement that he held a paper calling for a certain sum of money, is a sufficient demand for the money.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by E. Northrop, administrator of the estate of Mathias Thompson, deceased, against William Knott. Judgment for plaintiff, and defendant appeals. Affirmed.

C. E. McLaughlin, for appellant. Goodwin & Webb, for respondent.

HAYNES, C. This action was brought to recover from the defendant $720.37. The complaint contained two counts,—the first for money loaned; and the second was for the same amount alleged to have been deposited with the defendant for safe-keeping, to be repaid upon demand. The answer to the first count denied that he borrowed the said or any sum of money from plaintiff's intestate, or that he was indebted to said estate for any sum whatever; and in answer to the second count the defendant denied that plaintiff's intestate, or any one for him, deposited with or delivered to defendant for safekeeping, or for any purpose whatever, or at all, said or any sum of money whatever, and also denied the alleged indebtedness. The cause was tried by the court without a jury, and the findings were to the effect that the money in question was deposited with the defendant for safekeeping, to be returned upon demand; that plaintiff demanded it, and that defendant failed and refused to repay the same, or any part of it, and that the whole sum remained unpaid. Some exceptions were taken by the defendant to rulings upon the admission of evidence, and it is also contended that the findings are not justified by the evidence.

J. W. Denton, called for the plaintiff, testified, in substance, that about the last of October, or the first of November, 1891, he went to the defendant for a loan of $500; "the defendant said Mr. Peterson had money with him that he could loan me, but that he would write Peterson about it;" that defendant went away in a few days, and he never saw him about the money afterwards.

The plaintiff testified, in substance, that on December 13, 1892, he met the defendant, and told him that he was administrator, and asked him to deliver the effects of Thompson, alias Peterson, to him. "I told him I had a statement calling for money. He said he had [had] money on deposit there of Thompson's, but he did not have any then; that he could explain in regard to the money, and what became of it; but he did not do so. He said he used some of Peterson's money to loan, and was to have one-half the interest. He did not pay me any money. I told him I had a statement (a document. I could not describe the document) calling for so much money." The two notes delivered to the plaintiff by defendant, above mentioned, were shown to the witness, and identified by him. The first was a note made by M. J. Noee, October 31, 1891, at one year, for the sum of $168. The second note was made by W. P. Sutton, June 15, 1892, at 18 months, for $250. The witness further testified that defendant told him these notes belonged to Peterson. The receipt spoken of, and which was received in evidence against defendant's objection, is as follows:

"Mohawk, May 29, 1892.

"Received from Mathias Thompson seven hundred and twenty dollars 37 cents. One note Mr. Michel Nayo 160 and note W. P. Sutton 250 1130.37

———

"Wm. Knott 1337."

Plaintiff also testified to other conversations with the defendant, and added "that at all these conversations I had with him he stated to me that he had no money belonging to the estate, and did not owe the estate anything." The receipt copied above was not shown to the defendant at any of these conversations.

At the conclusion of the evidence on behalf of the plaintiff the defendant moved for a nonsuit, upon the ground that it was not proven that said or any sum of money was ever deposited with or loaned to the defendant, or that, if so deposited or loaned, it had not been repaid. The nonsuit was denied, and the cause was submitted upon the evidence introduced by the plaintiff.

Defendant's objection to the admission of the receipt in evidence was not well taken. It was, at the least, prima facie evidence that the defendant had received from plaintiff's intestate the amount of money therein expressed, and, unexplained and unimpeached, was conclusive evidence of that fact, and the receipt of the money by the defendant was a necessary step in establishing plaintiff's cause of action. The execution of the receipt by the defendant was admitted, and, even if the purpose for which the money was delivered to defendant was essential to its admissibility, persuasive evidence that it was delivered as a deposit had been given. In considering the sufficiency of the evidence to justify the finding that the money was received by the defendant as a deposit, it is not necessary to decide what inference should be drawn from the unexplained acknowledgment of the receipt of the money. Such acknowledgment would appear to be equally consistent with a payment, a loan, or a deposit; and hence the purpose for which the money was delivered and received may be shown by parol or other competent evidence, and for this purpose the admissions of the defendant testified to by the plaintiff, in the absence of all contradiction or explanation, were quite sufficient to justify the finding that the money in question was received by the defendant on deposit, and not as a loan, or in payment of a debt. The defendant was a competent witness as to conversations or transactions between himself and the plaintiff, and therefore the plaintiff's testimony as to defendant's statements must be taken as true, the defendant having declined to testify. The acknowledgment that he had had money on deposit, that he had used some of Thompson's money to loan it, and to receive one-half the interest, would certainly tend to prove that the money was not delivered to him in payment of a debt, and was delivered to him as a loan or deposit.

But it is contended by appellant that there is no evidence to sustain the finding that the deposit had not been repaid. This contention cannot be sustained. The receipt, having been given for money deposited, was evidence of a liability on the part of the defendant to the depositor, and, upon repayment of the money, he was entitled to a surrender of the receipt, or, if the receipt embraced other things, as promissory notes, for safe-keeping, he was entitled to have the return of the money indorsed upon it; and the possession of this evidence of liability by Thompson and his administrator, like the possession of a promissory note by the payee after maturity, is evidence of its nonpayment. It is true, the defendant, in his conversation with plaintiff, denied that he had the money then, or was indebted to the estate, but he did admit that he had had money belonging to Thompson, and said he could explain what became of it. In all this there was no hint of payment, and the most that can be claimed for it in defendant's favor is that the money had been lost under circumstances which relieved him from liability. No such defense was pleaded, nor was there any explanation as to what the circumstances were, nor any offer to prove such defense; but he stood upon the explicit denial in his answer that he had ever received the money for any purpose, or at all. We think the demand made by plaintiff on December 13, 1892, was sufficient. He was asked to deliver the effects of Thompson to the plaintiff as administrator. In part compliance with this demand, he delivered two promissory notes assumed by the plaintiff to be the ones mentioned in the receipt. He was then told by the plaintiff that he had "a statement or document calling for so much money," and to this statement of the plaintiff the defendant made the explanation hereinbefore stated and commented upon, that he had had money on deposit, but did not have any then, and that he could explain what became of it, but did not do so. This reference to the receipt or document, which it is conceded was written and signed by the defendant, with the general demand for all the effects in defendant's hands belonging to the estate, we think is a sufficient compliance with section 1823 of the Civil Code.

Appellant also specifies several alleged errors in rulings upon the admission of evidence. The more important of these relates to the introduction in evidence of two promissory notes claimed by the plaintiff to be those mentioned in defendant's receipt, and from which it is argued by respondent that, the notes mentioned in the same receipt with the money having been admittedly a deposit with the defendant, the inference is that the money was also a deposit. Without discussing the particular points of objection to the identity of these notes with those mentioned in the receipt, it is sufficient to say that we think they were properly admitted; but, if it be conceded that their admission in evidence was error, inasmuch as we have already held that, upon the evidence hereinbefore stated, without referring to these notes, the findings were sustained, the defendant was not prejudiced by their admission. The objection to the question by plaintiff to the witness J. C. Knickrem, as to whether the deceased had money deposited in his safe in the year 1891, should have been sustained; but, for the reason above stated, the judgment should not be reversed on that ground. It may also be conceded that a portion of the testimony of Charles Hegard, in which he testified to statements made by the deceased to him in 1892, the day before his death, to the effect that he (Thompson) had two notes and seven hundred and some odd dollars in money at Mr. Knott's, was incompetent evidence; the defendant not being present. So far as the testimony of this witness went to the identification of the receipt which had been left in his hands for several months, it was competent; but no part of this testimony was objected to by the defendant, nor was any motion made to strike it out. And, under these circumstances, the appellant is not entitled to a reversal of the judgment upon that ground. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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114 Cal. 617

## PEOPLE v. BARKER. (Cr. 162.)

(Supreme Court of California. Oct. 26, 1896.)

CRIMINAL LAW — CORROBORATING TESTIMONY — SUFFICIENCY—PROVINCE OF JURY.

1. On trial for robbery, testimony of the prosecuting witness tended to identify defendant as one of his assailants. Several other witnesses testified that they had seen the defendant, in company with his accomplice, near the scene of the robbery but a few moments prior to its commission. *Held*, that the evidence was a sufficient corroboration of the testimony of the accomplice connecting defendant with the crime to warrant a conviction.

2. In a criminal case the question of the weight and sufficiency of corroborating testimony is for the jury.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Thomas Barker was convicted of robbery, and appeals. Affirmed.

Paris & Allison, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Defendant is convicted of robbery, and appeals from the judgment and an order denying him a new trial.

1. It was objected that there was no evidence tending to connect defendant with the commission of the crime, other than the uncorroborated statements of an accomplice. We regard the evidence as quite sufficient to satisfy the statute as to the degree of corroboration required. The testimony of Leary, the prosecuting witness, while not positive on the point, nevertheless tended directly to identify defendant as one of his assailants, while that of several other witnesses placed defendant, in the company of his accomplice, in the near vicinity of the scene of the robbery at a very few minutes prior to the commission of the offense. This was evidence tending, independently of that of the accomplice, to connect defendant with the commission of the offense, and that is all that is required. The strength or credibility of the corroborating evidence is for the jury. It "need not be strong. It is sufficient if it tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to but little weight." People v. McLean, 84 Cal. 480, 24 Pac. 32. Nor need it extend to every fact and detail covered by the statements of the accom-

plice. People v. Kunz, 73 Cal. 313, 14 Pac. 836; People v. Cloonan, 50 Cal. 449.

2. The instruction as to the degree of corroboration required, which is objected to, is in full accord with the principles above stated, and correctly states the law. There is no error in the record, and the judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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114 Cal. 575

## PEOPLE v. HARRIS. (Cr. 150.)

(Supreme Court of California. Oct. 22, 1896.)

BURGLARY — PROOF OF CORPUS DELICTI — STATEMENTS OF DEFENDANT—EVIDENCE.

1. On a trial for burglary the prosecuting witness testified that he lived in a certain house; that he had there certain articles of personal property; that a part of said articles were in the house at 6 o'clock p. m. December 18, 1895; that about 9 o'clock p. m. of the same day A. and H., who were police officers, came to witness' house, having defendant with them, and also the said articles of personal property belonging to witness. The officers testified that between 8 and 9 o'clock p. m. of the same day they saw defendant some distance away from the house of the prosecuting witness, having with him a tin box containing opium dope, and other articles identified by the prosecuting witness. *Held*, that the testimony was sufficient to prove the corpus delicti, and hence to justify the admission of statements made by defendant to the officers.

2. The fact that the witnesses mentioned the opium dust, a razor, and other specific articles which the prosecuting witness recognized as his property, was sufficient to show that defendant had possession of the property.

3. The question asked the prosecuting witness, whether, when the officers and defendant were at his house, either of them said anything to him about the things that were stolen, to which the witness answered: "He [defendant] didn't say anything, but the two men asked me if those things were mine. There was nothing else said about the things,"—was without prejudice.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Harris was convicted of burglary, and appeals. Affirmed.

R. A. Ling, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of burglary, the charge being that he feloniously, burglariously, etc., entered the house of one Lou Sam with intent to commit larceny. He appeals from the judgment, and also from an order denying a new trial. The only point made by appellant for a reversal is that the trial court erred in allowing the witnesses Auble and Hawley to testify as to certain statements made by the appellant, the contention being that there was no sufficient proof of the corpus delicti independently of said statements. But the witness Lou Sam had testified that he lived in a certain house; that he had certain articles of personal property in said house; that a part at least of said articles were in said house at 6 o'clock p. m. of the 18th day of December, 1895; that afterwards, about 9 o'clock p. m. of the same day, the said witnesses Auble and Hawley, who were police officers, came to his (the witness Lou Sam's) house, having the appellant with them, and also the said articles of personal property belonging to said Lou Sam. The testimony of said witnesses Auble and Hawley, to which the objection was made, was substantially this: That between 8 and 9 o'clock p. m. of the same day they saw the appellant some distance away from the house of said Lou Sam; that said appellant had with him a tin box containing opium dope or "yen see"; that said witnesses asked said appellant where he got the said box, whereupon the appellant handed the said box, and also some other things, called by said witnesses "the rest of the stuff," to said witness Hawley; that appellant told said witnesses that he had got the things in a laundry, and would show them the place; that he took said witnesses to the house of said Lou Sam, and, in the language of one of said witnesses, "went right to the bunk and showed us where he got the stuff." He said he took it because he was hard up, and expected to get a good price for it in Chinatown. We think that the testimony of the witness Lou Sam, and also the facts testified to by the witnesses Auble and Hawley, independent of what appellant said, were sufficient, within the rule of the most extreme cases on the subject, to so show the corpus delicti as to justify the admission of the said statements of the appellant. Appellant's counsel contend that the evidence does not show, or even tend to show, that the appellant was ever in the possession of the articles alleged to have been stolen from the witness Lou Sam. This contention, however, cannot be maintained. The prosecution was no doubt somewhat careless in not asking the witnesses more particularly about the specific articles stolen, or in not seeing that the testimony was fully put into the bill of exceptions. It is clear enough, however, that the articles taken from the appellant by the said officers were recognized by the witness Lou Sam as his missing property; and a razor, the opium dust, and some other articles were specifically mentioned by the witnesses. There was also an objection made to the question asked the witness Lou Sam, whether when the said two police officers and the appellant were present at his house either of them said anything to him about the thngs that were stolen; but the answer of the witness was of no consequence, he merely saying: "He, the defendant, didn't say anything, but the two men asked me if those things were mine. There was nothing else said about the things." The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(114 Cal. 511)

**STETSON v. BRIGGS et al. (L. A. 177.)** [1]

(Supreme Court of California. Oct. 10, 1896.)

LEASE — EXECUTION — PLEADING — AUTHORITY OF AGENT.

1. An agent with authority only to collect rents cannot bind his principal by accepting as payment a credit on a personal indebtedness of the agent to the tenant.

2. An averment in a complaint of the execution of a lease by plaintiff to defendants is denied by the averment of the answer that plaintiff, having a lease, signed by him, and naming defendants as lessees, requested defendants, who did not want to lease the property, to sign the lease as lessees, and then assign it to another person, to avoid the making out of a new lease, and that they so signed it as an accommodation, but it was never delivered to them, and they never entered on the property.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Edward Gray Stetson against T. L. Briggs and others. Judgment for defendants. Plaintiff appeals. Reversed in part.

C. C. Cowgill and Edw. Gray Stetson, for appellant. J. W. Ahern and H. L. Packard, for respondents.

BELCHER, C. The plaintiff brought this action to recover the sum of $375, alleged, in two separate counts, to be due for the second installments of rent on two leases executed by plaintiff to defendants on land in Kern county, one tract described as a certain section 20, and the other as the north half of a certain section 7. Copies of the leases are attached to the complaint, from which it appears that they were both executed April 2, 1892, for the term of one year from February 1, 1892, to February 1, 1893, and that the rent to be paid on the one first named was $400 and the other $375, one-half of each sum being made payable on July 1, 1892, and the other half on October 1, 1892. It further appears that each lease contained the following provision: "And the said parties of the second part do hereby promise and agree to pay to the said party of the first part the said rent herein reserved in the manner herein specified, and not to let or underlet the whole or any part of said premises; * * * and not to assign this lease without the written consent of the said party of the first part." Indorsed on the last-named lease was an assignment dated April 2, 1892, and signed by defendants, in these words: "For value received, we hereby assign, transfer, and set over to Lizzie K. Mastellar all our right, title, and interest in and to the within lease." And following this was another indorsement, signed by Mrs. Mastellar, in these words: "I hereby agree to fulfill the terms of the within lease." The defendants, by their answer, denied that there was any rent due plaintiff from them on the first lease set out, and alleged that they had fully performed all the covenants and conditions therein to be performed by them, and had paid to plaintiff all sums of money mentioned and due from them thereunder. And as to the second lease the answer denies that the defendants are bound thereby, or that they, or either of them, are indebted to plaintiff in any sum of money, or at all, by reason of said lease. It then, as an affirmative defense, alleges, in effect, that on April 2, 1892, one Houghton, who was plaintiff's agent in Kern county to lease his lands and collect the rents, had in his hands the draft of the said lease, signed by plaintiff, and in which defendants were named as lessees; but that, as defendants did not want the land, Houghton requested them to sign the lease, and then assign it to Mrs. Mastellar, and thereby avoid making out a new lease, and sending it to San Francisco, to be signed by plaintiff, where plaintiff then had his place of business; and that defendants, to accommodate the plaintiff and Houghton, signed the lease as requested, but never entered on the land, or received any benefit therefrom, and that the lease was never delivered to them; and that plaintiff, in the month of July, 1892, knew of said assignment, and accepted from Mrs. Mastellar the first installment of rent, and ratified the acts of Houghton in so leasing said land. The case was tried before a jury, and the verdict and judgment were in favor of defendants. From that judgment the plaintiff has appealed, and has brought the case here on the judgment roll and a bill of exceptions, the appeal being taken within 60 days.

1. At the trial the theory of the plaintiff was that he had never received the second installment of rent on the section 20 lease,—$200,—and that, if it was paid by defendants at all, it was by a credit of the amount on the personal indebtedness of Houghton to them, and hence did not constitute a payment. The evidence tended to support this theory, and there was very little, if any, conflict. It is true that Houghton was plaintiff's agent, with authority "to collect the rents under the leases involved in this action," but under this authority he had no right to accept anything but money in payment. Mudgett v. Day, 12 Cal. 139; Taylor v. Robinson, 14 Cal. 399; Story, Ag. (9th Ed.) § 98. In accordance with his theory, the plaintiff requested the court to give to the jury the following instructions, which were refused, and exceptions reserved: "(3) An agent who is only authorized to collect rents has no power to receive in payment anything but money. (4) If you believe that W. E. Houghton was only authorized to find tenants for plaintiff's land, and collect the rents under leases executed by plaintiff, and that the second installment of rent for section 20 was never paid except by a credit on Houghton's account with the defendants, such payment does not bind the plaintiff, nor discharge the defendants." These instructions stated the law applicable to the case correctly, and the refusal to give them was clearly error.

2. The theory of plaintiff as to the liability of defendants to pay the rent on the section 7 lease is that, when defendants signed the lease, they became obligated to pay the rent

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[1] Rehearing denied.

stipulated for, and that this obligation was not discharged or affected by the subsequent assignment, whether it was made with or without the consent of plaintiff. But no obligation on the part of defendants to pay the rent was created or arose until the lease was fully executed, and it was not so executed until it was signed and delivered. Code, Civ. Proc. § 1933. It is objected, however, that the averment in the complaint that the lease was "executed" by the plaintiff and defendants is not met by the affirmative averments in the answer as to the manner and circumstances under which it was signed by defendants, and its due execution must therefore be deemed admitted. But it is not essential that a traverse should be expressed in negative words. An averment in the answer of the contrary of what is alleged in the complaint is equivalent to a denial (Perkins v. Brock, 80 Cal. 320), and the averments in the answer here are, in our opinion, equivalent to a denial of the execution of the lease. If, therefore, the facts alleged in the answer be true, and there was evidence tending to sustain them, then the lease was never fully executed by defendants, and they never became obligated by it. This being so, it is unnecessary to consider the very elaborate argument of counsel for plaintiff. It follows that the judgment should be reversed as to the first cause of action for $200, and should be affirmed as to the second cause of action for $175.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed as to the first cause of action for $200, and is affirmed as to the second cause of action for $175.

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114 Cal. 631

## GRANGER v. ROBINSON. (L. A. 251.)

(Supreme Court of California. Oct. 29, 1896.)

APPEAL—UNDERTAKING—SUFFICIENCY.

When appeals are taken from both a judgment and an order denying a new trial, a single undertaking is sufficient, provided both appeals are referred to therein and made the consideration for its execution.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Motion to dismiss appeal. Denied.

Hanry Conner, for appellant. Walter Bordwell, for respondent.

PER CURIAM. Motion to dismiss an appeal upon the ground that the undertaking is insufficient. The appeal is from the judgment, and also from an order denying a new trial. The undertaking recites both of the appeals, and that in consideration thereof the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding $300. It was held in Chester v. Association, 64 Cal. 42, 27 Pac. 1104, that, upon an appeal from both the judgment and an order denying a new trial, only one undertaking for $300 need be filed in order to give this court jurisdiction of the appeal. This was recognized as an exception to the general rule requiring a separate undertaking for each appeal, but the practice had been continued so long, and had become so well settled, that as was said in Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187, the court very properly declined to disturb it. The sufficiency of this practice, as well as the fact that it is an exception to the general rule, has since been frequently recognized, and upheld by this court. Corcoran v. Desmond, 71 Cal. 103, 11 Pac. 815; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813. It is, however, necessary that the undertaking shall refer to each of the appeals as distinctly as if they were from separate orders requiring an undertaking for each. If the undertaking recites merely the appeal from the judgment, the appeal from the order denying a new trial will be dismissed. Bornheimer v. Baldwin, 38 Cal. 671; Berniaud v. Beecher, 74 Cal. 618, 16 Pac. 510; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650. If, on the other hand, both of the appeals are referred to in the undertaking and made the consideration for its execution, a single undertaking for $300 will be sufficient. In the present case the undertaking recites that the defendant has appealed from the judgment and also from the order denying a new trial, and is executed "in consideration of the premises and of such appeal." Under the rule of practice held in the above-cited cases to be well settled, this undertaking is sufficient. The motion is denied.

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114 Cal. 501

## BAKER et al. v. SOUTHERN CALIFORNIA RY. CO. (L. A. 61.)

(Supreme Court of California. Oct. 10, 1896.)

STOCK-KILLING CASE—COMPLAINT—AMENDMENT—HARMLESS ERROR.

1. Allowing an amended complaint to be filed without notice is not ground for reversal, where, for aught that appears, it should have been allowed had notice been given.

2. The superior court, on transfer to it from justice court of a case as involving the question of title to or possession of land, may allow an amendment of the complaint, under Code Civ. Proc. § 838, providing that after the filing of the papers therein with the clerk the superior court shall have over the action the same jurisdiction as if it had been commenced therein.

3. The allegation in an amended complaint for killing of cattle by a train that defendant's railway "is" not fenced is not an allegation that it was not fenced at the time of the accident.

4. A complaint for killing cattle, alleging that they, without fault of plaintiff, strayed on the track and ground occupied by defendant's railway at a certain station; that defendant so negligently managed its train that it ran on and killed the cattle; that at the point where they were killed the railway was not fenced; and that at or near the place where the cattle were killed there is a highway crossing the railroad, and no bell was rung,—leaves it uncertain as to whether plaintiff's cause of action is founded on failure of defendant to fence at a point where it was its

duty to (Civ. Code, § 485), or on failure to ring at a crossing, or on other negligent management of its train

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Amelia B. Baker and another against the Southern California Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

W. J. Hunsaker, for appellant. Withington & Carter, for respondents.

HAYNES, C. This action was brought by the plaintiffs in justice court to recover the sum of $130, the value of a cow and a steer alleged to have been killed by a train on defendant's road. An answer was filed in which it was alleged, among other things, that the determination of the action necessarily involved the question of title to or possession of real property; and said cause was accordingly certified to the superior court, under the provisions of section 838 of the Code of Civil Procedure. Thereafter, on the 22d day of January, 1895, an order was made by said superior court on motion of the plaintiffs, and without notice to the defendant, granting plaintiffs leave to file an amended complaint, and the complaint upon which this action was tried in said court was thereupon filed. Afterwards, on February 1, 1895, the defendant, upon notice duly given, moved the court to strike out said amended complaint, and to vacate the order under which the same was filed, basing said motion upon various grounds stated therein. This motion was denied, the defendant demurred to said amended complaint, the demurrer was overruled, and an answer filed. The cause was tried by the court without a jury, and findings and judgment were for the plaintiffs; and this appeal is from the judgment, and from an order denying defendant's motion for a new trial.

Respondents contend that the amount in controversy being less than $300, and no question as to the title or possession of real estate being raised on appeal, this court is without jurisdiction, and that the appeal should be dismissed. Respondents moved this court in December last to dismiss this appeal upon the ground that it had no jurisdiction to entertain or consider it. That motion was denied, and the opinion of the court then rendered thereon is a sufficient answer to the contention of respondents now made herein. See 42 Pac. 975. The plaintiffs should have given notice of their motion for leave to file an amended complaint, but as the motion, for aught that appears in the record, should have been granted had due notice of the motion been given, respondents are not prejudiced. It is quite true, the jurisdiction of the superior court must appear on the face of the pleadings certified to it by the justice of the peace, and any amendment of the pleadings which would show that the justice had jurisdiction to try the case would doubtless justify the court in remanding it; but the amended complaint in this case shows upon its face that the title or possession of real property was necessarily involved in the action, and therefore the jurisdiction of the superior court was not affected. We see no reason to limit the power of the superior court to permit amendments in any other respect to the same extent as it might do if the action had been commenced therein. Said transfer was made under section 838 of the Code of Civil Procedure, which provides, among other things, that, "from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein." The case of City of Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143, cited by appellant, is broadly distinguishable from this case, and does not conflict with what we have said touching the power of the superior court to permit an amended complaint to be filed. In that case, after it had been certified to the district court the defendant was permitted to withdraw his verified answer, which alleged that the legality of the license was necessarily involved in the case, and to demur to the complaint. This court held the withdrawal of the answer to be an abandonment of the only issue which gave the district court jurisdiction, and in that connection remarked, "The action should have been tried or determined in the district court upon the pleadings in the justice's court." The amendment made in this case did not eliminate the facts upon which the right to a transfer of the case to the superior court depended, and hence could not affect its jurisdiction. In Arroyo Ditch & Water Co. v. Superior Court of Los Angeles County, 92 Cal. 47, 28 Pac. 54, it was held that the jurisdiction exercised by the superior court under the provision of section 838 of the Code of Civil Procedure is original, and not appellate, and quoting from City of Santa Cruz v. Santa Cruz R. Co., supra, said, "The superior court had jurisdiction only because the pleadings had before the justice, and filed with its clerk, presented the issue of the legality or the validity of the tax or impost." In this case the issue as to the possession of the plaintiff was as effectual to show jurisdiction in the superior court as the allegation of ownership, and was not such an amendment as affected its jurisdiction.

The defendant demurred to the amended complaint: First, for want of facts sufficient to constitute a cause of action; and, second, for uncertainty; and said demurrers were overruled. We think the demurrer should have been sustained. It is alleged in the fourth paragraph of the complaint that the cattle, "without the fault of plaintiffs or of either of them, casually strayed upon the track and ground occupied by the defendant's railway at Sorrento station." The fifth paragraph alleges "that defendant then and there, by its agents and servants, and not regarding its duty in that behalf, so carelessly and negligently ran and managed its cars and locomotive that the same ran on and against the said cattle, and killed and destroyed the same," and proceeds to allege that the defendant then and there killed and destroyed said cattle and took and carried away the same, and converted said cattle to its own use. The sixth paragraph alleged "that at the point where said cattle were killed, taken, and carried away as aforesaid, defendant's railway is not fenced on either side thereof." The seventh paragraph alleges "that at and near the point where said cattle were taken and carried away as aforesaid there is a public road or highway transsecting said defendant's said railway, and that at the time aforesaid when said cattle were killed, taken, and converted as herein stated, the said defendant did not ring, or cause to be rung, the bell attached to the defendant's said locomotive, at or near said public road or highway, or at the time of crossing the same." It will be observed that the complaint nowhere alleges that it was the duty of the defendant to fence its road at the place where the cattle were killed. We do not hold that, in a complaint which does not indicate that the cattle were killed at a place where the company would not be required to fence their track, it would be necessary for the plaintiff to allege such duty. Section 485 of the Civil Code provides that railway companies must make and maintain a good and sufficient fence on either or both sides of their track and property. The same section further provides that, where the railroad corporation pays to the owner of the land through or along which its road is located an agreed price for making and maintaining such fence, a railway company is relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who fail to construct and maintain such fence. The latter provision, generally speaking, must be pleaded by the defendant in defense of the action, as it will be assumed that it was the duty of the railroad company to have kept and maintained the fence where the injury occurred, unless something in the complaint indicates that at said point it was not their duty, under said provision of the Code, to fence their road. It is true, the section above mentioned does not make any exceptions as to stations or highway crossings; but the necessity of the case, as well as other provisions of the Code, show that the railroad company are not only under no obligation to fence their road at particular points, but have no right to do so,—as, for example, they cannot fence on the sides of their road across a public highway transsecting it. Nor will it be presumed that all roads or avenues to a station are to be kept closed, or that the station or station grounds are to be fenced off, so as to prevent access thereto.

Under the allegations of the complaint that the cattle "strayed upon the track and ground occupied by the defendant's railway at Sorrento station," and that "at or near the point where said cattle" were killed there is a public highway crossing the railroad, and that no bell was rung at said crossing, the inference or presumption is that at the place where the cattle strayed upon the road, or were killed, not only no duty rested upon the defendant to fence its road, but that it had no right or authority to fence it. Besides, the allegation in paragraph 6 "that defendant's railway is not fenced" is an allegation of a condition existing at the time the amended complaint was filed, which was nearly a year after the cattle were killed; and, for aught that appears, the railway may have been fenced at that time, though destroyed by fire or removed subsequently. It is true that cattle may be negligently killed or injured at a place where there is no duty or obligation on the part of the railway company to fence its track, and the company be liable therefor. In the complaint before us there is a general allegation of carelessness on the part of the defendant in managing its cars and locomotive, but there are also in the complaint two specifications of particulars in which it is alleged the defendant was negligent, or of facts which it is contended constitute negligence; the one being that the railway is not fenced, and the other that defendant did not ring, or cause to be rung, a bell at or near said public road or highway, or at the time of crossing it. One of these points was included in defendant's special demurrer, which we think should have been sustained, inasmuch as the complaint is uncertain as to whether plaintiffs' cause of action is founded upon the alleged negligent acts of the defendant in the management of its train, or upon the failure of the defendant to fence its track or right of way. If the defendant so negligently managed its train that it would have been liable for killing the cattle at a place where they were not required to fence the road, and it were so alleged, a cause of action would be stated; but, when the failure to fence or the failure to ring the bell are added as allegations of fact tending to show the liability of defendant, the complaint at once becomes uncertain. Besides, if the complaint be construed as alleging that the cattle were killed through the negligence of the appellant in managing its train at a place or point where it was not required to fence its track, the finding of the court would not be consistent with such allegation, since it is stated in the sixth finding that the killing of the cattle was due to the negligence of the defendant in failing to fence its tracks and in failing to ring its bell, and there is no finding of any other negligence on the part of the appellant. It may also be noted, in passing, that there is nothing to indicate that the property described in the fourth finding as that occupied by the plaintiffs is the property described in the complaint. The judgment and order appealed from should be reversed, with leave to the plaintiffs to amend their complaint if so advised.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with leave to the plaintiffs to amend their complaint if so advised.

114 Cal. 605

## DUNN v. LONG BEACH LAND & WATER CO. et al. (L. A. 94.)

(Supreme Court of California. Oct. 24, 1896.)

ACTION IN BEHALF OF CITY — RIGHT OF CITIZEN TO MAINTAIN.

1. A citizen and taxpayer of a city cannot maintain an action in behalf of the city against third persons unless the bringing of such action is a duty devolving on the authorities of the city, as to which they have no discretion, and which they have refused to perform.

2. An action cannot be maintained by a citizen to set aside a judgment against a city, quieting the title of a claimant to land alleged to have been dedicated to the public for street purposes, which judgment was rendered in pursuance of an agreement with the city authorities by which the city acquired other property in consideration of its making default; there being no offer to restore such property, and no allegation that the use of the alleged street by the public has been interfered with.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by James C. Dunn against the Long Beach Land & Water Company, the Long Beach Development Company, and the city of Long Beach. Judgment for defendants on a demurrer to the complaint, and plaintiff appeals. Affirmed.

W. Pollard, Wells & Lee, and S. P. Mulford, for appellant. A. B. Hotchkiss and Silent & Campbell, for respondents.

McFARLAND, J. A demurrer to the complaint was sustained in the court below, and judgment entered for defendants; and plaintiff appeals from the judgment. The subject-matter of this action is certain premises constituting a street or passageway called "Ocean Park Avenue." The purpose of the action is to enjoin the defendants from making any claim to said premises under a certain judgment of the superior court entered on the 10th of March, 1889, in an action entitled "Long Beach Land & Water Company, Plaintiff, v. City of Long Beach, Defendant," numbered 10,455, and to have said judgment canceled; to have said premises decreed to be the property of the public, held by the city of Long Beach in trust for the public, and to have the title of said city to said premises quieted; to have it adjudged that neither of said defendants other than the city has any right, title, or interest in or to any portion of said premises; and to enjoin said defendants other than said city from asserting any claim whatever to said premises, or any part thereof, adverse to the city of Long Beach or this plaintiff. The plaintiff brings this suit entirely in his capacity as a resident of, and a property owner and taxpayer in, said city of Long Beach. The material averments of the complaint are briefly these: That, in 1882, J. and L. Bixby and Thomas Flint, being the owners of a tract of land in which said Ocean Park avenue is now situated, caused the same to be surveyed and staked off, and caused a map to be made and filed in the county recorder's office showing that said tract was subdivided into lots, blocks, streets, lanes, avenues, and parks, and named said tract "Town of Willmore"; that, among other streets, avenues, etc., the said Ocean Park avenue was thus surveyed and staked off; and that, by these acts, the said avenue was dedicated for the use of the public. It was further averred that said town of Willmore was afterwards included in the territory of the city of Long Beach, and that said avenue has ever since been a public avenue by virtue of the dedication as aforesaid. It was further averred that in 1888 the said Long Beach Land & Water Company, defendant herein, without any right or title, asserted a claim as against the city of Long Beach to said avenue; that the board of trustees of said city of Long Beach entered into a conspiracy with said water company for the purpose of enabling the said company to acquire that portion which had been so dedicated; that, in pursuance of said conspiracy, it was agreed in the month of January, 1889, that said matter should be compromised by the said company conveying to the city certain lands and certain other streets and passageways, and the board of trustees agreeing that no defense would be made by the city to an action brought by said water company to quiet its title to said premises; that, in accordance with said compromise, the said water company brought an action, to wit, the said action No. 10,455, above referred to, and, the board of trustees making no defense (as it was understood they should not), judgment was entered in favor of said company, decreeing that said company was owner of said premises, and that the city had no property right or easement therein. It was further averred that said judgment was ultra vires and void, and, to avoid the plea of the statute of limitations, it is averred that "the facts set out in this complaint, setting forth the fraud, conspiracy, and collusion entered into by and between the Long Beach Land & Water Company and the majority of the board of trustees of the city of Long Beach," whereby said judgment was obtained, "became first known to and were not discovered by plaintiff till the month of April, 1894." This present action was not brought until February 18, 1895, more than five years after the entry of said judgment. It is not averred in terms that the plaintiff requested the present board of trustees to bring this action, and that they refused to do so; but it is averred that the city attorney of Long Beach did bring an action similar to the present one, and that he was ordered by the board of trustees to dismiss it, and to bring no further action of that character. It is averred that the defendant the Long Beach Development Company claims to have some interest in the premises, and that for that reason it is made a party to this suit, and it is prayed that said defendant be required to set up whatever claim it may have, and that the same may be adjudged to be invalid.

The demurrer is general, and also includes nearly all the special grounds of demurrer mentioned in the statute. We think that the demurrer ought to be sustained. There are a great many grounds of demurrer, such as estoppel, statute of limitations, insufficiency of description of the premises involved, want of offer to rescind and restore, ambiguity, uncertainty, etc., which we do not deem it necessary to discuss. We do not think that the complaint states facts sufficient to constitute a cause of action, or to justify the plaintiff in bringing it. It is no doubt, under the authorities, frequently difficult to determine whether or not in a given case a person merely in his capacity of citizen or taxpayer can maintain an action by which he seeks to control the administration of municipal government, and put himself in the place of public officers selected for the purpose of such administration. The cases cited by appellant are mostly actions brought by taxpayers directly against public officers to restrain them from increasing the burden of taxation by levying or enforcing taxes which could not be legally imposed. The rule is that the municipality, through its governing body, has control of the property and general supervision over the ordinary business of the corporation; and there would be utter confusion in such matters if every citizen and taxpayer had the general right to control the judgment of such body or usurp the office. Where the thing in question is within the discretion of such body to do or not to do, the general rule is that then neither by mandamus, quo warranto, nor other judicial proceeding can either the state or a private citizen question the action or nonaction of such body; nor in such cases can a private citizen rightfully undertake to do that which he thinks such body ought to do. It is only where performance of the thing requested is enjoined as a duty upon said governing body that such performance can be compelled, or that a private citizen can step into the place of such body and himself perform it. If, therefore, in the case at bar, it was not a duty enjoined upon the board of trustees of the city of Long Beach to bring an action similar to this present action brought by appellant, then we need not discuss the general subject of the right of private citizens to maintain actions concerning municipal affairs, which right is founded to a great extent upon necessity, and the want of any other proper party plaintiff; and the proposition that it was a duty enjoined upon said trustees to bring such an action cannot be maintained. In the first place, the main purpose of this action could not, under any view, be judicially accomplished; for it seeks to have the fee-simple title of the city to said avenue quieted, and the respondents enjoined from asserting any right or claim whatever thereto; while it is clear from the complaint that the city or the public has, at best, only an easement in the premises, consisting of a right of way over it as a public thoroughfare. Then, again, it is averred that the judgment sought to be vacated is ultra vires and void; and, if that be so, it could never be enforced, and there is no averment that any one ever tried to enforce it. But waiving these points for the present, and assuming that said avenue was dedicated as claimed in 1882, there is no averment that the use of said avenue as a public thoroughfare has ever been interrupted by respondents, or any other person; no averments that respondents have put buildings upon it, or fenced or inclosed any part of it, or placed on it any impediments to travel, or obstructed in any way the enjoyment by appellant and the public of the alleged easement. On the other hand, it is expressly averred in the complaint "that ever since said dedication aforesaid, and for upward of twelve years last past, this plaintiff and other residents, citizens, and taxpayers of the city of Long Beach aforesaid have continued to use the said lands as and for a public park and avenue." Under these circumstances, the proposition that it is the duty of the present board of trustees to put the city into litigation by commencing the suit indicated by appellant, and that they have no discretion to refuse to do so, cannot be successfully maintained. In this present action the appellant seeks to have the alleged compromise and judgment of March, 1889, set aside, solely upon the ground of the want of power of the then trustees to make such compromise, not upon the ground that it was a bad bargain for the city. There is no averment which we can find in the complaint that the lands and public ways conveyed by the water company to the city were not more valuable to the city and the public than said Ocean Park avenue. And, in the event of a suit being brought by the city, would not it be compelled to restore said lands and ways to said water company? And would not other doubtful questions involving rights which the city now peacefully enjoys be opened up? As the matter now stands, the city and the public have the lands and ways granted by the said water company at the time of said alleged compromise, and also have ever since enjoyed, and now enjoy, the uninterrupted use of Ocean Park avenue itself. As long as the present circumstances continue, any alleged rights which respondents in the future might undertake to enforce would not be strengthened, but would rather be weakened by the lapse of time. It cannot be rightfully said, therefore, that the trustees now in office are not exercising a wise discretion by refusing, at the present time, to commence unnecessary and hazardous litigation. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(114 Cal. 542)

## GASTON v. GASTON. (No. 16,001.)[1]

(Supreme Court of California. Oct. 14, 1896.)

JUDGMENT FOR ALIMONY—ENFORCEMENT—LIEN.

1. The jurisdiction of a court to award alimony to a wife on granting her a decree of divorce is not dependent on allegations in the complaint of the husband's ability.

2. A court has the power to make its judgment for the payment of alimony to a wife a lien on property of the husband, the provision of Civ. Code, § 140, authorizing it to require a husband to give security for the payment of alimony, or to appoint a receiver, not being an abridgment of its general equity powers.

3. It is not essential to the validity of a decree for the payment by a husband of a monthly allowance to his divorced wife for her maintenance that the husband should be the owner of either separate or community property from which such payment could be enforced.

4. A judgment for alimony, to be paid to a divorced wife monthly, is not within the provisions of Code Civ. Proc. § 681, limiting the right to the issuance of execution on a judgment to five years from the date of its entry.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action of divorce by Anna E. Gaston against Andrew A. Gaston. Defendant moved the court to vacate an order for the sale of property under a decree for alimony theretofore entered, and from the order denying such motion appeals. Affirmed.

H. V. Morehouse and W. A. Bowden, for appellant. John E. Richards (C. D. Wright, of counsel), for respondent.

BRITT, C. On November 22, 1884, plaintiff obtained a decree in the court below dissolving the bonds of matrimony previously subsisting between herself and defendant, awarding to her the custody of their minor child, setting over to her a specified portion of the community property, and requiring defendant to pay the sum of $45 per month "during her lifetime, or during the time that she shall remain unmarried, as permanent alimony for her maintenance and support." It also declared a certain tract of land situated in the county, part of the community property set over to the defendant, to be charged with a lien in favor of plaintiff for securing such payments, and directed the issuance of an order of sale of such land in case the defendant should fail to make the said payments as required. The ground of the action was extreme cruelty practiced by defendant upon plaintiff. The complaint contained no allegations of defendant's ability to pay alimony, etc., though it alleged the existence of several parcels of community property. Defendant did not answer the complaint, but he appeared by attorney at the trial. He regularly paid the monthly alimony awarded to plaintiff until October, 1894, when he refused to make further payment. Plaintiff then obtained from the court an order for the sale of the defendant's land as provided in the decree. This was on November 16, 1894. A few days later the defendant moved the court to vacate said order of November 16th. The court refused, and this appeal is from the order denying his motion.

It is argued that the portion of the judgment requiring the payment of $45 per month for the support of plaintiff is void, because no statement of the husband's ability was contained in the complaint. The provision for support in such cases is ordinarily an incident of the judgment of divorce. The jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources, any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody. Civ. Code, §§ 138, 139; Ex parte Gordan, 95 Cal. 374, 30 Pac. 561; 2 Bish. Mar., Div. & Sep. 1067 et seq. The statute provides that "the court may require the husband to give reasonable security for providing maintenance, * * * and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." Civ. Code, § 140. Appellant claims that the effect of this section is to render void the portion of the judgment imposing a lien on his land; that the power of the court was limited to exacting security of him. We think the law is otherwise. With us an action for divorce is treated as a case in equity (Wadsworth v. Wadsworth, 81 Cal. 187, 22 Pac. 648); and the statute ought not to be construed as abridging the power exercised by courts having cognizance of matrimonial causes—commonly, though not always, as a branch of their chancery jurisdiction—to declare a lien for securing the award of support to the wife in such cases. Said the supreme court of Ohio of a judgment like the present, except that it omitted the provision for a lien: "That it is within the legitimate power of the court to make such decree a charge upon real estate we have no doubt, and it has been the practice so to do in cases where it was deemed proper." Olin v. Hungerford, 10 Ohio, 268. And such is the current of authority with but little dissent. Wightman v. Wightman, 45 Ill. 167; O'Callaghan v. O'Callaghan, 69 Ill. 552; Holmes v. Holmes, 29 N. J. Eq. 9, 12. Many other cases are collected in the reporter's note to Stoy v. Stoy, 41 N. J. Eq. 370, 2 Atl. 638, and 7 Atl. 625. Moreover, the divorce being upon the ground of extreme cruelty, the court was authorized to assign the community property to the parties in such proportion as, under the circumstances, seemed just. Civ. Code, § 146. Under this section it had the power to assign to the wife the absolute property in the land in question, and this included power to charge a lien on the same. Foster v. Foster, 56 Vt. 540; Blankenship v. Blankenship, 19 Kan. 159. These considerations sufficiently dispose also of the further view advanced by appellant that the lien expired, under section 671, Code Civ. Proc., in two years after the entry of the judgment. The lien does not derive its force from that section.

It is also insisted (as we understand the argument) that permanent alimony could not be allowed to the wife, because, it is said, the husband then had neither separate nor community property to which resort could be had to enforce payment thereof. Civ. Code, § 141. We are not convinced that there was no such property. It was not essential, however, to warrant the decree for future maintenance, that he should then have owned property of either class. Ex parte Spencer, 83 Cal. 460, 23 Pac. 395; Eidenmuller v. Eidenmuller, 37 Cal. 364.

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[1] Rehearing denied.

Next, it is said that, in virtue of the statute limiting the right to have execution on a judgment to the period of five years from the date of entry (Code Civ. Proc. § 681); and, that period having expired in this instance, "the judgment ceased to be of binding force, and process could not issue under it." But the court had power to make suitable allowance for support of the wife during her life (Civ. Code, § 139); and the allowance might take the form of pecuniary payments at successive monthly intervals (Ex parte Spencer, 83 Cal. 460, 23 Pac. 395). The right to execution for these does not accrue until they respectively fall due. The case is within the principle of De Uprey v. De Uprey, 23 Cal. 352. The order should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(114 Cal. 491)

## JURGENSON v. DILLER. (Sac. 113.)[1]

(Supreme Court of California. Oct. 10, 1896.)

MINING CLAIM—LIENS—AGENCY—CONSTRUCTION OF STATUTE.

1. Code Civ. Proc. § 1183, giving any person doing work on a mining claim, at the instance of the owner or his agent, a lien thereon for his work, and further providing that any "person having charge of any mining * * * shall be held to be the agent of the owner," does not entitle a laborer to a lien for work done for a person whom he knew not to be the owner, and not to be working the mine as representative of the owner.

2. Code Civ. Proc. § 1192, providing that every building or other improvement constructed upon any lands with the knowledge of the owner shall be held to have been constructed at his instance, and the land shall be lienable accordingly, unless he gives written notice as therein provided, does not cover the case of work done in removing ore from a mine, where it is not done in improvement of the property.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Peter A. Jurgenson against R. Diller. Judgment for defendant, and plaintiff appeals. Affirmed.

William J. Herrin and John Guidery, for appellant. Park Henshaw, for respondent.

BRITT, C. Action to enforce an alleged lien for labor on certain mining claims, together called the "John Dix Mine." Defendant became the owner by purchase at a sale of the ground on foreclosure of mortgage, and the sheriff's subsequent deed therefor, executed March 4, 1888. One Dix had previously been the owner, and after said March 4th he asked and obtained leave of defendant to remain on the premises, promising to take care of the same, and make no expense for defendant. Without authority from the latter Dix proceeded to work the mine, and hired plaintiff for this purpose. Under such employment, plaintiff performed the labor in question between November 1, 1888, and September 15, 1890, for which a balance remains unpaid.

It is provided in section 1183, Code Civ. Proc., among various other things relating to the liens of mechanics and others on real property, that any person performing labor on a mining claim shall have a lien thereon for his work, whether done at the instance of the owner or his agent; "and every contractor, subcontractor, architect, builder or other person having charge of any mining, * * * shall be held to be the agent of the owner for the purposes of this chapter." It is argued that, under this section, Dix was a person in charge of the mining, and hence was the agent of defendant in employing the plaintiff. But the presumption raised by the statute may be repelled. Donohoe v. Mining Co. (Cal.) 45 Pac. 259, 260. The evidence here tended to show that, when plaintiff did the work in question, he knew that Dix did not own the property, and was not working the mine as defendant's representative; that Dix employed plaintiff on his own account, paid him such wages as were paid at all, and at no time assumed to act on defendant's behalf. Obviously, plaintiff had no just reason to expect payment from defendant, and cannot charge a lien upon his mine on any theory of Dix's agency.

Section 1192, Code Civ. Proc., provides that every building or other improvement mentioned in section 1183, constructed upon any lands with the knowledge of the owner, shall be held to have been constructed at his instance, and his interest in the land shall be lienable accordingly, unless he shall, within three days after obtaining knowledge of the construction, alteration, or repair, post a written notice that he will not be responsible for the same, etc. Plaintiff urges that his claim of lien should be upheld, because, he says, defendant, having the knowledge mentioned in this section, yet failed to post such notice. That the notice was not posted is undisputed; and plaintiff testified at the trial that on a single occasion, in the year 1888, defendant was at the mine, and then saw him, plaintiff, and another man working there, "drifting in a tunnel." It was said by the court in Williams v. Association, 66 Cal. 200, 5 Pac. 90, that the language of said section 1192, "which treats of buildings and improvements, and of knowledge of the construction, etc., would hardly cover a case like the one now before us." That action, like the present, was prosecuted for the enforcement of a lien for work done on or in a mine; and, though the observation of the court we have quoted was unnecessary to the decision there, we think it correctly stated the law. "Drifting in a tunnel" (the only work in which, so far as appears, defendant knew plaintiff to be engaged) means, as we understand the mining phrase, taking earth, gravel, or ore from ground made accessible by means of the tunnel; is not synonymous with "running a tunnel"; and is not the construction, alteration, or repair of any building or improvement on or in a mine,—the knowledge of which must be brought home to the owner before any duty becomes incumbent upon him under said section 1192. This construction of the statute is not intrinsically unjust. It is equitable to require the owner who sees going forward an unauthorized building or other beneficial improvement upon his property to give notice that he will not be responsible therefor (Avery v. Clark, 87 Cal. 628, 25 Pac. 921); but this consideration fails when the work consists in a subtractive process,—the removal of the very corpus of the property; as well require one who sees a trespasser cutting his timber to post notice of his nonliability, under penalty of having his land subjected to a lien for the labor. The judgment and order denying plaintiff's motion for a new trial should be affirmed.

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[1] Rehearing denied.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying plaintiff's motion for a new trial are affirmed.

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114 Cal. 570

## PEOPLE v. ARMSTRONG. (Cr. 132.)

(Supreme Court of California. Oct. 22, 1896.)

LARCENY — EVIDENCE OF ACCOMPLICE — CORROBORATION.

1. On a trial for larceny, where the thing stolen is described in the information as the property of "Sam Sisler," and the evidence shows that the owner's full given name is "Samuel," there is no material variance.

2. On a trial for larceny the jury were charged that under Pen. Code, § 1111, a conviction could not be had on the uncorroborated evidence of an accomplice, and later that, "if you are satisfied beyond a reasonable doubt that defendant is guilty, * * * it will be your duty to return a verdict to that effect." *Held*, that the instructions informed the jury that evidence corroborative of that of the accomplice was indispensable to conviction.

3. On a trial for larceny the evidence of an accomplice inculpated defendant in the theft of a horse, two bridles, and a saddle, which were taken by the accomplices to M. county. There was other evidence that defendant then went to Y. county, where he was arrested, having then in his possession one of the bridles stolen with the horse; that he expressed astonishment at being overtaken, and declared that if he had not been surprised he would have resisted arrest. *Held*, that the facts tended to corroborate the testimony of the accomplice that the horse was stolen as the result of a conspiracy between defendant and the witness.

4. On a trial for a larceny, where the flight of defendant, as a corroborating circumstance, might have been caused by an apprehension of arrest for a breach of the peace, the circumstance is for the jury, who are not bound to attribute the consciousness of guilt indicated by flight to one disposing cause rather than the other.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Claude Armstrong was convicted of larceny, and appeals from the judgment of conviction and from an order denying him a new trial. Affirmed.

Lamberson & Middlecoff, for appellant. Atty. Gen. Fitzgerald, for the People.

BRITT, C. 1. On the night of July 25, 1895, a horse, two bridles, and a saddle were stolen from the premises of the brothers Sisler in Tulare county. Defendant was convicted of the theft of the horse under an information in which the animal was described as the "property of George P. Sisler and Sam Sisler." The evidence showed that "Samuel" was the full given name of the person called "Sam Sisler" in the information, though he was commonly known by the latter designation in the community where he lived. Appellant contends that here was a case of fatal variance between allegation and proof. The objection is untenable. People v. Leong Quong, 60 Cal. 107; People v. Smith (Cal.) 44 Pac. 663.

2. Testimony inculpatory of defendant was given at the trial by one Barlow, who confessedly was an accomplice in the offense charged. The court instructed the jury, in the language of section 1111, Pen. Code, that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself tends to connect the defendant with the commission of the offense, etc. Among other instructions, it also gave the following: "If you are satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged in the information, it will be your duty to return a verdict to that effect." Appellant argues that the jury might have inferred from this instruction that they could be satisfied of defendant's guilt by the testimony of Barlow alone. But the court had informed them that evidence corroborative of that of the accomplice was indispensable to conviction, and it must be assumed that this caution was held in mind when the jury came to consider whether defendant was guilty beyond a reasonable doubt. The charge was to be taken as a whole, and it was not necessary that each paragraph should contain all the conditions and limitations expressed in the others. People v. Morine, 61 Cal. 367, and cases cited; People v. Leonard, 106 Cal. 302, 314, 39 Pac. 617, 620.

3. It is further contended that there was no evidence corroborative of Barlow and tending to connect defendant with the commission of the offense. It appeared that defendant and Barlow were two of a trio of intimates, the third member being one Morgan. According to defendant's own statements and ad

missions at the trial, Barlow and Morgan "got the horse" in the nighttime,—in what manner defendant claimed not to know,—while he waited for them at an appointed meeting place. He recognized the horse as belonging to Sisler. The three surreptitiously fled together from the vicinity of the larceny, and by a most circuitous route, covering seven or eight hundred miles, reached the county of Madara; the horse—ridden, it seems, by Morgan—being taken with the party. There was further evidence, independent of that of Barlow, that defendant next went north to Yolo county, where he was arrested on the present charge, having then in his possession one of the bridles which was stolen with the horse. He expressed astonishment at being overtaken after the efforts he had made to evade pursuit, and declared that if he had not been surprised he would have resisted capture, even to the killing of the arresting officer. We think the facts here stated tended strongly to corroborate the testimony of Barlow to the effect that the horse was stolen as the result of a conspiracy for that purpose between himself, Morgan and defendant; in which case it was not important whether defendant or Barlow—as the latter claimed—was the person who tarried at the common rendezvous while the other conspirators led the animal from its owners' corral. True, there was evidence to show that before the theft of the horse the defendant was, as he put it, "taking precautions to avoid running into an officer," being apprehensive of arrest for some breach of the peace, and his flight might have been ascribed to such apprehension. But this was a circumstance for the jury. They were not bound to attribute the consciousness of guilt indicated by flight to one disposing cause rather than the other. The evidence warranted the verdict. See People v. Cleveland, 49 Cal. 577; People v. Rolfe, 61 Cal. 540; People v. Hong Tong, 85 Cal. 171, 24 Pac. 726. The judgment and order denying a new trial should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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114 Cal. 632

### PEOPLE v. MAIN. (Cr. 192.)

(Supreme Court of California. Oct. 29, 1896.)

LARCENY—EVIDENCE OF ACCOMPLICE—CORROBORATION—INFORMATION—VARIANCE.

1. On trial for larceny, an accomplice testified that he drove with defendant to a slaughterhouse, and remained in the car while defendant entered the house, and took therefrom a butchered sheep and hog, which they carried back to the house in which they lived. There was no other evidence which tended to connect defendant with the offense, or to corroborate the testimony of the accomplice. *Held* that, under Pen. Code, § 1111, which requires a corroboration of an accomplice's testimony, the evidence was insufficient to convict defendant.

2. On trial for larceny, the information stated that the property was stolen from "the slaughterhouse of A. Zimmermann and L. Deffner, copartners, situated about two miles east of the town of St. Helena." The evidence showed that the firm was composed of John Zimmermann and L. Deffner, but that there was no other butcher in that neighborhood by the name of Zimmermann, and no other slaughterhouse belonging to or used by the firm of Zimmermann & Deffner, within seven miles of St. Helena. *Held*, that the variance was immaterial.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

One Main was convicted of burglary, and appeals from the judgment of conviction and the order denying him a new trial. Reversed.

Geo. E. Colwell, for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The defendant was convicted of burglary in the first degree, in entering a slaughterhouse and stealing therefrom a sheep and a hog that had been killed, for which he was sentenced to imprisonment for seven years in the state prison.

The only evidence before the jury connecting the defendant with the overt act was that of one Hanson, against whom an information had been filed charging him with burglary committed at the same time and place. After he had been called as a witness he refused to testify upon the ground that his testimony would tend to convict him of a felony, and thereupon the district attorney dismissed the information against him. He then testified that on the 7th of April, 1896, he and certain other persons were living at Mrs. Moore's, near St. Helena, and that he and one of those persons, together with the defendant, drove along the county road in a cart to the slaughterhouse in question, and that the defendant remained in the cart while he and the other person entered the slaughterhouse, and took therefrom a sheep and a hog, which they then carried back to Mrs. Moore's. There was no other evidence which tended to connect the defendant with the commission of the offense, or to corroborate the testimony of this accomplice. Mrs. Moore testified that, after she went to bed, she heard some of the boys go out, but did not know who went out; nor was there any testimony, other than that of Hanson, tending to show that the defendant even knew that the hog and sheep had been taken from the slaughterhouse until after they had been brought to Mrs. Moore's house, when, wakened by the noise, he came out of his room, and saw them lying on the table. Several of the witnesses testified, and there was no evidence to the contrary, that he went to bed early in the evening, and remained there until wakened, as above stated. The testimony was insufficient to justify the jury in convicting the defendant. Pen. Code, § 1111; People v. Thompson, 50 Cal. 480; People v. Koening, 99 Cal. 574, 34 Pac. 238; People v. Smith, 98 Cal. 218, 33 Pac. 58. Aside from the testimony of the accomplice, there was absolutely no evidence on which to found even a suspicion of his guilt.

The variance between the ownership of the slaughterhouse, as charged in the information and as shown at the trial, was immaterial. The information stated that it was "the slaughterhouse of A. Zimmermann and L. Deffner, co-partners, situated about two miles east of the town of St. Helena, in the county and state aforesaid." At the trial it was shown to be the slaughterhouse of John Zimmermann and L. Deffner; but it was also shown that there was no other butcher in that neighborhood by the name of Zimmermann and no other slaughterhouse belonging to or used by a firm of Zimmermann & Deffner, within a radius of seven miles of St. Helena. The discrepancy in this averment of ownership could not mislead the defendant, or prejudice him in his defense. People v. Edwards, 59 Cal. 359.

The judgment and order denying a new trial are reversed, and a new trial granted.

We concur: VAN FLEET, J.; GAROUTTE, J.

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114 Cal. 628

## PEOPLE v. LAURINTZ. (Cr. 188.)

(Supreme Court of California. Oct. 29, 1896.)

Rape — Assault with Intent — Consent — Girl under Age of Consent.

A defendant may be convicted of an assault with intent to commit a rape on the person of a girl under the age of consent, though she in fact consented to the assault, her incapacity under the statute extending to the act and all its incidents.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

One Laurintz was convicted of an assault with intent to commit rape, and appeals. Affirmed.

E. S. Salomon, L. C. Pistolesi, and J. A. Stephens, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The sole question in this case is whether a defendant can be legally convicted of an assault with intent to commit rape upon the person of a female under the age of consent, where the latter in fact consents to the defendant's act. This same question was before the court in the recent case of People v. Verdegreen, 106 Cal. 211, 39 Pac. 607, where the reasoning and doctrine of the cases now relied upon by defendant was considered and rejected, and where it was held (following People v. Gordon, 70 Cal. 467, 11 Pac. 762) that, under our statute, which makes a female under a certain age incapable of consenting to an act of sexual intercourse, and making such act rape regardless of such consent, a girl under that age is equally incapable in law of consenting to an assault committed with the intent to have such intercourse; that whether the girl in fact consents to or resists such an assault is immaterial. In either event the defendant is guilty. It is there said: "It is the declared policy of our law, as expressed in the statute, that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse, and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. The obvious purpose of this is the protection of society by protecting from violation the virtue of young and unsophisticated girls. To hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person made for the express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents." The evidence in this record clearly makes a case against the defendant within the principles there announced, and the instructions of the court are in exact accord therewith. As we are not disposed to depart from the construction there given our statute, we must hold that the court below did not err in its rulings. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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114 Cal. 620

## EPPINGER et al. v. KENDRICK. (Sac. 46.)

(Supreme Court of California. Oct. 28, 1896.)

Bills and Notes—Pleading—Special Defenses—Sufficiency of Allegations—Inconsistent Defenses—Sufficiency of Evidence—Principal and Surety—Liability of Surety—Release—Evidence.

1. In an action on a note signed by defendant and one F. the defendant pleaded the general denial, and, as a special defense, that he had signed the note for the accommodation of plaintiffs only, and not as surety for F.; and, if found to be a surety, that F. had directed certain payments made by him to be applied on the note, which had not been done. *Held*, that a motion for judgment on the pleadings was properly refused.

2. An objection to evidence under such plea on the ground that it does not state facts constituting a defense was properly overruled.

3. An allegation in the answer that the note was executed at the request of one S., who was the manager and agent for plaintiffs, was sufficient as to the fact of agency under an objection to evidence.

4. Where two separate defenses, one of which is inconsistent, are pleaded together, such inconsistent defense cannot be construed as an admission to destroy the other.

5. In an action on a note signed by defendant and one F., which the defendant claimed was executed for the accommodation of the plaintiffs, and not as surety for F., the defendant testified that plaintiffs' agent had represented that they needed money; that F. was owing them, and that he wished defendant to go on F.'s note, so that they could use it as collateral; that F. did not make such request, and that defendant finally

consented as an accommodation to plaintiffs. Plaintiffs testified that their agent had requested F. to secure defendant as a surety; that F. had recently consummated a transaction with defendant in regard to a patent on which F. was to have a royalty, and that plaintiffs had suggested that F. turn over the royalty to defendant in order to secure him for becoming his surety, and that an agreement was in fact entered into under which defendant was to retain the royalty to the amount of the note, and pay the same to plaintiffs. Plaintiffs did not deny that they, and not F., had requested defendant to go on the note, nor did they deny that they represented to defendant that they wished his signature as collateral to enable them to raise money. *Held*, that the jury was justified in finding that defendant was an accommodation maker for the benefit of plaintiffs.

6. It appeared that the note had been renewed at different times, but there was nothing to show that any new consideration had passed between the parties. It also appeared that defendant had made payments on the note, which, however, he testified were made with money derived from the sale of grain belonging to F. It further appeared that in a letter agreeing to ship to plaintiffs a quantity of grain to be applied on the note defendant had asked that a new note be made, payable one year from date; that such request for extension was made in view of the stringency of the money market, and the fear that plaintiffs might fail, and the note pass into the hands of third parties, against whom he would have no defense. *Held*, that the transactions in connection with the renewal of the note and the payments made by defendant were not sufficient to render him liable as a surety.

7. In an action on a note signed by defendant and one F., which the defendant claimed was as to him an accommodation note, and that, moreover, if he was liable as surety, F. had deposited with plaintiffs grain, with directions that the proceeds should be applied to the note, which had not been done, it was not error to instruct the jury that, if defendant was in fact a surety upon the original note; that before the renewal of the note F. had placed in plaintiffs' hands grain sufficient to pay the original note, and requested plaintiffs to sell the same, and apply it on said note, but that they failed to do so, and without defendant's consent applied the proceeds to other uses,—they must find for the defendant.

8. A creditor obtained from his debtor a note representing part of an open account due, which note was signed by a third person as surety. The debtor deposited with the creditor a quantity of grain, directing that it be sold, and the proceeds applied on a note. The creditor, however, applied the proceeds to the open account. *Held*, that this was, in effect, a repayment to the principal, releasing the surety from liability to that extent.

9. In an action upon a note, where the defendant pleaded that he had signed the note for the accommodation of the plaintiffs, and not as surety for the real debtor, and testified to all the circumstances surrounding the transaction, he was then asked, "At the time of signing these renewal notes, what was your understanding as to the purpose of your signature thereto?" and was permitted to answer that, "It was to be used in place of the original note." *Held*, that the admission of the testimony was error without prejudice.

10. It was not reversible error to allow the defendant to testify as to whether there was any other or further consideration for the signing of the new notes than the original note previously given.

Commissioners' decision. In bank. Appeal from superior court, Glenn county; Frank Moody, Judge.

Action upon a promissory note, brought by Eppinger & Co. against J. K. Kendrick and M. P. Farnham. Farnham having failed to answer, the action proceeded against Kendrick alone, and upon a judgment for the defendant plaintiffs appeal. Affirmed.

Benjamin F. Geis, K. E. Kelley, and Platt & Bayne, for appellants. Hurst & Hurst and C. L. Donohoe, for respondent.

HAYNES, C. This action was brought against M. P. Farnham and J. K. Kendrick upon two promissory notes, each dated August 19, 1891, payable one day after date, one for $2,000, and the other for $800, to the order of Eppinger & Co., upon which there was claimed to remain unpaid $1,119.04 and interest. Farnham, having been adjudged an insolvent debtor, did not answer, and the action proceeded against Kendrick alone, whose answer consisted of a general denial, and a special defense, in which it was alleged that on September 12, 1887, Farnham was indebted to the plaintiffs in the sum of about $6,000, and, at the request of Oscar C. Schultz, manager and agent for said plaintiffs in their mercantile business at Germantown, he (Kendrick) executed with Farnham a promissory note for $2,000, payable to the order of the plaintiffs one day after date, with interest at the rate of 1 per cent. per month; that he executed the same upon the representation of said Schultz that plaintiffs needed money; that Farnham's note was not good as collateral security, and that his (Kendrick's) name would be used for no other purpose than to make the note good as collateral security at the bank, and that the notes in suit were given in renewal thereof; that he did not execute any of the notes at the request of Farnham, and that, as to him, they were without consideration. It was also alleged that in 1890 Farnham delivered to plaintiffs a quantity of wheat sufficient to have paid said note, with the request that it should be applied thereon, but that Schultz said that he wanted to use the note longer, and he would see Kendrick, and obtain his consent, but did not do so; that he received no consideration for the execution of any of the notes, and that Farnham did not request him to execute them. The jury returned a verdict for the defendant, and this appeal is from the judgment entered thereon, and from an order denying a new trial.

Plaintiffs' motion for judgment on the pleadings was properly denied. Whether the general denial was sufficient to prevent judgment in the absence of proof need not be considered.

Plaintiffs also objected to evidence under the special defense upon the ground that it does not state facts sufficient to constitute a defense. The "special defense," so called, really contains two special defenses: (1) That defendant was not Farnham's surety, but joined in the execution of the notes for the accommodation of the plaintiffs, to enable them to raise money upon them as collateral; and (2) that, if he were liable as surety, the principal maker had put in plaintiffs' hands sufficient wheat to pay them, and directed that the proceeds be applied upon the original note, and that they did not so apply it. These defenses should have been separately pleaded, but no objection was taken by motion to require them to be separately stated, nor by special demurrer for ambiguity or uncertainty. Though defectively pleaded, the answer stated a defense, and the objection to evidence upon that ground was properly overruled. So, too, the objection that the agency of Schultz for the plaintiffs is not sufficiently alleged cannot be sustained. The answer in that regard is sufficient as against an objection to evidence, though defectively pleaded, whatever might have been held if it had been specially demurred to.

The question principally discussed by counsel goes to the sufficiency of the evidence to justify the verdict. The defendant testified that at the time the original note was executed (September 12, 1887) Mr. Schultz came to him, and said the plaintiffs needed money; that Farnham was owing them, and that he wanted him to go on Farnham's note so that they could use it as collateral; that Farnham did not request it; that defendant declined to execute it, but Schultz appealed to him, reminding him that he had accommodated him in many ways, that as a friend he wanted him to sign it, so he could use it as collateral, and he then agreed to do so, and that the notes in suit were renewals without any new agreement or consideration. Mr. Schultz testified, in relation to the making of the original note, as follows: "Mr. Eppinger had been up and saw that the account was very large, and said the account had to be reduced; told me to go out and see Farnham, which I did and told him what Mr. Eppinger said. Mr. Farnham said he could not pay at present, and stated he had consummated a transaction with Mr. Kendrick on a patent plow, and was willing that I have the royalty. I told him that wasn't satisfactory to my people at all. I then says, 'If Mr. Kendrick will sign your note with you for $2,000, you can secure Kendrick by allowing him to retain the royalty on the plows he is to manufacture as security for the money.'" These statements of defendant and Schultz are materially conflicting; but appellants contend that the other evidence given by and on behalf of defendant renders defendant's statement as to the transaction so improbable that the court cannot consider it, and that, therefore, there is no material conflict. One of these items of evidence relates to the plow contract. Some time prior to the making of said note, a contract was made between Farnham and Kendrick, by which Kendrick was to manufacture a patented plow for Farnham, under which Farnham was to receive a royalty of $10 for each plow sold; and, at the suggestion of Schultz, at the time the original note was made, an additional agreement was made, by which Kendrick was to retain the royalty to the extent of $2,000, and pay the same to plaintiffs; and, if Farnham should otherwise pay the note, this latter agreement should be canceled. Schultz learned of the plow contract when he went to see Farnham, and that, we may reasonably suppose, led Schultz to make the effort to have Kendrick go upon Farnham's note. It should not be overlooked that Schultz nowhere denies that he, and not Farnham, requested Kendrick to go on the note; nor did he deny that he represented to Kendrick that he wanted his signature to enable him to use it as collateral with which to raise money; nor was Schultz's suggestion that Farnham should secure defendant by allowing him to retain and apply the royalty upon the note inconsistent with that purpose. Kendrick did not solicit security from Farnham, but this contract was made at Schultz's suggestion, and was written and retained by him, and the plaintiffs thereby obtained from Farnham whatever security the royalty afforded. Appellants contend, however, that it is not reasonable that plaintiffs, if they desired to use the note as collateral, would have made it payable one day after date. But, on the other hand, it may be said that, if Kendrick's purpose was to secure the plaintiffs' claim against Farnham, it is equally improbable that he would have placed himself in a situation in which he was liable to be sued the second day thereafter, instead of stipulating for time to enable Farnham to pay. So far, therefore, as the evidence relates to the making of the original note, the evidence is sufficient to justify the jury in finding that defendant was an accommodation maker for the benefit of plaintiffs. The notes here in suit were given in renewal of the former note; the one for $2,000 representing the principal, and the one for $800 representing the interest. There does not appear to have been any new consideration, or any new agreement or understanding, at the time they were executed; and defendant testified that they were to be used in place of the other note. The circumstances relied upon by plaintiffs to show that the notes were not executed by Kendrick otherwise than as security for Farnham occurred afterwards. There is credited on one of these notes, September 7, 1892, $714.32, and on the other, at the same date, $285.68, making together $1,000, and that payment was made by a check drawn by the Bank of Willows on the Bank of California to the order of Mr. Kendrick, and, therefore, appeared to have been made by him; but he testified that it was Farnham's money, and came from his wheat, and was represented by another check, which he took to the bank at Willows, and got its check on the Bank of California for it. According to the testimony of Mr. Kendrick, Schultz never demanded any payment from him until in July, 1892, and that was the first time Schultz said or did anything showing that he held him personally liable, and defendant then denied his liability. Schultz then said: "You live right here by Mr. Farnham, and you can take a crop mortgage on his crop, and get your money from Farnham. We live down at Dixon, and we do not have the opportunity. Hochheimer & Co. will take what he has, and we cannot get it." Kendrick took a crop mortgage from Farnham, but the date of the mortgage I do not find. On June 6, 1893, Kendrick sold to plaintiffs 50 tons of wheat at $1.15 per 100, to be delivered in July, the proceeds to apply on these notes; and this makes the amount of the only other credit upon the notes, amounting together to $1,156.-73, credited on July 15, 1893. On July 4th, prior to this delivery, Kendrick wrote Schultz, in reply to some communication from him, as follows: "Dear Sir: I have just telegraphed you: 'I would with one proposition. See letter.' You said, when here, I could have all month. I mean I will ship immediately with this proposition. Those notes are to be taken up when I pay the $1,000 this month, and a new one made payable first of August, 1894. The note will be just as good, and if there is any crisis I will not be compelled to pay it until the time we agreed I could have when you were here." Mr. Kendrick wrote another letter, two days later, of similar import. The first of these letters was evidently written in reply to some communication from Schultz urging an immediate shipment of the wheat, which, under the contract, was to be shipped in "July." Mr. Kendrick explains what he did by saying he was informed by Schultz that his company was in a bad fix, and he inferred "were liable to go under"; that he did not want these notes outstanding; that he "wanted a note that could not touch them for a year," so he could get the wheat out of Farnham's crop, and that was why the letters were written; that he was afraid the company might break up, leaving the notes in the hands of others. That there were grounds for this fear appears from Schultz's letter to him of July 18, 1893, in which he said: "During this awful stringency of money every available thing was sent to the city, so that it may be some few days before I can get your old note." I fail to find in any of the transactions subsequent to the making of these renewals any conclusive evidence affecting the uncontradicted testimony of the defendant as to the circumstances and representations attending the original transaction. Upon the face of some of these subsequent transactions they would appear to be inconsistent with defendant's claim; but, as explained by him, they do not so affect his testimony as to remove the conflict conceded to exist between the testimony of Schultz and Kendrick as to the original transaction. Besides, defendant was corroborated to a greater or less extent by Farnham and some other witnesses. Upon this branch of the case we cannot say that the jury were not justified in finding for defendant. This conclusion makes it unnecessary to consider whether the plaintiffs were bound to apply the proceeds of the wheat delivered to them by Farnham in 1889 upon the old note, nor whether the answer of defendant was such as to make that claim available as a defense. It is well settled that a defendant may plead as many defenses as he may have, though they are inconsistent, and neither of two inconsistent defenses can be used as an admission to destroy the other.

Appellants also contend that the verdict is against law, because it is in disregard of 10 different instructions given them by the court. These instructions cannot be repeated here. We have examined each one, and each instructs the jury that if they find from the evidence that certain facts exist, their verdict must be for the plaintiffs. But whether those facts exist was a question for the jury; so that the question is not whether there was a palpable violation of the instructions, but whether the evidence justified them in finding upon these facts as the verdict shows they must have done in order to find for the defendant.

Appellants specify the fourth instruction given at defendant's request as erroneous. This instruction is to the effect that, if the jury believe from the evidence that Kendrick was in fact a surety for Farnham upon the original note, yet, if they further believe that before the renewal of the original note, Farnham placed in plaintiffs' hands a quantity of wheat sufficient to pay said original note, and requested plaintiff to sell the same for that purpose, and apply it on said note, but that they failed to do so, and without Kendrick's consent applied the proceeds to other uses, and that Kendrick did not consent to such application to other uses, and did not know of Farnham's said request at the time he signed the renewal notes, they must find for the defendant. We see no error in this instruction. Appellants' contention that the defendant cannot avail himself of the rights of a surety because he averred in his special defense that he was not a surety, has already been noticed. Two special defenses were pleaded, in one of which he denied that he was a surety, and the other alleged the delivery of the wheat by Farnham, with direction to apply the proceeds to the payment of the $2,000 note. In the second special defense there is an implied admission that he executed the note as surety. That inconsistent defenses and hypothetical pleadings are permitted, see Bell v. Brown, 22 Cal. 679 et seq. Upon the face of each of the notes Kendrick, it is true, appeared to be a joint maker, and therefore a principal. "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal." Civ. Code, § 2832. It is not pretended that plaintiffs acted upon the faith of Kendrick being a principal. The testimony of Mr. Schultz shows the contrary. "If they had agreed to take him as surety, they could only have held him as such, although he appeared as principtl upon the written instrument." Harlan v. Ely, 55 Cal. 340. There was evidence tending to prove that when Farnham deposited the wheat with plaintiffs he directed that they should sell it, and apply the proceeds to the payment of the $2,000 note, and that Schultz replied, in substance, that they would like to use the note longer, and he would see Kendrick, and get his consent. This he failed to do. The question is, therefore, whether, as against Kendrick, assuming that he was bound to plaintiffs as surety, they could apply the wheat or its proceeds to Farnham's open account, and hold Kendrick for the payment of the note. As between the plaintiffs and Farnham there is no question that it must be applied as directed by the debtor (Civ. Code, § 1479, subd. 1), and "a surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." Civ. Code, § 2849. In Law v. East India Co., 4 Ves. 829, it was said: "It cannot be contended, upon any principle that prevails with regard to principal and surety, that when the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can be called upon." Here the effect of applying the wheat or its proceeds to the payment of the open account instead of the note was, so far as Kendrick is concerned, a repayment of the fund thus provided back into the hands of Farnham. The same principle is applied in Bragg v. Shain, 49 Cal. 131; Kiessig v. Allspaugh, 91 Cal. 231, 27 Pac. 655; Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646; and Clarke v. Scott, 45 Cal. 86. Appellants cite Shriver v. Lovejoy, 32 Cal. 575, where it was held that: "All the makers of a joint and several promissory note, whatever may be their true relations between themselves, stand, as to the payee, as principals. * * * As he [a defendant who was in fact a surety] was not entitled to show that he was not a principal, but that, as between himself and Lovejoy & Co., he was merely their surety, he had no better right than Lovejoy to complain of the release of the attachment." In that case property of Lovejoy, who was claimed to be the real debtor, was released by the plaintiff. Two of the justices (Shafter and Sawyer) concurred in the judgment on the ground that the court below found, upon sufficient evidence, that Grandvoinet was not a surety, but a principal party to the note. But whether the opinion of the majority was right or wrong is immaterial now. That case was decided before the Code, and, as we have seen, section 2832, Civ. Code, expressly authorizes one who appears on the face of the instrument to be a principal to show that he is in fact a surety; and, besides, a distinction may well be taken between the release of property seized by the creditor in an adversary proceeding, and property or money placed in the hands of the creditor by the debtor for the protection of his surety, inasmuch as the creditor has no right to apply it to any other purpose than that to which the debtor directs where such direction is given. Damon v. Pardow, 34 Cal. 278, was also decided before the Code, and, as to the inability of a joint maker to show that he was in fact a surety, followed Shriver v. Lovejoy, supra; and it was further held that appellant Waters, who claimed to be a surety, could not show that Pardow deposited with the payee collaterals to secure the payment of the note, which he did not sell, and apply in satisfaction of the note, but still held the same, and that it became of little value. But sections 2840, subd. 2, and 2849, of the Civil Code, have changed the rule laid down in the case last cited. Whether, under these sections, a release by the creditor of attached property belonging to the principal debtor would operate as a release of the surety pro tanto need not be decided. There is nothing inconsistent with the views we have expressed in Harlan v. Ely, 55 Cal. 340, or in Leeke v. Hancock, 76 Cal. 127, 17 Pac. 937. In the first of these cases the court quoted section 2832, Civ. Code, and said: "The section of the Civil Code relates to a class of cases in which the apparent differs from the real character of a contracting party. But one may be a surety merely, as between himself and his co-promisor, and yet, as to the creditor, both his apparent and actual relation be that of principal. * * * It would be strange if one could not waive his right to be treated as surety, and agree that he should be bound as upon his unconditional promise." Leeke v. Hancock, supra, follows and cites Harlan v. Ely. As there was at least some evidence to which the instruction was applicable, the instruction itself being right, this point must be ruled against appellants; for, if it be conceded that the evidence was insufficient to sustain this defense, the evidence under the other defense being sufficient to sustain the verdict, the judgment cannot be reversed.

The defendant was asked by his counsel the following question: "At the time of the signing of these renewal notes, what was your understanding as to the purpose of your signature thereto?" Plaintiffs were not prejudiced by the ruling permitting it to be answered. The witness had already testified to the circumstances surrounding the transaction; that he did not sign them for Farnham; that he was not asked to become security for Farnham; that he received no benefit, or anything of value; and that the request therefor came from the plaintiffs. The answer was that "it was to be used in place of the other note," and there was no evidence to the contrary.

The following question was also objected to: "Was there any other or further consideration for the signing of the new notes other than the $2,000 note that had been previously given?" This question also followed a statement which appeared to be a full recital of all the circumstances connected with the transaction, and was doubtless intended to cover any other possible consideration; and, in the connection in which it was put, cannot properly be considered a conclusion of law. But, if it were so, as there was no evidence tending to show any consideration other than the circumstances already disclosed, we cannot see that plaintiffs were prejudiced.

We are also referred, by folios, to numerous other exceptions taken by appellants, and which are not argued, nor even restated, in appellants' brief. We have, however, examined each of them, and find no error justifying a reversal. We advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

5 Cal. Unrep. 532

## HART et al. v. KIMBERLY et al. (L. A. 280.)

(Supreme Court of California. Oct. 29, 1896.)

APPEAL—FAILURE TO FILE TRANSCRIPT—INEXCUSABLE NEGLECT.

Subsequently to the taking of the appeal, one of the appellants, being ill, requested her attorney to desist from further proceedings, but, after receiving notice of a motion to dismiss the appeal for failure to file the transcript within the required time, said appellant directed the attorney to proceed with the cause. No action was taken towards the preparation of a transcript prior to appellant's first direction to her attorney, nor after the order to proceed with the appeal. *Held*, that the appeal would be dismissed.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Hart and others against Kimberly and others. An appeal was taken from the judgment, and appellees moved to dismiss the same for failure to file the transcript. Motion granted.

B. F. Thomas, for appellants. E. B. Hall and Richards & Carrier, for respondents.

PER CURIAM. The appeal herein was taken May 26, 1896, and, no transcript on appeal having been filed in this court, the respondents, on August 27th, gave notice to the appellants of a motion to dismiss the appeal. At the hearing of the motion the appellants presented affidavits to the effect that one of the appellants had been ill, and that, while in this condition, had, on June 15th, instructed her attorney to desist from any further proceedings in the cause, and that thereupon he had abandoned all proceedings for filing the transcript; that in the latter part of August the appellant requested her attorney to proceed with said appeal. Upon these statements appellants ask to be relieved from their default, and that they be allowed 20 days within which to file a transcript on appeal. The motion must be denied. No action towards the preparation of the transcript appears to have been taken prior to the direction to the attorney not to proceed with the appeal, or since the subsequent direction to proceed therewith; nor is it shown that this latter direction was given until after receiving the notice to dismiss the appeal. While the illness of the appellant, as shown by the affidavits, might have been urged as ground for an order extending the time within which to file the transcript if such extension had been asked within the 40 days, it is not a sufficient reason for relieving her from default when the application therefor is made after the default. The motion to dismiss the appeal is granted.

(117 Cal. 223)

## McCAUGHEY v. SCHUETTE et al. (L. A. 115.)[1]

(Supreme Court of California. Oct. 22, 1896.)

EJECTMENT—PLEADING.

A complaint in ejectment, alleging the execution by defendant to plaintiff of a deed to the premises, without further allegation of ownership or right of possession, is demurrable, as pleading evidentiary, instead of ultimate, facts.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by O. McCaughey against H. C. Schuette and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

A. McConoughey and E. Parker, for appellants. Wm. Humphrey, for respondent.

SEARLS, C. This is an action to recover possession from the defendants, who are appellants here, of lots A, B, C, J, K, and L in block 131 of Horton's addition to San Diego, county of San Diego, state of California. Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

The complaint was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. We think the demurrer should have been sustained. The complaint may be summarized thus: (1) December 22, 1891, defendants made their promissory note to plaintiff for $2,000, and to secure the payment thereof executed a mortgage upon the lots of land sought to be recovered in this action. (2) Afterwards, and on the 22d day of March, 1893, plaintiff and defendants entered into an agreement by the terms of which said defendants agreed to convey to plaintiff, and the latter agreed to take, said real property in full payment of the note, and to release defendants from liability thereon, and deliver the same up to defendants, and to discharge of record the mortgage. (3) That on the 23d day of December, 1893, defendants delivered to plaintiff their grant deed of said premises, and the latter delivered up the note and discharged the mortgage of record. Said deed from defendants to plaintiff and the note and mortgage are made part of the complaint. (4) At the date of the delivery of the deed there was $2,501.28 due on the note, and the deed was made in payment thereof. (5) Defendants are in possession of the premises, and plaintiff has demanded possession thereof, which said defendants refused to deliver up, and exclude plaintiff therefrom against his will and right. Wherefore he demands judgment for the delivery of possession of said premises, etc. It is a fundamental rule of our code pleading that ultimate, and not probative, facts are to be averred in a pleading. Miles v. McDermott, 31 Cal. 271. In Thomas v. Desmond, 63 Cal. 426, it was said, in substance, that, where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies. In Siter v. Jewett, 33 Cal. 92, it was held that averments in a complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. Racouillat v. Rene, 32 Cal. 450, is to like effect. In Gates v. Salmon, 46 Cal. 361, it was held that an allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land, which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage. Such evidentiary matters should be stricken out in an action of ejectment. Willson v. Cleaveland, 30 Cal. 192. See, also, San Joaquin Co. v. Budd, 96 Cal. 47, 30 Pac. 967. It will be observed that in the complaint in the present case there is no averment of seisin, or ownership, or possession, or right of possession to the demanded premises, but the pleader contents himself with a statement of evidentiary facts which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership and right to possession in the plaintiff. In Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750, it was said of such a pleading that it was insufficient, and that a complaint which stated only facts from which the ultimate fact might be deduced was subject to a demurrer. In City of Los Angeles v. Signoret, 50 Cal. 298, the action was to enforce a lien for the construction of a sewer. The complaint referred to an exhibit, attached to and made a part thereof, for particulars, which exhibit recited the various steps necessary to create the lien, but on demurrer the pleading was held insufficient. The complaint here is argumentative; that is to say, the affirmative existence of the ultimate fact is left to inference or argument. Such pleading was bad at common law, and is none the less so under our code system. To uphold such a pleading is to encourage prolixity, and a wide departure from that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect, except to incumber the record with verbiage, and enhance the cost of litigation. We recommend that the judgment and order appealed from be reversed, and that the court below be directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

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[1] Rehearing granted.

I concur: BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

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114 Cal. 566

## GLAS v. GLAS. (Sac. 120.)

(Supreme Court of California. Oct. 22, 1896.)

HOMESTEAD—SALE—NOTES—OPTION TO DECLARE NOTE DUE—WAIVER—MORTGAGE—RECORD.

1. Under Civ. Code, § 1241, subd. 4, providing that the homestead is subject to forced sale on debt secured by mortgage on the premises, executed and recorded before the declaration of homestead was filed, a husband, after executing a mortgage to his wife which was recorded, cannot defeat her right to foreclose by filing a declaration of homestead.

2. A delay of eight months by the payee to declare the mortgage note due for nonpayment of interest is not a waiver of the provision in the note authorizing the payee, at his option, to declare the note due on default in payment of interest, though the note also provides that interest not paid when due shall be added to, and bear interest with, the principal.

3. The certificate of the recorder of the receipt of the mortgage for record need not be under seal.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by Kunigunde Glas against Frank Glas, Sr. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Robert L. Hargrove, for appellant. Geo. E. Church, for respondent.

HAYNES, C. This action is prosecuted to foreclose a mortgage executed by the defendant to plaintiff. The plaintiff had judgment, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial. After the execution of the note and mortgage the defendant filed a declaration of homestead upon the mortgaged premises, and appellant's principal contention is that the plaintiff, who is the wife of the defendant, cannot foreclose the mortgage, because of the declaration of homestead so filed by the husband.

1. This contention can be best stated in the pathetic language of his brief: "Can respondent, by aid of the judicial arm, invade the home and fireside, destroy the homestead and the sanctum of virtue and truth, in an action by her against her husband to foreclose a mortgage, when the husband has no other suitable place of abode? Can the homestead be abandoned in this manner? Will equity permit the wife to destroy the home provided for her by her husband, and destroy his means of support, and cast him out to the world in his dotage, simply to satisfy her avariciousness, or a demand for her pound of flesh?" Terrible as the consequences may appear to constrained to hold that the husband cannot defeat the mortgage as a lien, nor its foreclosure, by subsequently filing a declaration of homestead upon the mortgaged premises. Section 1241 of the Civil Code provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * * (4) On debts secured by mortgages on the premises executed and recorded before the declaration of homestead was filed for record." That the parties to the note and mortgage are husband and wife does not affect the rights of the plaintiff. Section 158 of the Civil Code provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried. * * *" Appellant's contention would nullify the provisions of the foregoing section, and would enable the husband to obtain his wife's money upon the faith of the security given by the mortgage, and yet defeat the security thus given, by his separate and independent act, without her knowledge, consent, or concurrence.

2. The note secured by the mortgage was dated August 25, 1892, and made payable three years after date, and this action was commenced before the expiration of the time above stated. The note, however, contained a provision for annual payment of interest, and another provision, "that, if not so paid when it became due, it should be added to the principal, and become a part thereof, and bear interest at the same rate as said principal sum." The note, however, contained this further stipulation: "But, if default be made in the payment of interest as above prescribed, then this note shall immediately become due, at the option of the holder thereof." And the mortgage contained the provision "that, in case of default in payment of any installment of the interest, then the whole sum of interest and principal should be due, at the option of the said party of the second part, or assigns, and suit may be immediately brought," etc. This suit was brought eight months after the delinquent installment of interest became due, and it is contended by appellant that this delay in making demand and bringing the action was a waiver of the default in the payment of interest. This contention cannot be sustained. The cases cited by the appellant to this point do not sustain his contention. In Campbell v. West, 86 Cal. 197, 24 Pac. 1000, it was held that, the plaintiff having failed to exercise the option upon the first default, he was not bound to waive its exercise at any subsequent default; and that was really the only question in the case, as the installment of interest upon which the plaintiff exercised his option fell due on Saturday, and on the following Monday the plaintiff notified the defendant of his option to consider the whole amount of principal and interest due. In the other case cited by appellant, namely, Hewitt v. Dean, 91 Cal. 5, 10, 27 Pac. 424, it was said: "Although the plaintiff might have dealt with the defendants in such a way that he would be estopped from ting his right of option, or by some act

of his waive such right, yet mere forbearance or inaction would not cause such waiver. His leniency toward the defendants, by forbearing to make an election within a reasonable time, could not impair his right, or be regarded by them as a waiver thereof."

3. It is further claimed that the installment of interest alleged to be in arrears was in fact paid. The court found that, of the installment of $220, but $90 had been paid, and this finding we think justified by the evidence.

4. Upon the trial the mortgage, together with the indorsements thereon, showing the date of its filing for record, and the volume and page where it was recorded, was received in evidence over an objection made by counsel for defendant; and afterwards, in a motion for nonsuit, one of the grounds specified was that plaintiff failed to prove that said mortgage had been recorded. This objection was not made at the time of the introduction of the mortgage in evidence, and it is now contended that the indorsement upon the back of the mortgage that it was filed and recorded, though signed by the recorder, was not evidence, in the absence of the seal of that officer. There is no statutory requirement that the certificate of the recorder of the receipt of the mortgage for record, and that it had been recorded, indorsed upon the original mortgage, should be attested by his seal. It is only certified copies that must be so attested.

5. The defendant attempted to set up in his answer, by way of counterclaim, that, between the 1st day of July, 1888, and the commencement of the action, in April, 1894, he had paid, laid out, and expended, and loaned to the plaintiff for her use and benefit, divers sums of money, which, with the value of labor, work, and services rendered her, amounted to the sum of $2,000, and proceeded at great length to state that the defendant had borrowed money upon his separate property, and that the greater part of said sums was advanced to the plaintiff for improving her separate property. The allegations, however, are so indefinite and uncertain that it is difficult, if not impossible, to form a reasonable conjecture either as to the time when such alleged advances were made or labor performed, or the amount or value of either. Upon the trial the defendant was asked some general preliminary questions with a view to sustaining said counterclaim. After testifying to the alleged payments on account of interest on the mortgage, he was asked the following question: "I will ask if you have laid out and expended any other money for the plaintiff which she applied to her separate property?" Answer. "Yes, sir." He was again asked as follows: "I will ask you if you have laid out, paid out, or expended of your own separate property within two years last past, at the special instance and request of the plaintiff, which she applied to her own separate property?" An objection to this question was overruled, and the witness answered, "I did." Similar questions were subsequently put to the witness, and objections were made and sustained, and exceptions taken by the defendant. These questions were all preliminary, and, if answered by the witness, must have been answered "Yes" or "No," and would not have shown that any specified sum of money had been loaned or advanced to the plaintiff, nor that any specified value of labor had been done or performed for her. These special interrogatories were continued at great length, until finally the court suggested to counsel for defendant that he might shorten the matter by stating what he expected to prove by the witness, and make his offer of proof so that the matter might be ruled on at once, without so many rulings and exceptions. Counsel thereupon made a statement, covering more than four pages of the printed transcript, of the facts which he expected to prove by the witness; but this offer related exclusively to the homestead, and there was not a word touching the alleged counterclaim, or of any fact bearing upon it, nor were any of the numerous questions put to the witness prior to this general statement so framed as to show any amount, whether of money advanced or labor performed, which could be the basis of any finding or computation of amount or value. Under these circumstances, if it be conceded that these preliminary questions should have been allowed, it is clear that the answer, if favorable to the defendant, could not have supported a finding in his favor upon the counterclaim. Besides, more than four years of the time covered by these alleged transactions transpired before the date of the note and mortgage here in suit, and it is scarcely probable that the defendant would have executed the note and mortgage without deducting all sums which she may then have owed to him. This complete lack of evidence to sustain the defendant's counterclaim fully justified the court in finding against the defendant upon that issue.

Numerous other questions arising upon the admission or exclusion of evidence are specified by appellant, but they are without merit, and are not of such character as to justify comment. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 527

## COLFAX MOUNTAIN FRUIT CO. v. SOUTHERN PAC. CO. (Sac. 87.)[1]

(Supreme Court of California. Oct. 24, 1896.)

CARRIERS OF GOODS — CONNECTING LINES — CONSTRUCTION OF FREIGHT CONTRACT—LIABILITY FOR DELAY—BURDEN OF PROOF.

1. Under Civ. Code, § 2201, declaring that the liability of a carrier who accepts freight for a place beyond his route ceases on delivery to a connecting line, "unless he stipulates otherwise," a provision in a freight contract that the carrier's responsibility shall cease at the connecting point is not rendered ineffective by a further stipulation for through passenger train service.

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[1] Rehearing granted.

2. There being no repugnancy between the provision limiting the carrier's liability to its own line and the stipulation for through passenger train service, the fact that the first is printed, while the last is in writing, is immaterial in construing the contract.

3. Where a railroad company receives freight for shipment under an agreement to forward it to its destination, and the stipulation that its liability as carrier shall cease on delivery of the goods to the first connecting line, the contract also providing for "passenger service through," the duty of the company as forwarding agent continues till the goods arrive at their ultimate destination, and it is therefore liable for any delay caused by its failure to notify each successive connecting road of the conditions of the contract in respect to the manner of transportation.

4. In an action by the shipper against the contracting carrier for damages caused by such delay, the burden is on defendant to show that it notified each successive connecting road of the conditions regarding the manner of transportation, or, if it did not, that the delay was not attributable to its default in this respect.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewitt, Judge.

Action by the Colfax Mountain Fruit Company against the Southern Pacific Company to recover damages resulting from delay in the transmission of freight. Judgment for plaintiff, and defendant appeals. Reversed.

Foshay Walker, for appellant. Ben P. Tabor, for respondent.

BRITT, C. At the trial of this case the parties agreed on the facts by written stipulation which was adopted by the court as its findings. It thus appears that on October 24, 1890, defendant was a common carrier operating a line of railroad between Colfax, in Placer county, Cal., and Ogden, Utah, the latter point being the terminus of its route in the direction of the city of New York. On that day defendant received from plaintiff at Colfax a car load of fruit for transportation according to the terms of a written contract called a "shipping order" signed by plaintiff, describing the goods to be carried, stating that the same were to be forwarded to Ogden station and there delivered, and containing also the following matter: "Consignee, marks, and destination: Sgobel & Day, New York. * * * Care C. & N. W., via Erie Dispatch, New York. Passenger train service, U. P. 32009. Agent Southern Pacific Company will please forward subject to conditions and agreements indorsed hereon." One of such conditions was that: "The company agrees to forward the property to the place of destination named, but its responsibility as a common carrier is to cease at the station where the freight leaves this road, when the property is to be delivered to connecting roads or carriers." It seems that the characters "U. P. 32009" meant "Union Pacific car No. 32,009." Concurrently with the execution by plaintiff of such shipping order, the defendant gave to plaintiff a "shipping receipt," which differed from the order mainly, for present purposes, in that it contained the words "passenger service through," instead of "passenger train service," as in the order. At this time there was a traffic agreement in force between defendant and several other carriers, whose routes, by successively connecting, formed a through line, viz. the Union Pacific Railway Company, the Chicago & Northwestern Railway Company, and the Erie Dispatch Company, and pursuant to such traffic agreement said car of fruit was carried to New York. There the Erie Dispatch Company delivered it to the consignees, and collected of them the whole amount of freight charges for the haul from Colfax, which amount was divided in gross among the several connecting carriers for the carriage by them respectively furnished to the goods in accordance with their said arrangement. Defendant transported the car in question, by passenger train, over its road to Ogden, and there delivered it to the Union Pacific Railway Company, the next connecting carrier, with request that the last-named company "and its connection between Ogden and New York City should, until the arrival of said car at final destination, accord to it passenger train service." After such delivery to the Union Pacific Company—but on what line does not appear—delay occurred in the transmission of the car, so that it was three days overdue on arrival at New York, and in consequence the fruit suffered decay, and was sold at a loss to plaintiff. For the amount of such loss the court below held defendant liable, and rendered judgment in plaintiff's favor.

With us it is declared by statute that the liability of a common carrier who accepts freight for a place beyond his usual route ceases upon delivery of the freight at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, unless he stipulates otherwise. Civ. Code, 2201. Plaintiff contends that the defendant in this instance "stipulated otherwise." It is not argued that any relation of partnership arose between the connecting carriers on account of their said traffic agreement (Darling v. Railroad Co., 11 Allen, 298; Hutch. Carr. § 169), but that by the contract with plaintiff defendant itself undertook to furnish passenger train service for the car from Colfax to New York, the connecting lines being its agents for this purpose. For defendant it is claimed that upon delivery of the car at Ogden to the next connecting carrier, with instruction for continued passenger train service, defendant's obligation under the contract terminated. We are unable to agree with either contention. Conceding, as plaintiff maintains, that the words "passenger service through," in the shipping receipt, are to be read as part of the agreement of the parties,—although in the stipulation on which the case was tried such contract is said to be contained in the shipping order signed by plaintiff,—there is yet no repugnancy between the provision for such service and the condition indorsed on both order and receipt that the responsibility of defendant as a common carrier shall cease at Ogden when the property is delivered to a connecting road; and, in the absence of conflict between the provisions, the fact asserted by counsel, that the language "passenger service through" was in writing, while said indorsement was printed only, is of no influence in the proper construction of the instrument. Vorwerk v. Nolte, 87 Cal. 236, 25 Pac. 412. The stipulation for through passenger train service, understood as it must be in connection with the agreement to deliver at Ogden, and with other parts of the contract, imports that defendant will, as a common carrier, afford service of that description over its own line to Ogden, and thereafter will, as a forwarding agent, do those things incumbent upon it to secure like service for the car to the place of final destination. The car, as marked and accepted, was "through" freight, yet this did not bind defendant to give it transportation beyond its own route. Civ. Code, 2201; Palmer v. Railroad Co., 101 Cal. 187, 35 Pac. 630. To stipulate for passenger train service, then, was but to particularize the means of transmission, not to change the parties by whom, without those words, transmission was unquestionably to be effected. Nothing different is held in Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. 988. Hence, the responsibility of defendant as common carrier having ended at Ogden, no sufficient facts are found to make it liable for the subsequent delay. But the terms of the contract show that defendant's duty of forwarding agent existed after its relation of common carrier ceased, and continued to the end of the route. This is an important feature of such a contract. "The owner does not and cannot always accompany [the goods], and give his personal directions to each one of the successive carriers. He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty and invests him with authority to give the requisite and proper instructions to each successive carrier to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to the place of their ultimate destination. Otherwise they would never reach that place." Briggs v. Railroad Co., 6 Allen, 246, 249. See, also, Northern R. Co. v. Fitchburg R. Co., 6 Allen, 258. This duty it performed on delivery of the goods to the first intermediate carrier, the Union Pacific Company, but the record fails to show whether it gave or caused to be given any request or direction to the Chicago & Northwestern Railway Company, or to the Erie Dispatch Company, concerning the service to be afforded the car when it came into their hands respectively. Defendant took the risk of obedience to its request to the Union Pacific Company for communication of such instructions. If the delay complained of occurred by reason of failure in this particular, defendant is responsible for it. Plaintiff had not authorized delegation of its agency as forwarder. If, however, proper and timely instructions were given to each successive carrier, then defendant is not liable for failure of any of them to observe the same. Hooper v. Wells, Fargo & Co., 27 Cal. 11, 27; Northern R. Co. v. Fitchburg R. Co., 6 Allen, 254.

There are therefore absent from the record material findings necessary to the rendition of judgment, and the case must be tried anew. Upon such trial the question of the burden of proof may be important. The authorities having a bearing on this subject by analogy are not harmonious, but in our opinion the better and juster reason requires that, the facts appearing in the present record being established, defendant shall have the burden of proof to show that, as bailee of the goods for the purpose of forwarding them from Ogden to New York, it performed or caused to be performed the obligations assumed by it under the contract with plaintiff as to each successive carrier, or, if it did not, then that the delay in transmission was not attributable to its default in this regard. Boies v. Railroad Co., 37 Conn. 272; American Exp. Co. v. Second Nat. Bank of Titusville, 69 Pa. St. 394, 402; Clark v. Spence, 10 Watts, 335, 337; Funkhouser v. Wagner, 62 Ill. 59; Collins v. Bennett, 46 N. Y. 490; Ouderkirk v. Bank, 119 N. Y. 263, 23 N. E. 875.

The contract between the parties as stipulated at the trial varied greatly from that alleged in the complaint, but it seems no objection was made by defendant on this ground in the court below, and we think the plaintiff should have leave to amend on return of the case to that court. The judgment should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

114 Cal. 578

## MULLAN v. STATE. (S. F. 442.)

(Supreme Court of California. Oct. 24, 1896.)

ACTION ON CONTRACT WITH STATE—DEMURRER—JUDICIAL NOTICE—RATIFICATION BY LEGISLATURE—POWER OF GOVERNOR TO EMPLOY AGENT—ESTOPPEL NOT AVAILABLE AGAINST STATE.

1. Where a complaint alleges that plaintiff, at the special instance and request of defendant state, rendered certain services as its agent, and seeks to recover the agreed compensation therefor, the objection that the alleged employment was illegal may be raised by demurrer, since the court will take cognizance of the fact that there could be no valid contract without legislative authority, and by Code Civ. Proc. § 1875, subds. 2, 3, is charged with knowledge of all public and private acts.

2. Under Const. art. 4, § 15, declaring that "no law shall be passed except by bill," and section 32, forbidding the legislature to pay or to authorize the payment of any claim created against the state by a contract "made without express authority of law," and providing that such unauthorized contracts shall be null and void, the legislature cannot, by mere resolution, ratify the act of the governor in assuming to employ an agent to collect a claim in favor of the state.

3. Pol. Code, § 380, subd. 5, providing that whenever any suit or legal proceeding is pending against the state, or which may affect the title of the state to property, or which may result in any claim against the state, the governor may direct the attorney general to appear in behalf of the state, "and may employ such additional counsel as he may judge expedient," does not authorize the governor to employ one not an attorney as a mere agent to collect a claim in favor of the state against the United States.

4. The state, by accepting the benefit of a

contract made in its behalf with an individual, without authority of law, does not estop itself from denying the validity of the contract.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by John Mullan against the state of California to recover on a contract of employment. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Atty. Gen. Fitzgerald, for the State.

VAN FLEET, J. Appeal from the judgment entered upon failure to amend after demurrer sustained to the complaint. The complaint is in two counts. The first count alleges the following facts: That between the 12th day of December, 1878, and the 1st day of May, 1891, the plaintiff rendered services to the defendant, at its special instance and request, as the agent of said state, in acting in its behalf in the matter of recovering certain moneys paid by the state to the United States under the provisions of a certain act of congress approved August 5, 1861, entitled "An act to provide increased revenue from imports to pay interest upon the public debt, and for other purposes"; that the defendant promised to pay plaintiff therefor 20 per cent. of all such moneys collected by him from the United States; that thereafter plaintiff collected from the United States, as such agent, and caused to be paid to said state, the sum of $216,357.87; that no part of said 20 per cent. of said sum has been paid to plaintiff; and that said plaintiff has presented his claim for the sum due him to the state board of examiners, as provided by law, and said board has refused to allow said claim, either in whole or in part. The second count is upon a similar cause of action for a smaller amount. The demurrer was sustained upon the ground that the alleged employment of plaintiff was unauthorized and void, and created no valid obligation against the state. It is suggested by appellant in limine that this objection does not arise on demurrer; that the allegation that plaintiff was employed by the state as its agent is one of fact, and is admitted by the demurrer; that, if such employment was not legal because made in a manner not binding upon the state, that question can only be raised by answer and disclosed by evidence, but does not appear upon the face of the complaint. But the court will take cognizance of the fact that there could be no valid employment of plaintiff by the state for the purpose alleged without authorization by the law-making power; and, as we are further charged with knowledge of whatever is established by law, and of all public as well as private acts of the legislative, executive, and judicial departments of the state (Code Civ. Proc. § 1875, subds. 2, 3), the complaint must be regarded as laying before us whatever of authority there may exist in the law for plaintiff's employment, to the same extent as if such authority were expressly alleged. Whiting v. Townsend, 57 Cal. 515; Faekler v. Wright, 86 Cal. 210, 24 Pac. 996; Cole v. Segraves, 88 Cal. 105, 25 Pac. 1109.

Proceeding, then, to inquire as to the authority under which plaintiff assumed to act in the premises, we find that the only thing relied upon as tending to establish any special legislative authorization for the alleged employment is based upon these facts: In his biennial message to the legislature at its twenty-fifth session the governor made a statement that he had received information with reference to proceedings before congress looking to the reimbursement of this state for certain expenditures made by it in suppressing Indian hostilities during the Modoc war, and in repelling prior Indian invasions and hostilities, and also of certain sums assessed against this state under the act of congress approved August 5, 1861, to pay the interest on the public debt, and for other purposes, and wherein it is stated that he had appointed Capt. John Mullan to represent this state in said matters before the authorities at Washington, and recommends to the legislature "that these appointments be ratified and confirmed by you, and that you provide for his compensation to be paid out of the sums he may recover for the state, contingent, however, upon his success, it having been expressly understood that such compensation should be left entirely to your judgment and discretion." (Volume 1. Appendix to Journal of Senate and Assembly, 25th Sess. pp. 22, 23.) Acting upon this recommendation of the governor, the legislature, on March 3, 1883, adopted the following resolution: "Assembly Concurrent Resolution No. 20, relative to directing the governor to fix the compensation for services rendered by Captain John Mullan in collections of claims due the state from the United States. Whereas, the governor and state surveyor-general of this state have heretofore appointed Captain John Mullan, of San Francisco, California, agent and attorney to represent the interests of the state of California before the proper authorities of the United States at Washington, D. C., in the matter of the claim of this state to the five per cent. net proceeds of the sales of the public lands by the United States in this state; and also in the matter of the direct tax levied upon this state by the United States, under the act of congress of August sixth, eighteen hundred and sixty-one; and also of her claim arising during the Modoc war in eighteen hundred and seventy-two; and also under the provisions of the act of congress of June twenty-seventh, eighteen hundred and eighty-two; therefore, be it resolved by the assembly of California, the senate concurring, that the appointments so conferred upon Captain John Mullan by the governor and surveyor-general, respectively, are hereby ratified and confirmed, and the governor of this state be, and he is hereby, authorized and directed to fix the compensation for the services by Captain John Mullan heretofore and that may be by him hereafter rendered, at twenty per cent. of each of the sums or claims that may be by him collected from the United States, and to pay to him such per cent. out of the moneys that may be collected by him and paid to this state on account of each of the foregoing matters respectively; provided, however, that this state shall not in any event become liable for any expenses, fees and salaries of any nature whatever other than such contingent commission." The resolution further provides for the turning over to Capt. Mullan of all papers and vouchers with reference to the claims involved, and the taking of his receipt therefor. The references in the resolution to the appointment of Mullan by the surveyor general to represent the state in its claim to the 5 per cent. proceeds on sales of lands is not here involved.

It is contended by the attorney general, and we think correctly, that these proceedings did not constitute any competent basis for the contract alleged within the provisions of the constitution of this state. Section 32 of article 4, of our constitution, so far as pertinent to the question involved, provides: "The legislature shall have no power * * * to pay or to authorize the payment of any claim hereafter created against the state * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." And section 15 of the same article provides that "no law shall be passed except by bill." That the action of the governor and legislature did not constitute the enactment of a "law" within the purview of the constitution is quite obvious. It is, in fact, not contended that the resolution is to be regarded as a "bill" within the meaning of the constitution, but it is urged that the words "express authority of law," as there used, have a broader signification than that of a valid statute law enacted with all the formalities requisite in the case of a bill, and that it was competent for the legislature to ratify the act of the governor in assuming to appoint the plaintiff by a resolution such as the one here quoted, and that such action constitutes "express authority of law." But we are unable to coincide in this view. The language of the constitution is in itself a complete answer to the proposition. It provides in express terms that there shall be but one mode of enacting a "law" thereunder, and that mode is the exclusive measure of the power of the legislature in that regard. A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it. The fact that it may have been intended to subserve such purpose can make no difference. The requirements of the constitution are not met by that method of legislation. "Nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode appointed by the instrument which invests them with power, and under all the forms which that instrument has rendered essential." Cooley, Const. Lim. p. 155, c. 6. It is true, as contended, that legislation for certain limited purposes by means of resolutions or legislative orders is in use to some extent in certain of the states and in congress. But it will be found that in most, if not all, instances it is under a constitution which either expressly recognizes it, as does the constitution of the United States, or one which at least does not forbid it. And it will be usually found to take the form of a resolution, requiring the assent of the executive to give it effect. In congress this form of legislation is regarded as a bill, and treated with the same formalities. Even if this mode of legislation were competent under our constitution, the resolution relied upon would not arise to the dignity of law, since it lacks the essential of executive approval. In Lithographing Co. v. Henderson (Colo. Sup.) 32 Pac. 417, under a constitution containing restrictions similar to those found in that of California, it was held that a resolution adopted by both houses of the legislature for a purpose not dissimilar in principle from that intended to be subserved by the one under consideration was not "a law of the state," as it "was not passed by bill." And see People v. Toal, 85 Cal. 333, 24 Pac. 603.

The case of Miller v. Dunn, 72 Cal. 462, 14 Pac. 27, 29, is cited by appellant as authority for the proposition that the language "express authority of law" is not confined in its meaning to a statute law enacted in the manner prescribed in the constitution. But in that case the statute under which the contract was made and the service performed had in fact been passed with all the formalities requisite under the constitution to a valid law, and it was held that such an act, although unconstitutional, was nevertheless a "law" in the sense that it would support an appropriation to pay for the work done under color of its apparent grant of authority, and before its invalidity had been declared by the courts. In this case the legislature did not pretend to follow the formal requirements of the constitution in its attempt to grant authority for the contract, and its action lent no color of regularity to plaintiff's employment. Moreover, we are not disposed to extend the doctrine announced in Miller v. Dunn. The case of Brooks v. Fischer, 79 Cal. 173, 21 Pac. 652, merely holds that, under section 8 of article 11 of the constitution, a city charter, adopted by the freeholders of a municipality, may be approved by a concurrent resolution of the two houses of the legislature, without the consent of the executive, because that provision only requires the assent of the "legislature," and does not contemplate the passing of an act for the purposes of such approval; it being expressly held "that the legislature is one thing and the lawmaking power of the state another." It is not authority for the proposition that the legislature can enact "laws" without submitting them to the governor for his consent.

There is no merit in the claim that the employment of plaintiff was authorized by section 380, subd. 5, of the Political Code, which, in defining the powers of the governor, provides that: "Whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to property, or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state, and may employ such additional counsel as he may judge expedient." That provision has no application to the facts of this case. The action of the governor was not attempted to be taken under that section, nor is the action brought upon any such theory. The complaint does not aver that plaintiff was employed as counsel, or even that he was an attorney at law, and so eligible for the character of employment there provided for. He was employed as a mere agent. While an attorney might be employed as agent, one not an attorney could not be employed for the service contemplated in that section. Nor is there anything in the point that the state is now estopped from denying the validity of the contract with plaintiff, since he has in good faith performed the service. The question of equity or good faith cannot affect our consideration in this case. It is not like a transaction between private individuals. As suggested in Miller v. Dunn, supra: "There is no moral obligation on the part of the state which can be enforced upon equitable principles, nor does the good faith of the party dealing with the state cut any figure in the case, if in fact the work was done 'without express authority of law,' for this provision was placed in the constitution to cut off all claims based upon mere good faith and equity." And says Mr. Bishop: "The government is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known rendering such a consequence impossible. So that the government is bound only when there is an actual authorization." Bish. Cont. § 993. One dealing with public officers is charged with the knowledge of, and is bound at his peril to ascertain, the extent of their powers to bind the state for which they seem to act. And, if they exceed their authority, the state is not bound thereby to any extent. Throop, Pub. Off. § 551. See, also, State v. Horton, 21 Nev. 466, 34 Pac. 316. We think the demurrer was properly sustained, and the judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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5 Cal. Unrep. 462

**POTTKAMP v. BUSS et al.** (S. F. 183.)

(Supreme Court of California. Oct. 29, 1896.)

In bank. Petition for rehearing. Denied. For original opinion, see 46 Pac. 169.

PER CURIAM. The opinion is modified by striking out the last sentence in division 2 thereof, and inserting in lieu thereof the following, viz.: "The last amended complaint was filed February 20, 1893, and would authorize a recovery for all the rents received by the defendants within five years prior to that date. Code Civ. Proc. § 336, subd. 2. As the court was authorized to apply the amounts paid by the defendants for repairs, taxes, etc., in liquidation of the earliest items of rents collected by them, it is clear that the amount for which the judgment was rendered was not barred by the statute of limitations." Rehearing denied.

(115 Cal. 16)

## HERRIMAN et al. v. MENZIES et al. (No. 15,991.)[1]

(Supreme Court of California. Nov. 7, 1896.)

CONTRACT—RESTRICTION OF TRADE—MONOPOLY—PUBLIC POLICY—VALIDITY.

A contract provided for the formation of an association between several firms and individuals "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association was to continue for five years, and was given power, through a majority vote, to fix a schedule of charges; and it was agreed that each member would do no work for lower prices. Each member was to carry on the business in its or his own name, as theretofore, for the benefit of the association, and render regular statements to the association. The agreement was to cover all business done by any of its members in the state, and provided that any member violating the contract should pay to the association a certain amount as liquidated damages. *Held*, that the contract did not create a monopoly to unduly restrict the business of stevedoring, in contravention of public policy.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Albert Herriman and others against Stuart Menzies and others on a contract. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Henry N. Clement, for appellants. T. C. Coogan, for respondents.

VAN FLEET, J. In this case the defendants appealed to this court from the judgment and from an order denying a motion for a new trial. The appeal from the judgment was heretofore dismissed, and the order denying a new trial affirmed, in department. Herriman v. Menzies, 44 Pac. 660. Subsequently the order dismissing the appeal from the judgment was, upon petition therefor, set aside, and a hearing of the motion ordered in bank. Since the last order, the appeal from the judgment has been submitted upon the merits, but without a waiver of said motion to dismiss.

The appeal from the judgment involves but one question,—whether the complaint states a cause of action. The objection urged is that the contract which forms the basis of the action, and under which the accounting is asked, is contrary to public policy, and void. The contract is set out in hæc verba. It provides for the formation of an association between several firms and individuals engaged in the business of stevedoring in the city of San Francisco under the name of the Master Stevedores' Association, "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association is to continue five years. Certain officers, consisting of president, vice president, and secretary, whose duties are defined, and a standing committee for the auditing of accounts of the members, are provided for. The association is given power through a majority vote of its members to "fix a schedule of prices or charges for any and all work as stevedores to be done and performed by its members, and they hereby agree that they will each of them observe and abide by such schedule of prices or charges, and that none of them will do or perform any such work at or for less or lower prices, or suffer or allow any discount to be made therefrom, except as may be allowed or authorized by the association." "(9) Each of the firms and parties hereto is to carry on the business of master stevedores, according to the provisions of this agreement, in their own names as heretofore, for the benefit of this association; and each agree to do so in an efficient and economical manner, and that their disbursements shall be subject to examination and approval or disapproval as herein provided." Each member is required to keep full and correct accounts of the business done by him, including all receipts and disbursements, and render statements thereof at stated intervals to the association. The agreement covers all business done by any of the members in San Francisco and the other ports in the state, and provides that any member violating any provision of the contract shall pay to the association a certain amount as liquidated damages.

It is contended that the contract contemplates an illegal scheme and combination to stifle competition in the stevedoring business, and is in restraint of trade, and that its effect is to create a monopoly; and that in these respects it contravenes public policy, and is opposed to good morals, and so constitutes no proper basis for an action either at law or in equity. We are unable to coincide in this construction of the contract, or to perceive anything therein which renders it invalid upon the grounds stated. The objection that its effect is to create a monopoly in and unduly restrict the business of stevedoring does not find support in its terms. A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not monopoly. Webster defines it as "the sole power of dealing in any species of goods," and Bouvier as "the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise." And these definitions accord with that given by later writers. Spell. Trusts, § 133. An agreement, the purpose or effect of which is to create a monopoly, is unlawful if it relate to some staple commodity, or thing of general requirement and use or of necessity, and not something of mere luxury or convenience. Assuming that the business of stevedoring is a thing which is the proper subject of a monopoly within this definition, there is nothing in this agreement to render it obnoxious to that objection, nor anything to show that it will operate to unlawfully restrain trade. It nowhere appears therefrom that the parties to this contract, by the combination of their business interests provided for, are in the control, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or control the price of such labor or business. There is absolutely nothing to show that they comprise more than the most insignificant part or fraction, either in number or volume of business, of those engaged in that trade in this community. We are not at liberty to indulge in inferences which would restrict the parties in their right to combine their interests. Parties are to be given the widest latitude to make contracts with reference to their private interests (Printing Co. v. Sampson, L. R. 19 Eq. 465), and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. Appellant says that the purpose of this contract is expressly declared as that of "controlling the business of stevedoring," and that this implies an improper restriction of that business and a monopoly. But the language of the contract is, "to govern and control the business of master stevedores, to be carried on by its members." This is a very different thing from a combination to control the entire business of stevedoring. Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. Say the supreme court of Illinois, in People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co., 20 Ill. App. 492: "The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern cases. Maule, J., in Proctor v. Sargent, 2 Scott, N. R. 289, remarked that: 'Many persons who are well informed upon the subject entertain an opinion that the public would be better served if, by permitting restrictions of this kind, encouragement were held out to individuals to embark large capitals in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient.' Greenhood, Pub. Pol. 689, and cases cited." And in Skrainka v. Scharringhausen, 8 Mo. App. 522, it is said: "The old doctrine of the common law that contracts in restraint of trade are void is no longer to be rigorously insisted upon precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions, as the laws of trade have become better understood during the development of our commercial system, and the changes which have been introduced in the social system. Presbury v. Fisher, 18 Mo. 50; Long v. Towl, 42 Mo. 545. It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade."

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[1] Rehearing denied.

We find nothing in the terms of the present agreement which would necessarily work an unreasonable restriction in the manner of conducting the business in question, or which would necessarily interfere with the freedom or right of others not parties to the contract to engage in and carry on such business. The parties themselves, it is true, have combined their business as severally carried on by them, and have agreed to be bound by a schedule or rate of charges to be fixed by the association; but this in itself is not an unlawful restraint of trade so long as it does not appear that the rates to be charged are unreasonable, or the restriction such as to preclude a fair competition with others engaged in the business. In Collins v. Locke, 4 App. Cas. 674, it is held that where the object of an agreement was to parcel out the stevedoring business of the port of Melbourne among the parties to it, and so prevent competition, at least among themselves, and reasonably keep up the price, it was not invalid, though its effect might be to create a partial restraint upon the power of the parties to exercise their trade. In Association v. Walsh, 2 Daly, 1, where an agreement not materially unlike the present was entered into between master stevedores, fixing a rate of prices to be charged by the members in their business, and making a penalty for any member doing work for less, and an action was brought to enforce such penalty for a default by one of the members, it was held that such an association was not an unlawful combination, as injurious to trade or commerce, nor the restrictions unlawful, as being in restraint of trade. "An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal, as being in restraint of trade, unless it appears that they have a monopoly of that product." Ray, Contract. Lim. p. 223, and cases there cited. See, also, People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co., supra; Skrainka v. Scharringhausen, supra; Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (U. C.) 542; Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629. In Ontario Salt Co. v. Merchants' Salt Co., supra, speaking of an agreement of similar import between salt manufacturers to keep up the price of that commodity, it is said: "I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price; and nothing more than this has been agreed to by the parties here." We find nothing necessarily inconsistent with the doctrine of these cases in the cases cited by appellants. In the case of Factor Co. v. Adler, 90 Cal. 117, 27 Pac. 37, the language relied upon has express reference to contracts "entered into with the object and view of controlling and necessarily suppressing the supply, and thereby enhancing the price of articles of actual necessity." In Lumber Co. v. Hayes, 76 Cal. 387, 393, 18 Pac. 391, 393, in the language of the court: "The very essence and mainspring of the agreement—the illegal object—'was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured.'" In Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, the contract precluded the parties absolutely from shipping to, or selling the commodity within, a large part of the territory of the United States, and restricted the output of the powder within the territory wherein the parties were at liberty to sell; and it was held that the contract was void, as in restraint of trade. The cases from other states relied upon are as clearly distinguishable from the present as are the foregoing. After a careful review of all the authorities, we are unable to say from the terms of the present contract that it, to any extent, trenches upon the rule of public policy invoked, or that there is anything within its provisions which should preclude the parties thereto from enforcing it. This conclusion renders the motion to dismiss the appeal of no consequence. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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114 Cal. 588

## McMAHON v. THOMAS et al. (S. F. 359.)

(Supreme Court of California. Oct. 24, 1896.)

NEW TRIAL — NOTICE OF MOTION — ATTORNEY OF RECORD—WAIVER OF DEFECTS.

1. A notice of motion for a new trial is defective unless signed by the attorney of record for the moving party.

2. M. was attorney of record for defendants on a trial wherein they recovered judgment, but on appeal L. appeared as one of the attorneys, signing his name to the notice of appeal, and making the argument. In a second trial M. appeared, and moved that J. be substituted as defendants' attorney, but no formal substitution was made. J. conducted the second trial for defendants, and, after judgment against them, notice of a motion for new trial was served on plaintiff, which was signed by L. alone. *Held*, that the notice was insufficient, because not signed by an attorney of record.

3. Plaintiff did not waive his objection to such defect by acquiescing in L.'s appearance on the appeal.

Department 1. Appeal from superior court, San Benito county; John H. Logan, Judge.

Action by one McMahon against Thomas and others. From a judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

L. W. Jefferson and William A. Beasly, for appellants. Briggs & Hudner, for respondent.

VAN FLEET, J. At the hearing in the court below of the defendants' motion for a new trial, which was made upon the minutes of the court, plaintiff objected to the hearing, and asked that the motion be denied, upon the ground that no proper notice of the motion had been given, in that the notice of motion was not signed by the attorney of record of defendants in the cause. The judge reserved his ruling on the objection, stating that he would consider and determine the same in disposing of the motion. Subsequently he made an order denying the motion for a new trial, from which order defendants have appealed; and plaintiff, having preserved his said objection in the settlement of the statement, now renews the objection in this court, and asks that the order denying a new trial be affirmed upon that ground, without inquiry into the merits. If the objection is well taken, this would seem to be the proper practice. Gumpel v. Castagnetto, 97 Cal. 16, 31 Pac. 898; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082.

G. B. Montgomery was the attorney of record for the defendants in the court below. He alone signed the answer. The first trial resulted in a judgment for defendants. Plaintiff moved for a new trial, which was granted, and from that order the defendants appealed to this court. 39 Pac. 783. Upon that appeal L. W. Jefferson, Esq., appeared as one of the attorneys for defendants. He signed his name with that of the attorney of record to the notice of appeal, and also to the stipulation as to the correctness of the transcript thereon, and he argued that appeal in this court. That order being affirmed, the case went back for a new trial, and when it came up in the lower court Montgomery, the attorney of record, appeared, and, as recited in the statement, "moved the court that J. J. May, Esq., be substituted as attorney of the defendants for the attorneys theretofore of said defendants, and upon said motion of said Montgomery the court remarked, 'Very well; file your written consent;' but no consent of either of the defendants, or their said attorneys, or either of them, was filed with the clerk, or entered upon the minutes, and no notice was given from attorney to client, or client to attorney, at said or any other time, of any application for such order. Thereupon said J. J. May alone tried said cause on behalf of the defendants." That trial resulted in a verdict for plaintiff, upon which the present judgment was entered. Within due time the notice of motion here in question, asking a new trial on behalf of the defendants, was served on plaintiff's attorneys. This notice was signed by L. W. Jefferson alone, as attorney for the defendants. Subsequent to the giving of said notice, on July 22, 1895, when the motion was first on the calendar of the superior court for hearing, Jefferson appeared, and had the clerk continue the same to a later date. This was in the presence of counsel for plaintiff, who signified his assent by saying, "Very well."

It is conceded that no formal substitution of attorneys has ever been had in said cause, and the questions arising are: (1) Do the facts stated, which all appear from the settled statement, show the service of any authorized notice of motion? And, (2) if not, has plaintiff waived the right of objection thereto? That no attorney, other than the attorney of record, is authorized to sign a notice of motion for a new trial has been held in a number of cases, and may now be regarded as well settled. It was so held in Hobbs v. Duff, 43 Cal. 491. In that case there were several defendants, Mr. G. F. Sharp being the attorney of record for the defendant Duff. The notice of intention was signed, "G. F. & W. H. Sharp, Attorneys for the Defendants." Neither member of the firm was the attorney of record for any defendant but Duff, and it was held that the notice was ineffectual as to any defendant but Duff. So in Prescott v. Salthouse, 53 Cal. 221, the same ruling was had. The facts of that case were not entirely dissimilar from those before us. Messrs. Baggs & Tully were the attorneys of record for the plaintiff. At the trial the court made an order "that Julius Lee be, and he is hereby, associated with Messrs. Baggs & Tully for the plaintiff." This order the clerk omitted to enter, and it was afterwards entered nunc pro tunc as of the day it was made. Mr. Lee participated in the trial on behalf of the plaintiff, and the plaintiff's notice of intention to move for a new trial was signed by him alone. Objections to the sufficiency of the notice, having been properly reserved, were sustained by this court, it being held that an order associating an attorney is unknown to the practice as prescribed by the Code of Civil Procedure; that the Code provides only for the substitution of an attorney, and that without such substitution an attorney has no authority to sign a notice of motion for a new trial. See, also, Whittle v. Renner, 55 Cal. 395. It is clear, therefore, that the notice in question was of no avail, unless the objection thereto has been waived. Respondent urges that such objection has been waived by the fact that Mr. Jefferson has been recognized by the plaintiff's attorney as an attorney of record in the case. This claim is based upon the fact of Mr. Jefferson's appearing without objection as attorney for the defendants on the former appeal, above mentioned. But we do not think that the recognition by the attorneys for the plaintiff of Mr. Jefferson's right to appear in that proceeding can be in any respect construed as a waiver by them of the present objection. It has been repeatedly held that an appeal is an independent proceeding, and that an appellant has the right to select any counsel to represent him upon an appeal, regardless of who may have appeared as attorney of record in the court below. The record does not show that Mr. Jefferson has ever been dealt with by the attorneys for plaintiff other than as the attorney prosecuting said appeal. Furthermore, as appears from the facts above stated, Mr. Jefferson was not recognized by the defendants themselves as their attorney of record, since it there appears that when it was deemed desirable to have Mr. J. J. May substituted, Mr. Montgomery, the attorney of record, appeared for the purpose of making that motion.

It is further contended that the question as to the regularity of the notice of motion for a new trial is concluded by the recital found in the bill of exceptions that: "In due time, to wit, on July 11, 1895, defendants filed herein, and duly served upon plaintiff's attorneys, their notice of motion for a new trial, specifying therein the grounds upon which the motion would be made," etc. If the recitals of the statement stopped there, there might be some ground for the claim based upon it, but the judge immediately proceeds to recite the facts as to the service of notice which we have above stated, and which show that no such effect was intended by the language just quoted as is sought to be placed upon it by the defendants. We find, in fact, nothing in the record, which tends to show a waiver by the plaintiff of his right to avail himself of the objection now urged; and, it appearing that this objection has been properly taken and preserved, and that it is one which goes to the very life of the motion, we see no escape—however unsatisfactory to dispose of a case upon technicality—from giving plaintiff its benefit by affirming the order upon that ground. Upon the appeal from the judgment no point is urged for a reversal. The judgment and order are therefore affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

115 Cal. 6

## PEOPLE v. PAULSELL. (Cr. 175.)

(Supreme Court of California. Nov. 7, 1896.)

CRIMINAL LAW—INSTRUCTION—REASONABLE DOUBT.

The refusal of an instruction giving the well-established and approved definition of a reasonable doubt, and the giving, instead, of one stating that such doubt must be one based on "common sense," is erroneous.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

W. E. Paulsell was convicted of robbery, and appeals from the judgment, and from an order denying his motion for a new trial. Reversed.

The instrument referred to in the opinion was as follows: "Now, the reasonable doubt you have heard me speak of means precisely what the words import,—a fair doubt, growing out of the evidence in the case, based on reason and common sense."

T. C. Coogan and Reddy, Campbell & Metson, for appellant. Atty. Gen. Fitzgerald and C. N. Post, Dep. Atty. Gen., for the People.

McFARLAND, J. The judgment must be reversed, and a new trial ordered, on account of instructions given and refused upon the subject of reasonable doubt,—a subject upon which we had hoped there would be no further difficulty, except where instructions had been presented upon that subject by the defendant. We have frequently held that, where the well-known definition of "reasonable doubt" of Chief Justice Shaw in the Webster Case had been given to the jury, we would be loth to reverse a judgment for the refusal of the court to give other instructions upon the subject; and we have frequently warned trial courts against departing to any considerable extent from that definition. In People v. Chun Heong, 86 Cal. 332, 24 Pac. 1022, the court, through Beatty, C. J., said: "We cannot, however, abstain from again expressing the hope that the trial judges who have made use of this form of instruction will eventually see the propriety of returning to the approved definition, which since the time of Chief Justice Shaw has never been improved upon." In People v. Kernaghan, 72 Cal. 610, 14 Pac. 566, we said: "For instance, the definition—or, rather, description—of 'reasonable doubt' given by Chief Justice Shaw in the Webster Case has been adopted by this court, and by nearly all American courts, as a statement of that mental condition sufficiently accurate. Therefore, where a nisi prius court had given the language used by Chief Justice Shaw, and had confined itself to such language, we would be slow to reverse the case, although other instructions upon the subject not objectionable had been asked by defendant, and had been refused." In People v. Lenon, 79 Cal. 629, 21 Pac. 969, we said: "Most instructions of courts on the old subject of reasonable doubt turn out to be erroneous when they ambitiously step outside of well-established bounds." See, also, People v. Lee Sare Bo, 72 Cal. 626, 14 Pac. 310. If, in the case at bar, the court had given the instruction which has been so often approved by this court, and the point of appellant had been that other instructions were inconsistent with the said Shaw definition, then we would have been compelled to look closely into the other instructions to see if there was any such inconsistency which was material. But in the case at bar it happens that the appellant himself asked the court to give said definition of reasonable doubt which is found in the said Webster Case, in the following language: "In the words of our own supreme court, a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." And the court refused to give said instruction upon the ground that it was "given by the court elsewhere." Of course, it was clearly error to refuse this instruction. It ought to have been given, even if the court intended to say anything further upon the subject. We do not feel ourselves called upon to critically examine what is claimed to be the equivalent of the said refused instruction, and to determine upon a close analysis whether what the court said was, in fact, the exact equivalent of the said instruction which it refused to give. If experimental departures from the well-established language sanctioned by all courts upon the subject of reasonable doubt are to be here allowed, and each trial court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel. In the present case it is sufficient to say that the court introduced the new and unused phrase "common sense," and told the jury that the doubt must be based upon that. Counsel for appellant argues, after giving some of the definitions of "common sense" to be found in the dictionaries, that this language is merely the equivalent of saying that a jury should convict if they are satisfied of the guilt of the defendant to such a certainty as would influence their minds in the important affairs of life, which was held to be unsound by this court in People v. Brannon, 47 Cal. 96, People v. Ah Sing, 51 Cal. 372, and People v. Bemmerly, 87 Cal. 121, 25 Pac. 266. It is sufficient to say, however, that the phrase "common sense" is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own sense; and there is no warrant for the unnecessary use of such a term when there is apt language to express the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used. For this reason, the judgment must be reversed. Section 2061, Code Civ. Proc., provides: "That a witness false in one part of his testimony is to be distrusted in others." The court, in instructing the jury of its own motion, unfortunately changed the statutory language so as to make it as follows: "A witness proved to be willfully false in one part of his testimony may be distrusted in other parts of it." While the court undoubtedly should have been careful to use on this subject the language of the statute, we are not prepared to say that the judgment should be reversed on this account. But upon another trial the court, no doubt, will be more careful to follow the statutory language.

In its charge to the jury upon the subject of circumstantial evidence, the court read quite a long extract from the opinion of another court in another case, which contained really quite an argument in favor of the conclusiveness of circumstantial evidence, and a statement that such evidence was sufficient if it warranted a belief "as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns"; and the court then told the jury that the part of said opinion just quoted was not the law in this state. This course, we think, was improper. It is usually the province of the court to tell the jury what the law is, not what it is not; and, while we are not called upon to say whether or not such a course would warrant a reversal of the judgment, we may say, at least, that it is not commendable. The court also instructed the jury upon this subject as follows: "The doctrine of circumstantial evidence, in brief, is this: that all the circumstances must tend to establish the guilt of the defendant, and be inconsistent with any other rational hypothesis." This language is somewhat ambiguous, and might be misleading. All of the circumstances taken together should establish the guilt of the defendant. They should do something more than merely tend to establish such guilt.

It is contended by the appellant that the court erred in overruling challenges to certain jurors, upon the ground of bias. We do not think, however, that this contention can be maintained, and the same questions will probably not arise upon another trial.

We see no other points necessary to be specially noticed. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

I concur: HENSHAW, J.

TEMPLE, J. I concur in the judgment and in the opinion, except the reference to section 2061, Code Civ. Proc. The instruction should be given only when made proper by some evidence. It is then to tell the jury that they must distrust a particular witness. This is an interference with the province of the jury which the legislature cannot authorize. It is prohibited by section 19, art. 6, of the constitution. See Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481.

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115 Cal. 1

## SAN JOAQUIN LUMBER CO. v. WELTON et al. (Sac. 104.)[1]

(Supreme Court of California. Nov. 7, 1896.)

MECHANIC'S LIEN — PLEADING — SUFFICIENCY OF COMPLAINT.

In an action to enforce an alleged lien on certain buildings, an allegation that "said buildings are in an unfinished condition, that work ceased thereon on or about the 1st day of April, 1894, and has not been resumed," is sufficient, in regard to the time of the cessation of the work, in absence of a special demurrer thereto, to admit proof and a finding of the exact date of such cessation.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by the San Joaquin Lumber Company against S. L. Welton, M. C. and H. J. Sadler, and others, to enforce an alleged lien. From a judgment in favor of plaintiff, defendants Sadler appeal. Affirmed.

Fred. H. Hood, for appellants. Davis & Allen, for respondent.

VAN CLIEF, C. The action is to enforce an alleged lien on certain buildings for the value of materials ($186.74) furnished by plaintiff to be used, and which were used, in the construction of said buildings. The plaintiff had judgment by default, all the defendants having failed to appear. The defendants H. J. and M. C. Sadler have appealed from the judgment on the judgment roll.

A reversal of the judgment is asked by appellants on the ground that no cause of action is stated in the complaint. The alleged defect in the complaint is that it does not show that plaintiff's claim of lien was filed for record within the time prescribed by section 1187 of the Code of Civil Procedure, as amended March 15, 1887, which requires a furnisher of materials to file his claim of lien within 30 days after completion of the building, etc.; and that "cessation from labor for thirty days upon any unfinished contract or upon any unfinished building * * * shall be deemed equivalent to a completion thereof." It is alleged in the complaint, which was filed June 22, 1894, "that said buildings are in an unfinished condition; that work ceased thereon on or about the 1st day of April, 1894, and has not been resumed." It is also alleged that plaintiff's claim of lien was filed and recorded on May 8, 1894. If the work ceased on April 1st, or at any time before April 7th, the buildings were properly deemed completed before May 8th, when the claim of lien was filed for record, and the filing was within 30 days after such completion. It is claimed by appellant, however, that a cessation of work on April 9th would be within the meaning of the phrase "on or about the first day of April." But, even if this be conceded,

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[1] For opinion on application for modification, see 46 Pac. 1057.

I think it only follows that the allegation as to time of the cessation of work was uncertain, and subject only to a special demurrer on that ground; and that, in the absence of such demurrer, the plaintiff was entitled to prove that the work ceased on the 1st day of April, 1894. It appears that evidence was introduced and considered, and that the court expressly found "that the work of constructing and erecting said dwelling house and barn ceased on the 1st day of April, 1894, and said buildings were then left in an unfinished condition, and still remain in an unfinished condition." This finding supplied the only want of certainty in the complaint, since it was alleged in the complaint and confessed by the default that after the cessation the work had not been resumed at the time this action was commenced. It follows that the only question worthy of consideration is whether or not the allegation as to the time of the cessation of the work was sufficient, in the absence of a special demurrer thereto, to admit proof and a finding of the exact date of such cessation.

The line of distinction between an uncertain or defective averment of a material fact and a total want of such averment is well defined by the authorities, especially in this state; and it has been uniformly held that, if the defect in the averment be merely that of uncertainty, it will be waived by failure to demur specially on the ground of uncertainty, and, of course, by a default. In Bates v. Babcock, 95 Cal. 482, 30 Pac. 606, this court said: "It is only where there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but, if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof. * * *" To the same effect are the cases of San Francisco v. Pennie, 93 Cal. 468, 29 Pac. 66, and Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659. In Garner v. Marshall, 9 Cal. 269, Mr. Justice Field said: "The general rule is that, wherever facts are not expressly stated which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment." Citing Steph. Pl. 149. In the case at bar it cannot be doubted that the averment in question, by fair and reasonable intendment, comprehends the fact found by the court, namely, that work on the buildings ceased on the 1st day of April, 1894. As to the continuous duration of the cessation of the work for more than 30 days before the filing for record, the claim of lien, and that the claim of lien was filed within 30 days after the constructive completion of the buildings, the complaint is sufficiently certain. I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(114 Cal. 690)

HANLEY et al. v. HANLEY. (S. F. 446.)

(Supreme Court of California. Nov. 6, 1896.)

JUDGMENT—COLLATERAL ATTACK FOR FRAUD—DECREE SETTING APART HOMESTEAD TO WIDOW.

1. A judgment or decree can be collaterally attacked for fraud only when such fraud is extrinsic or collateral to the matter tried, and an independent action cannot be maintained in equity to set aside a decree allotting a homestead to the widow of a decedent, on the ground that in procuring such decree the widow misrepresented to the court the facts as to the property.

2. A proceeding to set aside a homestead to the widow of a decedent is in rem, and the decree binds all parties interested in the estate, without personal notice.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by John Hanley and Michael Hanley against Ellen Hanley. This court sustained a demurrer to the complaint, and rendered judgment for defendant, from which plaintiffs appeal. Affirmed.

Sullivan & Sullivan, for appellants. Joseph D. Tobin and Andrew G. Maguire, for appellee.

McFARLAND, J. This is an equitable action, brought by the plaintiffs, as heirs of one Patrick Hanley, deceased, to vacate and set aside a certain decree of the superior court rendered in the administration of the estate of said Patrick Hanley, by which certain real property was set aside to the defendant, Ellen Hanley, the widow of said deceased, as a homestead. A demurrer to the complaint was sustained by the court below, and judgment was rendered for the defendant, and from such judgment plaintiffs appealed.

The complaint does not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained. The main averments of the complaint are that the premises in dispute were the separate property of said Patrick Hanley, deceased; and that said respondent, Ellen Hanley, willfully, falsely, and fraudulently represented to the court and testified that the said premises were community property, and also falsely represented that a certain declaration of homestead had been filed on said premises while she and her husband were actually residing thereon. The decree of the superior court setting apart said homestead was final, unless reversed on appeal; and it cannot be attacked collaterally in an independ ent action upon the grounds set up in the complaint. A judgment or decree of a court of competent jurisdiction can be set aside in an independent equitable proceeding for fraud only where the fraud alleged was extrinsic or collateral to the matter which was tried and determined by such court; and such is not the character of the fraud alleged in the complaint in this action. In U. S. v. Throckmorton, 98 U. S. 61, the court declared that the cases in which a court of equity is authorized to interfere and set aside a former judgment on the ground of fraud are those only where the fraud was extrinsic or collateral to the matter tried. This rule has been declared and followed in a large number of cases decided by this court: Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537; Langdon v. Blackburn, 109 Cal. 26, 41 Pac. 814; Gruwell v. Seybolt, 82 Cal. 10, 22 Pac. 938; In re Moore's Estate, 96 Cal. 523, 31 Pac. 584; In re Griffith's Estate, 84 Cal. 113, 114, 23 Pac. 528, and 24 Pac. 381; Fealey v. Fealey, 104 Cal. 355, 38 Pac. 49. In Pico v. Cohn, supra, this court said: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the question examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. * * * What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to help a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest." That was a case appealing very strongly to equitable considerations, for there it clearly appeared that perjury had been committed in a case where the judgment was rendered which was sought to be set aside. Nevertheless, the rule of the conclusiveness of the former judgment was applied. A number of the cases above cited were almost exactly like the one here at bar; that is, they were cases in which it was sought to set aside a decree setting apart a homestead. This was particularly the case in Gruwell v. Seybolt and Fealey v. Fealey. The latter case can hardly be distinguished in any way from the case at bar. The same principle was announced in the very late case of Lynch v. Rooney (Cal.) 44 Pac. 565. There is nothing in the contention of appellants that they had no notice of the proceeding to set aside the homestead. The proceeding was in rem, and all parties interested were bound by it without personal notice. See Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769, and cases there cited. The appellants rely somewhat upon the case of Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358, but that case was commented upon and distinguished from cases coming within the general rule above cited by the opinion of the court in Fealey v. Fealey, supra, in which it was held that the concealment perpetrated in Wickersham v. Comerford constituted a fraud which was extrinsic and collateral. The case at bar comes clearly and fully within the rule declared in the cases above cited. The judgment appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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(115 Cal. 14)

## SCATENA et al. v. CALIFORNIA CANNERIES CO. (S. F. 337.)[1]

(Supreme Court of California. Nov. 7, 1896.)

MOTION—ORDER THEREON—APPEAL.

**A party cannot complain of an order made in response to his own motion.**

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by L. Scatena and others against the California Canneries Company for goods sold and delivered. From a judgment in favor of plaintiffs, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Reinstein & Eisner, for appellant. Estee & Miller and J. H. Miller, for respondents.

SEARLS, C. Action to recover a balance of $866.47 on account of goods, wares, and merchandise sold and delivered to defendant (a corporation) by the plaintiffs as co-partners under the firm name and style of L. Scatena & Co. Defendant answered, denying many of the allegations of the complaint. It also set up a counterclaim, under which it demanded damages against the plaintiffs, as co-partners aforesaid, in the sum of $1,500, on account of a breach of a contract entered into by and between plaintiffs and defendant for the delivery of 150 tons of fruit at $20 per ton. Plaintiffs demurred to the cause of action contained in the counterclaim, which demurrer was undisposed of until the cause was on trial, when, as appears by the record, the demurrer was, on motion of counsel for defendant, sustained. Thereafter counsel for the defendant offered testimony in support of its counterclaim, which was rejected by the court. Plaintiffs had judgment, from which, and from an order denying its motion for a new trial, defendant appeals. The order of the court sustaining the demurrer to its counterclaim, and the ruling of the court in excluding evidence in support thereof, are the only errors of any importance assigned. The action of counsel for defendant in moving the court to sustain a demurrer to its answer of counterclaim is so extraordinary that we should doubt the correctness of the record but for the fact which also appears, viz. that defendant had brought suit against plaintiffs for a breach of the same contract set out in the counterclaim, which action was set down for trial on the same day with this cause, and was doubtless heard and determined. Be that as it may, the demurrer having been sustained by request of appellant, it cannot now complain on account thereof.

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[1] Rehearing denied.

2. The demurrer having been sustained to the counterclaim, there was no issue to which the proffered evidence in support thereof could apply, and hence no error in its rejection. The evidence was ample to support the findings. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(114 Cal. 681)

## BERGTHOLDT v. PORTER BROS. CO.

(Sac. 184.)[1]

(Supreme Court of California. Nov. 6, 1896.)

AGENCY—EVIDENCE—CURING ERROR.

1. As evidence that M. was the agent of a corporation, letters to him from S., its vice president and general manager, directing him to placard the buildings in which he was doing business with the corporation's name, photographs showing that they were marked as directed, letter heads and stationery showing that the business was conducted with M. as agent, and shipping receipts and bills of lading all showing the same thing, and seen by S., are admissible.

2. Evidence that M. employed plaintiff for and on account of defendant is admissible to show that plaintiff in good faith believed himself to be defendant's servant, though not to prove agency of M.

3. Error, if any, in refusing to allow defendant to ask certain questions, is cured by the court's offering to open the case, and permit such questions.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by Bergtholdt against the Porter Brothers Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

L. T. Hatfield, for appellant. D. E. Alexander and Alexander, Miller & Gardner, for respondent.

SEARLS, C. Action to recover for services rendered by plaintiff to the defendant, viz. a balance of $689.12, and, as assignee of F. H. Howell, to recover $536.93 for services rendered to defendant by said Howell. Plaintiff had judgment for $1,226.05 and costs of suit. Defendant appeals from the judgment, and supports its appeal by a bill of exceptions.

The Porter Brothers Company, the defendant, was and is a corporation organized and existing under and by virtue of the laws of the state of Illinois. Since 1892, and prior to that date, it has been engaged in shipping fruit from sundry points in California to Chicago, New York, Omaha, Minneapolis, and perhaps some other points east, where it sells and disposes thereof. Its head office in California seems to have been at Sacramento, and Nate R. Salsbury was its vice president and general manager for California. Newcastle, Penryn, and Loomis are stations upon the Central Pacific Railroad, situate in the fruit region of Placer county, Cal. A. Moger located at Newcastle in 1890, or early in the year 1891, and engaged in shipping fresh or green fruit, as it is termed, from that point east, consigning it mostly to the Porter Brothers Company, Chicago, for sale. This fruit was either purchased from the growers, or received on consignment for shipment and sale. In connection with the business, Moger dealt in and furnished to fruit growers packing material, consisting of lumber or shooks for boxes, paper, etc., which last business yielded a profit. On the 2d of May, 1891, the plaintiff entered the employ of Moger as a bookkeeper at Newcastle, at a monthly salary of $75, and continued to work as such bookkeeper at the same place until May 15, 1895. On June (or January) 1, 1892, plaintiff was informed by Moger that the defendant corporation had purchased the property and business at Newcastle, and that henceforth his employment would be under defendant at $75 per month until May, 1892, and thereafter at $100 per month. Moger also, early in 1892, secured warehouses for the receipt and shipment of fruit at Penryn and Loomis. Thus far there is no substantial conflict in the testimony. But here a sharp conflict occurs in the testimony as to whether defendant assumed and conducted the business in Placer county from about January, 1892, up to 1895, on its own account, with Moger as its managing agent, or whether Moger was simply a soliciting agent for defendant, with no authority to hire, on behalf of defendant, the necessary assistants for the transaction of the business. F. H. Howell, who assigned his claim to plaintiff, was employed as a shipping clerk in April, 1892, by Moger, who professed to act as the agent of defendant, similarly with plaintiff, and need not be specially mentioned hereafter, as the evidence applies equally to both Howell and plaintiff. The court below found that both plaintiff and Howell were employed by defendant, and that their services were necessary to the conduct of the business. These findings are attacked by appellant as being unsupported by the evidence. Their propriety depends upon the authority of Moger, as the agent, actual or ostensible, of defendant, to employ them on its behalf, for the reason that there is no pretense that they were employed on behalf of defendant, except through the agency of Moger.

We might content ourselves in support of the findings by the trite statement that there is a substantial conflict in the evidence, and hence that the findings will not be disturbed.

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[1] Rehearing denied.

We will, however, refer to some of the evidence in support of the deductions of fact reached by the trial court, viz.: (1) Prior to January 1, 1892, the warehouse at Newcastle was owned by the Newcastle Fruit Association, and Salsbury, the vice president of the defendant, had, on behalf of defendant, loaned $3,000 to the owners, secured by a mortgage on the property. Defendant had negotiated for the purchase of the building, but thought the price too high and did not purchase. A. Moger purchased the building in 1892 (in October or November), and gave a mortgage thereon to Salsbury (for defendant) of $3,700, in payment of which he conveyed the property to Salsbury (for defendant) in November, 1894. The land upon which the building stood was the property of the railroad company, and most, if not all, the time since January, 1892, defendant has been the lessee thereof. (2) On the 29th day of February, 1892, Nate R. Salsbury wrote A. Moger, from San Francisco, a letter in which, after speaking of having a switch or side track put in at the warehouse, he continued as follows: "If you secure the packing house at Loomis, I would suggest that you have a large sign painted on the roof, 'Porter Brothers Company, Chicago, New York, Minneapolis, Omaha. A. Moger, Agent.' Also have a sign painted for your house at Penryn, and get your sign painted on the Newcastle house as soon as possible." In March these signs were painted on the buildings. That at Newcastle, as is shown by a photograph in evidence, is as follows: On the roof, in large letters, "Porter Brothers Company;" and on the front, "Porter Bro's Company, Chicago, New York, Omaha, Minneapolis." The packing house at Penryn was similarly branded. Salsbury was at Newcastle several times in 1892, and saw these signs. (3) On or about January, 1892, the blank stationery used in the business, such as letter heads, receipts, bills of lading, etc., were changed. The letter heads were printed as follows: "Porter Brothers Company. A. Moger, Agent. Shipper Choice Mountain Fruit. Porter Brothers Company, Chicago, New York, Omaha, Boston, Philadelphia, New Orleans, Montreal." That defendant was aware of this mode of advertising is evidenced by the introduction in evidence of letters thus headed received by it from Moger, and by proof that Salsbury visited Newcastle, examined the stationery thus or similarly headed, and made no objections thereto. (4) The fruit was shipped by defendant as consignor to defendant as consignee at various points east, where defendant had branches or places of business. The following is a sample of shipping receipts: "Received by Southern Pacific Company, from Porter Brothers Company, one car of green fruit, to Porter Brothers Company, Chicago." These receipts were at once sent to the Sacramento office, which was in charge of Salsbury, vice president and manager, as aforesaid. (5) May 3, 1893, the Newcastle News, a newspaper published at Newcastle, contained an article on the extended business of the Porter Brothers Company, with cuts purporting to be pictures of Washington Porter and Fred Porter, etc., in which article the following paragraph occurs: "Porter Brothers Company are represented in Placer county by Captain A. Moger, assisted by Wallace Dewe at Penryn, and J. E. French at Loomis. The company will also be represented at Auburn." Extra copies of this paper were ordered, and the publisher thought he sent one to the company at Sacramento, but it was only a recollection and he was not sure. (6) A. Moger shipped some fruit to local points, say Reno, Truckee, Oregon, etc. This was shipped in his own name. (7) In 1894, Moger failed to disburse to fruit growers and others moneys forwarded him by defendant, and from about June, 1894, a change was made in the method of shipment, and checks were sent directly to shippers for balances due them for fruit. In 1895, defendant settled the delinquencies of Moger by paying in full for fruit shipped through to it, and 50 cents on the dollar for fruit purchased by Moger and shipped elsewhere. Other circumstances are in proof, but it is believed the foregoing are sufficient to warrant the court in its findings.

Errors of law: Nearly all the testimony on the part of plaintiff was objected to by counsel for defendant, and some 40 errors are assigned upon the rulings of the court admitting or rejecting testimony. Counsel for appellant has argued the questions thus raised in a general and discursive way, without much reference to them individually. This method of argument, coupled with the character of the bill of exceptions, which is practically a statement of the evidence as taken by the reporter, intermingled with remarks of counsel and observations of the court, has made the task of ferreting out the questions involved a most difficult one. We find most of the exceptions without merit. Others are ingenious, and, assuming the premises of appellant to be correct, are formidable, but upon a review of the record are found to be untenable. For the sake of greater brevity, we shall merely state the general legal propositions applicable to the case, and refer incidentally to some of the exceptions as coming within the several principles enunciated.

1. Agency and the extent of the power of an agent are questions of fact (Farnum v. Insurance Co., 83 Cal. 246, 23 Pac. 869), and may be established by parol, except in those cases where a written authorization is expressly required by positive law. Carey v. Petroleum Co., 33 Cal. 694. It may be established by circumstantial evidence. Whart. Ag. §§ 44, 121, 126; Burnett v. Fisher, 57 Cal. 152; Lumber Co. v. Krug, 89 Cal. 243, 26 Pac. 902, and cases there cited.

2. Where circumstantial evidence is resorted to for the purpose of establishing an agency, all the facts and circumstances showing the relation of the parties, and throwing light up-

on the character of such relation, are admissible in evidence. Ellis v. Crawford, 39 Cal. 526, 528.

3. If A. sells goods to B., supposing him to be a principal, but afterwards discovers him to be an agent of C. in the transaction, he may resort to C. for payment. Lumber Co. v. Krug, 89 Cal. 244, 26 Pac. 902, and cases there cited; Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518.

4. The mere declarations of a party are not proof that he is agent for another. People v. Dye, 75 Cal. 108, 16 Pac. 537; Hubback v. Ross, 96 Cal. 426, 31 Pac. 353. But, notwithstanding the foregoing rule, it is proper to show that a party dealt with a third party as an assumed agent of another, not for the purpose of proving the agency or its extent, but to show that such third party understood he was dealing with the other as an agent, and not as a principal. Swinnerton v. Development Co. (decided April 13, 1896) 44 Pac. 719.

Under the foregoing propositions, the letters from Salsbury to Moger directing him to placard the buildings with the name of the corporation defendant, and relating to various matters touching the business, the photographs showing that the buildings were marked as directed, the letter heads and other stationery showing that the business was conducted by defendant, with Moger as agent, the shipping receipts and bills of lading showing the same thing, and many other circumstances, were admissible as tending to show that the business at Newcastle, Penryn, and Loomis was conducted by defendant, through Moger as its general agent, aided by subordinates at Penryn and Loomis. The evidence that Moger employed plaintiff for and on account of the defendant was properly admitted. The court repeatedly stated during the trial that the declarations of Moger were not admissible to prove his agency or authority, and they were never in evidence for such purpose. The court did, however, admit evidence tending to show that from a given time the employment of plaintiff by Moger was for the defendant, as tending to show that plaintiff in good faith believed himself to be a servant of defendant. This was proper. The declaration of Moger to the effect that he was putting the signs on the building by instructions of defendant's vice president was of no moment, as his written authority and instructions so to do by defendant were in evidence.

The error of the court, if any, in refusing to permit counsel for defendant, on cross-examination of plaintiff, to prove when he received certain letters of defendant, which he produced and offered in evidence, was cured by the action of the court, after the trial closed, in offering to open the case, and permitting defendant to put the proffered questions, which was refused by defendant, unless the case should be opened generally for the reception of testimony.

The other errors complained of do not call for comment. Upon the whole case as made, we see no sufficient cause for reversal, and recommend that the judgment be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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(118 Cal. 393)

## PEOPLE ex rel. DREW v. RODGERS.

(Sac. 88.)[1]

(Supreme Court of California. Nov. 6, 1896.)

CHIEF OF POLICE—VACANCY IN OFFICE—ACTION FOR USURPATION—DISMISSAL—JUDGMENT—RES JUDICATA.

1. Under St. 1871–72, providing (page 243) that one elected chief of police shall hold "for the term of two years and until his successor is elected and qualified," and (page 246) that in case of a vacancy it shall be filled by appointment till the next city election, when a chief shall be elected for the unexpired term, the mere formal election and qualification of one ineligible to the office does not end the term of the incumbent and create a vacancy, so as to permit an appointment and election for an unexpired term.

2. An adjudication, in a proceeding under Code Civ. Proc. § 1111, to contest defendant's right to an office, that he was ineligible because not a citizen of the United States, is conclusive in an action against him for usurpation of the office, though the parties and causes of action are not identical.

3. An action for usurpation should not be dismissed, though the office is abolished before the trial, as judgment against defendant may subject him to a fine, and is a foundation for recovery by the rightful claimant of damages occasioned by the usurpation. Code Civ. Proc. §§ 805, 807, 809.

4. A judgment in an action for usurpation of office that relator be restored to office, and defendant be ousted, though not appropriate in form, because the office had been abolished before trial, cannot be corrected on appeal from an order denying a motion for new trial only.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by the people, on the relation of Warren F. Drew, against John B. Rodgers. Judgment for relator. From an order denying a new trial, defendant appeals. Affirmed.

Atty. Gen. Hart, C. T. Jones, and Johnson, Johnson & Johnson, for appellant. Robt. T. & Wm. H. Devlin, for respondent.

BRITT, C. Action for the usurpation of an office. It was commenced by the attorney general as early as April 29, 1893, and brought to trial February 7, 1894. By its judgment the court declared that the relator, Drew, is entitled to the office of chief of police in the city of Sacramento, and has been so entitled since the 1st day of April, 1890; that defendant Rodgers usurps and intrudes into such office, and has wrongfully held the same and exercised its functions since April 1, 1893; that the relator be admitted and restored to such office; and that defendant be ousted and excluded therefrom. Drew was

[1] Rehearing granted.

elected to said office at the city election held in March, 1890, for the term commencing April 1st following, under a statute providing that he should hold "for the term of two years and until his successor is elected and qualified." St. 1871–72, p. 243. The same act (page 246) provided that in case of a vacancy in the office the board of trustees of the city might fill the same by appointment until the next city election, at which time a chief of police should be elected for the unexpired term. At the city election in March, 1892, Rodgers received a majority of the votes cast for said office, and the proper canvassing board declared him elected thereto for the term next ensuing; but on June 17, 1892, in a proceeding to contest his right, instituted in the superior court under section 1111, Code Civ. Proc., he was adjudged to be ineligible to the office, by reason of alienage, and his election was annulled. He appealed, and the judgment was affirmed by this court in December, 1893. Drew v. Rodgers, 34 Pac. 1081. However, in April, 1892, he forcibly dispossessed the relator of said office, and thenceforward performed its duties; but the relator was at all times ready and willing to perform them, and claimed to be the lawful incumbent. The difficulty of Rodger's alienage having been removed by his naturalization, the board of trustees of the city on June 27, 1892, in form appointed him chief of police to hold until the next city election (this on the assumption that a vacancy existed in the office); and at the next election, in March, 1893 (not the regular time for electing to the office in question) he was again the person receiving the highest number of votes for said office, and was declared elected accordingly. In January, 1894, the new charter of the city of Sacramento went into operation. By its provisions the office of chief of police was created, but made appointive instead of elective, and it is conceded that the office of that name previously existing was abolished. St. 1893, pp. 588, 611.

Appellant contends that by his formal election and qualification in March, 1892, a successor to the relator in said office was elected and qualified, within the meaning of the statute permitting the latter to hold over until the occurrence of that event, and after the expiration of his prescribed term of two years, and that thus such contingent right of the relator to a prolongation of his term was cut off. We differ with appellant. Ineligibility for an office means incapacity to be elected or otherwise chosen thereto. Rodgers was affected with such incapacity in March, 1892, and the votes cast for him were "ineffectual for the purpose of an election." Saunders v. Haynes, 13 Cal. 154; Dryden v. Swinburne, 20 W. Va. 137, and cases cited. There being thus a failure to elect a successor to the relator, the contingency arose upon which he had the right to an extension of his original term. It is claimed that the whole matter is disposed of in appellant's favor by the decision in People v. Ward, 107 Cal. 236, 40 Pac. 538; but in that case—in which the writer was of counsel—the successor had been duly elected and had properly qualified, and the question presented differed widely from that involved here. It results that the alleged appointment of defendant to the office on June 27, 1892, was void, because there was then no vacancy. People v. Tilton, 37 Cal. 614; People v. Edwards, 93 Cal. 153, 28 Pac. 831. And for the same reason the election of Rodgers for the unexpired term in March, 1893, was void; the statute requiring an election for this office in the even-numbered years, and permitting it at other times only in case of a vacancy. St. 1871–72, pp. 243, 246.

The court rightly refused the offer of evidence at the trial that while defendant was yet a minor his mother was married to a citizen; the object being to show that he was really eligible for the office in March, 1892, although the precise matter had been put in issue in the previous case of Drew v. Rodgers, and decided against him. 34 Pac. 1081. The judgment roll in that action was in evidence at the trial of this. True, the parties and the causes of action are not identical; and Drew, the contestant in that case, was a different person from the relator here. But that was a proceeding prosecuted for the purpose of trying the very question whether Rodgers' election was not void because of his ineligibility. Code Civ. Proc. § 1111. It was a matter of public concern (Lord v. Dunster, 79 Cal. 477, 21 Pac. 865), involving the political and legal relations of the contestee, and we see no reason to doubt that the nullity of his election there determined was conclusive upon him in the present action (Code Civ. Proc. § 1908, subd. 1).

It is further argued that the court should have dismissed the proceeding, or have granted a nonsuit, because by the new charter of the city the office in controversy had been abolished before the case came on for trial. Under the statute governing the subject, the removal of the usurper is not the sole object which is or may be accomplished by the proceeding. Judgment may be rendered upon the right of the defendant, and also upon the right of the party, if any, alleged to be entitled to the office. If against the defendant, he must pay the costs, and, at the court's discretion, a fine. It is also the foundation of a recovery by the rightful claimant of damages occasioned by the usurpation. Code Civ. Proc. §§ 805, 807, 809. When, as in this instance, the action has been brought during the usurpation, and such consequences may flow from the judgment, it ought not to be held that the action must abate merely because efflux of time, or other circumstance which does not toll the legal wrong of the intrusion, has put a period to the disputed term. And to this effect is the decided preponderance of authority. People v. Hartwell, 12 Mich. 508; State v. Pierce, 35 Wis. 93; Hunter v. Chandler, 45 Mo. 452; People v. Loomis, 8

Wend. 396; Com. v. Jackson, 45 Pa. St. 59. Some cases cited by appellant—to which may be added Hurd v. Beck (Kan. Sup.) 45 Pac. 92 —are distinguishable. They proceed on the assumption that after the expiration of the usurped term no substantial right was involved.

The judgment is not, in form, appropriate to the state of the case at the time of trial, the office having been abolished; but it cannot be corrected on this appeal, which is from an order denying a motion for a new trial only. There is no error in the record available to defendant, and the order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(114 Cal. 635)

## RANKIN v. NEWMAN et al. (No. 15,857.) [1]

(Supreme Court of California. Nov. 5, 1896.)

SALE—THE CONTRACT—CONSTRUCTION—VALIDITY —PERFORMANCE BY EXECUTOR— APPEAL—REVIEW.

1. A partnership contract provided for an annual inventory and appraisement; that in case of death of one of the partners the "inventory provided for herein" should be taken as soon as possible, to determine the deceased partner's interest; that the survivors should give their 12 equal monthly installment notes in payment of deceased's interest so determined; provided, however, that the surviving partners shall have the option to continue the said co-partnership; the estate of the deceased partner taking the place of the decedent on such terms and conditions as may be agreed upon; the surviving partners and their successors to have the right to continue the business under the name of the old firm. *Held*, that such contract contemplated a sale on the death of one of the partners of his interest to the survivors.

2. On the death of one of the partners, his executor had the right to consummate the transfer of deceased's interest in the business to his surviving partners for the consideration specified in the contract, without the authority or consent of the probate court. Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

3. The mode and manner of fixing the amount of the purchase price is not so indefinite as to invalidate it; but such mode is found in the language of the contract itself, and is the inventory and appraisement provided for therein. Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

4. Such contract was not void as placing it within the power of the surviving partners to fix their own purchase price.

5. Under such contract the good will of the business passed to the surviving partners, and in no sense formed an asset of the estate to be inventoried and appraised. Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Bill by Ira P. Rankin, administrator with the will annexed of the estate of John Levinson, deceased, against William J. Newman and others, as surviving partners of the copartnership of which deceased was a member, for an accounting. Pending the suit, H. W. Philbrook was appointed such administrator, and substituted as plaintiff in the record. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. W. Philbrook, for appellant. Reinstein & Eisner and E. R. Taylor, for respondents.

GAROUTTE, J. William J. Newman, Benjamin Newman, and the deceased, John Levinson, were partners in the merchandise business, and held interests therein in proportion to the amount of capital invested by each. The last articles of co-partnership between these parties were entered into January 24, 1889; and, among other things, they provided in detail the manner in which an inventory and appraisement of the partnership business should be taken annually, which inventory and appraisement should form the basis in estimating the net profit going to each partner. The articles further provided as follows: "In the event of the death of one of the copartners the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay. The surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person selected, designated, and empowered by the heirs or legal representatives of the deceased partner to represent the interest of his estate in the co-partnership. Such person so representing the interests of the estate of the deceased partner shall have accorded to him access to all the books, papers, and accounts of the firm, and may, at his election, remain and continue at the place of business thereof until all matters relating to the interests of the deceased partner shall have been fairly and satisfactorily arranged and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been ascertained and determined. The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the co-partnership shall be paid to the heirs or legal representatives of the deceased partner in twelve successive and equal monthly installments, commencing within one month from the time the amount due has been ascertained and determined; for the amount of which installments the surviving partners shall execute and deliver to such heirs or legal representatives their promissory notes, payable as aforesaid, without interest, and satisfactorily secured by indorsement or otherwise; provided, however, that the surviving partners shall have the option to continue the said co-partnership; the estate of the deceased partner taking the place of the decedent on such terms and conditions as may be agreed upon between the surviving partners and the legal representatives of the deceased partner, but it shall not be obligatory upon the surviving partners so to do. The surviving partners and their successors shall also have the right and privilege of continuing the business under the said designation and name of Newman & Levinson."

Levinson died February 25, 1890, and forthwith the Newmans made an inventory and appraisement of the partnership business, as provided by the articles of partnership, by which inventory and appraisement it was determined that the net amount of Levinson's interest in the assets of the firm was the sum of $20,790.88. For this amount defendants prepared, and procured to be properly indorsed, their notes, 12 in number, for the sum of $1,732.57⅓ each, bearing date February 26, 1890, payable at successive monthly intervals following that date, and within one month after Levinson's death tendered them to Raveley, the executor of the will of said deceased, who had then received letters testamentary from the superior court. In July, 1890, the Newmans filed a petition in the court, alleging that they were ready and willing to purchase the interest of the deceased in the partnership upon the terms stated in the articles, and had requested the executor to allow them to do so; that he had refused; and praying an order directing him to convey that interest to them. The court sustained a demurrer to such petition, on the ground that it had no jurisdiction to grant the order prayed for. Thereafter, on September 6, 1890, Raveley, the executor, being of the opinion that he had the power to accept the terms proposed by the Newmans, received the said notes, and on that day executed to them two certain papers, the first of which acknowledged the delivery of the notes "in pursuance of the provisions of the articles of partnership * * * for the interest of the estate of said Levinson in said partnership." The other paper set out the transaction more in detail, and stated that the amount of such notes was the amount of Levinson's interest in the assets of the firm, as determined by the said inventory and appraisement, and that the notes were received by the executor "in full payment and satisfaction of the amount due the estate of John Levinson, deceased, for the interest of said deceased and of his said estate in the co-partnership firm as the same has been ascertained, as above stated." Levinson's residuary legatees were his mother and two sisters, all of full age. They, in writing, notified the Newmans on March 5, 1890, that they did not desire to employ any person to assist in taking the inventory of the assets of the late firm, then in progress, and the estate of the deceased had no representative in that undertaking, though the executor was often about the place of business, and both he and the legatees knew what was being done. No account of the good will of the firm was taken in the inventory made by the defendants, nor was it in the inventory and appraisement of the estate returned to the court by the executor. In the inventory and appraisement returned by the executor the value of the interest of Levinson in the partnership assets was stated at the same sum as that fixed by the appraisement of the defendants, to wit, $20,790.88, and was adopted by the appraisers on the strength of that appraisement. The omission to value the good will as part of the estate by the executor was resented by the legatees, and on this ground they petitioned the court to remove Raveley from his office of executor. He thereupon resigned; his accounts were settled; successive administrators with the will annexed carried on the administration, until finally H. W. Philbrook was appointed, and he has been substituted as plaintiff of record herein. This action is essentially one in equity, sounding largely in fraud, and asking for an accounting of the partnership affairs. The case has been before us in the past upon an appeal from the judgment (107 Cal. 602, 40 Pac. 1024, and 41 Pac. 304), where may be found an outline of the purposes of the action and the general framework of the pleadings.

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[1] Rehearing denied.

Fraud is charged in the body of plaintiff's bill, and upon that ground relief in a great measure is sought. But in the opinion of the trial judge, Hon. W. T. Wallace, which opinion is set forth in the record, it is stated that there is no evidence whatever to support such a charge. And, after a careful examination of the evidence, we find nothing therein even tending to show the practice of any fraud upon the heirs and legatees of the dead partner. It follows that all question of fraud is out of the case, and the only important question remaining is: Had the executor, under the articles of co-partnership, the right to consummate the transfer of the deceased partner's interest in the business to the surviving partners for the consideration specified in said articles? Although this interrogatory presents a clear-cut proposition of law, still it is well to say that, if this transfer of the partnership interest should be set aside, as is here sought by appellant, and all parties be placed in statu quo, as of the day the transaction was had, no substantial results favorable to appellant's interests would ensue. It would be a valueless victory, for, as said by the trial judge, upon an accounting the sum realized by the legatees would fall far short of the amount actually paid by the surviving partners to them. In appellant's brief the law is conceded to be: "Where the co-partners in the partnership contract—articles of partnership—do actually contract that on the death of a partner the partnership property and business belongs to the survivor or survivors, fixing the price at which it is to be taken by the survivor or survivors, such contract is binding according to its terms." Upon such concession we are brought face to face with the articles of co-partnership for the purpose of weighing and testing them by the formula furnished by appellant; and at the threshold of the investigation we are met by the objection that, at the date when those articles were entered into, the deceased partner, Levinson, was incapable, by reason of mental incapacity, of entering into any contract whatever. The mental incapacity of Levinson at the time was not even suggested in plaintiff's bill, and his mental status does not appear to be an element of the case that attracted serious attention at the trial. But some evidence came before the court upon the question without objection, which, even in the absence of direct issues raised by the pleadings, should be considered as bearing upon the question. Crowley v. Railroad Co., 60 Cal. 626. There are various good reasons why this evidence should not be held sufficient to invalidate the articles of co-partnership, and as an all-sufficient reason we suggest that the implied finding of the court was against any such contention. Appellant's principal witness to the point testified that, if Levinson had read the articles of co-partnership, he would have understood them, and there is no evidence in the record that he did not read them. As a salient circumstance bearing upon Levinson's mental capacity at that particular time, it may be noticed that some few days thereafter he executed his last will and testament, the will under which this administrator is now acting in prosecuting this litigation. It further appears that, upon his return from Europe after the execution of these articles, for several months, and up to the time of his death, he gave his personal attention to the business of the firm, as he had always done in the past. We are satisfied there is nothing in the point,

We have quoted in detail that portion of the partnership contract which declares what shall be done with the business in case of the death of one of the partners. In this respect the provision of the contract is not well drawn. It is not clear, but, upon the contrary, somewhat vague and indefinite. At the same time, when carefully read and considered, but one conclusion can be arrived at; and that is that, upon the death of one of the partners, the surviving members of the firm had at least the privilege and option of buying the interest of the deceased partner in the business upon certain terms. It is claimed upon the part of the Newmans that under the contract they were bound to do so. But to support the validity of the contract in this regard they are not compelled to go to such length; for, if they had an option by the articles of co-partnership to purchase upon stated terms, then they had the undoubted right to exercise that option, and take the interest of the deceased partner, if they were so disposed. Appeal of Harbster, 125 Pa. St. 3, 17 Atl. 204. In that case it is said: "It requires no argument to show that the interest of the deceased partner ended when the firm gave notice that they would take it in accord with the terms of the agreement." And in the case at bar, if the Newmans simply held an option to purchase the interest, there can be no question but that they exercised that option in favor of purchasing. If it should be held that the co-partnership articles did not give the surviving partners a right to purchase, then the presence of all that portion of the contract providing for the mode and manner of payment by the Newmans for the deceased partner's interest would be inexplicable. It is provided in great detail that they should give their equal monthly installment notes, running over a period of 12 months, in payment of the interest of the deceased partner. Such provision beyond question contemplated a sale; and that a sale to the surviving partners in case of the death of one of the firm was in the minds of all parties when the contract was made, does not admit of doubt. There can be no other reasonable construction of the contract.

It is insisted that the language here used provides no fixed and definite amount of money to be paid by the surviving partner for the interest of the deceased partner and it is claimed that for such reason there is no contract, at least no contract sufficiently clear and explicit to be capable of enforcement. There is no case cited by appellant that goes to the length here insisted upon. But, upon the contrary, that is certain which may be made certain, and many of the cases bearing upon this question rest upon this principle. Numberless cases might be cited where courts have recognized the right of the partners to stipulate in the co-partnership articles that the purchase price for the interest of a deceased partner shall be fixed by an inventory and appraisement to be taken after the death of such partner. In the very nature of things, a fair purchase price of an interest in the firm at an indefinite future time would be incapable of ascertainment. To fix the amount in advance would be simply a speculative gamble upon the part of all parties concerned, and hardly justifiable either in morals or law.

It is further contended that there is no mode whatever provided in the articles by which to ascertain the value of the interest of the deceased partner; and it may well be conceded that the provisions of the contract in this regard are not what they should be. In this particular the instrument is unhappily drawn, and well serves the purpose of being an invitation for litigation. As we have already seen, the articles provide for an annual inventory and appraisement, in order that the actual financial status of the concern may be determined. This inventory and appraisement was provided for in order that the annual profit or loss of each partner might be known. A succeeding subdivision of the contract, which we have heretofore quoted in full, then in part declares: "In the event of the death of one of the copartners, the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay. The surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person selected * * * by the heirs or legal representatives of the deceased partner, to represent the interest of his estate in the co-partnership, * * * and may at his election remain and continue at the place of business thereof until all matters relating to the interest of the deceased partner and his estate shall have been fairly and satisfactorily arranged and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been so determined. The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the co-partnership shall be paid to the heirs or legal representatives of the deceased partner in twelve successive and equal monthly installments." If the language of the contract had included the words "and appraisement" after the word "inventory," there would have been no question of indefiniteness, and no possible technical objection as to the matter of construction. But the absence of those two words should not nullify the contract. It would be carrying the doctrine of technicality too far, if we should so hold. The true intent of the parties is plainly apparent from the language used. And that intent was that an inventory and appraisement, as provided for in the articles, should furnish the basis for fixing the purchase price of the deceased partner's interest. Such is the fair construction of the language, taking it altogether, and, indeed, the only construction which can be given it. To say that the parties to the contract, while providing for a sale, and also providing for the manner and time for payment, never intended to provide as to the amount which should be paid, or to fix any mode by which the amount could be determined, would be going to lengths entirely unauthorized by the instrument itself. We hold that the mode and manner of fixing the amount of the purchase price is found within the language of the instrument itself, and that mode and manner is the inventory and appraisement provided for in a previous portion of the contract.

Conceding that the inventory and appraisement mentioned in the articles of co-partnership were intended by the partners to be used as the basis for fixing the value of a deceased partner's interest, then appellant contends that the contract was void as placing it in the power of the surviving partners to fix their own purchase price. There is no force in this contention. The contract contemplates the presence of a representative of the deceased partner during all these times, and incidentally it may be suggested that the executor was present during the time, more or less, and that both he and the legatees had full knowledge of what was being done, and ample opportunity to be present at all times and upon all occasions, to assist either personally or by agent. Again, as to the store and office fixtures, the value is fixed at a certain and definite amount. As to the stock of merchandise on hand, it is to be appraised at its actual value, but not to exceed its original cost. All solvent debts are to be taken at their face value. We see nothing so indefinite in these facts as to nullify the contract. The actual value of a piece of merchandise can be determined, and likewise it can be determined what is and what is not a solvent account. They are matters capable of ascertainment, and every partnership in the country is constantly engaged in determining them. There is certainly nothing so indefinite and uncertain as to the valuation to be fixed upon these assets as to in any way render the contract nugatory. In Appeal of Harbster, cited by appellant, the purchase price was fixed at the previous annual appraisement, with the proportion of profit or loss for the present year added or deducted, as the case might be. It certainly in that case was no easier to fix the amount of the profit or loss than it was in this case to fix the actual value of the stock, or determine what debt was a solvent account. Indeed, both of those factors of the business were necessary elements to be determined before the profit or loss could be fixed. In another of appellant's cases—Blake v. Barnes (Sup.) 12 N. Y. Supp. 72—the purchase price by the surviving partners upon the death of a member of the firm was to be determined by an inventory and appraisement to be made as follows: "(b) Accounts overdue at a fair estimate, to be determined, if necessary, by arbitration. (c) Rejected machinery, or any other property or merchandise for which the firm was not willing to allow the valuation inventoried or hereinbefore provided for, at the price offered by the highest bidder. (d) For the stereo and electrotype plates, engravings, * * * a sum equal to the gross profits of the firm for the last two complete business years preceding the time of settlement." It was not suggested that such a character of valuation avoided the contract, although the case was bitterly contested on other grounds. The case of Simmons v. Leonard, 3 Hare, 581, goes away beyond the cases just cited. It was there provided that the surviving partners should take the interest of the deceased partner at a valuation shown by the last annual accounting, the articles having provided for annual accounts. A partner died, and no annual accounts had been taken. The representative of the deceased partner, as in this case, contended that there could be no sale, as the purchase price was not fixed. The vice chancellor said: "The rule which justice and common sense would apply in such a case is, I think, too clear for serious argument. The proviso for sale in one event (that of the term running out), and the proviso for paying off a deceased partner's share (dying during the term) by installments, is conclusive evidence of an intention and agreement that the death of a partner during the term should not work a dissolution of the whole partnership, but that the survivors should have a right to carry it on with the accommodation of paying off the executors of a deceased partner by installments." And, in conclusion, he held the contract for a sale good, and that the purchase price should be determined by an accounting.

In Dinham v. Bradford, 5 Ch. App. 519, it is held, in effect, that the articles of co-partnership might provide that the purchase price of a deceased partner's interest in the business should be fixed by three disinterested parties. In Quinlivan v. English, 44 Mo. 46, the value of the interest of a deceased partner was to be fixed by an appraisement made after his death, and, in case of a dispute as to the valuation of the stock, the matter was to be submitted to three arbitrators. The court held such an agreement valid and binding. Indeed, it may be suggested that the authorities are practically unanimous that any question of indefiniteness or uncertainty as to the amount of the purchase price, or the manner or mode in which such price is to be arrived at, in no way affects the right of the surviving partners under the partnership contract to buy. And it is held in many cases that such conditions only result in casting the burden upon the trial court to take an accounting and fix the price. We conclude that the contract is valid and binding in all respects; that the amount of the purchase price for the deceased partner's interest in the business was fixed by the articles with such sufficient certainty as to deny the court the right to hold a general accounting. And, in the absence of a showing of fraud, to some extent at least, in the making of the inventory and appraisement which formed the basic element in fixing the purchase price, the transaction should be upheld.

While this litigation, judging by the size of the transcript and briefs before us, has now assumed somewhat mammoth proportions, there was a time in its early history when but a single matter was involved. And that matter arose upon the contention of the administrator that the good will of the business was not included in the inventory and appraisement of the property of the deceased returned by the executor to the probate court. Owing to the views we entertain as to the validity of the contract, this contention may be disposed of in a few words. The contract of partnership provided: "The surviving partners and their successors shall also have the right and privilege of continuing the said business under the said designation and name of Newman & Levinson." We have no doubt that the good will of the business passed to the surviving partners under this provision of the contract, and in no sense formed an asset of the estate. Much could be said upon this question showing the instability of appellant's claims in this regard, but we deem it unnecessary. The order appealed from is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.

BEATTY, C. J., and HENSHAW and TEMPLE, JJ. We concur in the judgment. We do not think we can say, over the implied finding of the trial court, that the execution of the partnership articles was procured by fraud, or by the use of undue influence. The question is argued on the assumption that the Newmans were contracting with the expectation that they would be the survivors. We do not think we can assume that. Such a consideration was proper to be urged upon the trial court under the charge of fraud, and evidence could have been addressed to that point. It does not appear that any such question was tried. It does appear that Levinson was then ill, but we do not find that the illness was deemed mortal. He lived more than one year thereafter, and during a portion of that time was able to attend to business. But the advantages of the agreement are not all on one side. In case of a dissolution by death it would have been the privilege of the surviving partners, in case there was no provision made for such an event, to have stopped the business, and to have gone into liquidation. In such case the goods would have been sold at a sacrifice, and the estate would have realized nothing for the good will.

As to the construction and effect of the twelfth article of the partnership agreement between the defendants and their deceased partner, our views do not coincide with those expressed in the preceding opinion. The meaning of that article is, of course, the main question in the case, and for two years after the death of Levinson it was the only question; the attack upon the validity of the agreement based upon the alleged mental incapacity of Levinson, and the charge of undue influence by his surviving partners, being an evident afterthought. So much stress, however, has been laid upon this matter in the argument, and it forms so large and so essential a part of the charge of fraud, to the elaboration of which the voluminous brief of appellants is mainly devoted, that it cannot be ignored. The fact that the validity of the partnership agreement is affirmed by the implied finding of the superior court, and that there is substantial evidence to support such finding, is sufficient, as shown in the preceding opinon, to put an end to the question so far as it is material to the decision of this appeal, but with respect to the matters so vehemently and intemperately argued upon the part of appellant, and especially with reference to the torrent of vituperation poured out upon Mr. Justice Harrison, it is important to note that never upon any occasion during the time that he was acting as attorney for Executor Raveley was there the slightest hint or suggestion to the effect that the partnership articles were in any respect invalid, or that Levinson, at the time he signed them, was mentally incapacitated, or subjected to the slightest degree of undue influence. On the contrary, the whole dispute from the beginning, and for two years after the death of Levinson, was as to the construction of the agreement, and in particular whether, according to its terms, the estate of Levinson was entitled to separate and additional compensation for his interest in the good will of the business of the firm. The mother and sisters of Levinson—all adults—and Mr. Philbrook, their attorney, assumed as a fact unquestioned that the contract was entirely valid, and that the rights of all parties were dependent upon its proper construction. Under these circumstances it would have been strange, indeed, if the attorneys for the executor had not taken the same view. Naturally and inevitably they confined their attention to the meaning of the contract, and to the steps necessary to be taken in carrying it out according to the intention of the parties. They (the firm of Jarboe & Harrison) had been employed by the executor within a few days after the death of Levinson, and Mr. Philbrook shortly afterwards was employed by the mother and sisters of the decedent to look especially after their interests. From the very first there was an open difference of opinion between these attorneys as to the meaning of the partnership agreement with respect to the right of Levinson's estate to be paid an additional compensation for his interest in the good will of the business, over and above the appraised value of his interest in the stock of goods, fixtures, accounts, and other tangible assets of the firm. Jarboe & Harrison took the position, which they always maintained openly and unequivocally, that, according to the proper construction of the agreement, the surviving partners took the whole interest of the deceased partner, including the right to continue the business under the name of Newman & Levinson, upon payment of the appraised value of his share of the assets, to be ascertained by an inventory and appraisement according to the annual custom of the house, and that no separate allowance for good will was contemplated or provided for. Mr. Philbrook took the opposite view, which he likewise consistently maintained. There was no other difference between the parties or their legal advisers, and, when the inventory and appraisement were made, their fairness and correctness, so far as they went, were not disputed, the only objection on the part of Mr. Philbrook and his clients being that it made no allowance for the value of the good will. No charge of fraud, or undervaluation of assets, or overstatement of liabilities in the appraisement, was then or ever during Judge Harrison's connection with the case made or suggested. The dispute was wholly upon a question of law,—i. e. the construction of a contract,—and as to this there was, as above stated, no equivocation or concealment whatever.

Mr. Philbrook, however, seems to think that Jarboe and Harrison were guilty of a species of disloyalty to his clients, because, notwithstanding their opinion to the contrary, they did not sustain him in his position, and advise their client accordingly. But this contention is utterly unreasonable. They were attorneys for the executor, who was trustee not only of the legatees, but also of the creditors of his testator, and it was their imperative duty to advise him to proceed according to the true construction of the agreement as they interpreted it, and especially to see that he wasted no portion of the estate in fruitless litigation. In view of the difference of opinion between them and the attorney for the legatees, it was natural that they should take time to consider, before deciding a question so delicate and so important, and equally natural that they should wish to submit the decision of the matter to the probate court. But when that court, in the proceedings instituted by the Newmans to compel the executor to transfer to them the interest of the deceased partner, declined to give a construction to the agreement upon the ground that it had no jurisdiction to decide upon the matter, the responsibility was thrown upon the attorneys for the executor to decide whether he should accept or reject the tender which the Newmans had made of the appraised value of Levinson's interest. Being obliged to take the responsibility of deciding, they naturally decided according to their own construction of the contract, and not according to Mr. Philbrook's. Differing, as we do, from the views which they entertained, we should never have thought of imputing a bad motive for their decision, if for no other yet for the simple reason that, if wrong, it could harm no one but themselves and their client. A large part of Mr. Philbrook's tirade is based upon the assumption that Jarboe and Harrison did not really entertain the opinion which they expressed, and that they only advised the executor to the course that he took because they were acting in collusion with, and in the interest of, the Newmans. The absurdity of this position is manifest from the fact that any settlement between the executor and the Newmans, not made in accordance with the true construction of the contract, could only involve the parties to such settlement in loss and difficulty, and could not possibly foreclose or prejudice the rights of the residuary legatees.

By accepting the money and notes tendered by the Newmans in full payment for the interest of his testator in the firm, the executor placed himself in the position of unequivocally refusing to proceed against the surviving partners on account of the value of the good will, and thereby gave to the residuary legatees the right to ask, as they ultimately did, for his discharge, upon the ground that he was neglecting the duties of his trust. As to the executor, this was the sole effect of erroneous advice on this point. As to the Newmans, the effect of a settlement unauthorized by the probate court, and unwarranted by the terms of the partnership agreement, would simply be to expose them to an action for an accounting,—this very action,—in which the most rigorous and burdensome rules for computing the interest of Levinson in the assets of the firm and profits of the business would be enforceable against them at the option of the administrator with the will annexed. To suppose, as the argument does, that the attorneys for the executor were deliberately giving him advice which they knew to be bad, in order to serve the interest of the Newmans at the expense of the legatees, when the only effect of the course advised would be to expose the executor to censure and punishment, and the Newmans to certain loss, is rather too heavy a draft on human credulity. But it is not alone the acceptance of the tender made by the surviving partners, and the advice upon which the executor acted, that furnish grounds for Mr. Philbrook's suspicions. It is the secrecy of the transaction, and the fact that the receipts or acknowledgments given by the executor were in the handwriting of, and were witnessed by, a gentleman who, at the date of the settlement, had been nominated by a leading political party of the state for a seat on this bench, that excites his deepest indignation. He can see in these circumstances nothing but a deliberate attempt to defraud his clients and to corrupt this court.

As to the secrecy of the transaction, the simple truth is that Mr. Philbrook and his clients were not called in to witness the payment of the money or the delivery of the receipts, and there was no reason why they should be present. It was not necessary that they should be there to protest in order not to be bound by the settlement. Their rights were not being concluded, or in any wise prejudiced. The fact that the notes and money were in the hands of the executor was nothing to them. The time for presentation of claims of creditors had not elapsed, the time for filing a first annual account had not arrived. No part of the money in the hands of the executor could then, or for months thereafter, be applied in payment of claims or legacies; in short, neither the executor nor the Newmans could gain the slightest advantage, nor the legatees suffer the slightest loss, by concealment of the fact that the settlement had been made. And accordingly we find that, upon the very first occasion calling for a disclosure of the fact and the terms of the settlement, such disclosure was fully and unreservedly made in the most direct and certain terms. The settlement was made in September, and in November following, in response to a demand for an amended inventory of Levinson's estate, which should include the item of good will of the business, the surviving partners served upon Mr. Philbrook their written answer, which contained, among other things, the following passage: "And deny that said William J. Newman, or said Benjamin Newman, has not fully accounted to said executor of said estate for any and all moneys, interests, and claims due to said estate from said William J. Newman or said Benjamin Newman, or either of them, and aver, on the contrary, that they have fully accounted for any and all claims, payments, and sums due said estate in the manner set forth in said memorandum in writing, and in this behalf said William J. Newman and said Benjamin Newman aver that after the appointment of said S. W. Raveley as the executor of the last will and testament of said John Levinson, deceased, said executor requested them—said William J. Newman and Benjamin Newman—to account to him for the interest of said decedent in said co-partnership, and said William J. Newman and said Benjamin Newman did thereupon account to him and exhibit to him, said executor, all the books and assets of every kind belonging to said co-partnership, and it appeared therefrom that the entire interest of said decedent in the assets of said co-partnership amounted to the sum of $20,790.80; and thereupon said William J. Newman and said Benjamin Newman elected and decided, under and in accordance with the provisions of said memorandum in writing, to purchase and pay for the interest of said decedent in said co-partnership, and thereupon executed to said S. W. Raveley, as executor aforesaid, twelve certain promissory notes, bearing date the 26th day of February, 1890, payable at monthly intervals thereafter, each for the sum of $1,732.57⅓ (said promissory notes aggregating the sum of $20,790.80), in full payment and discharge of the interest of said decedent in said co-partnership business, as the same had been ascertained and determined by the inventory and appraisement thereof, made in accordance with the provisions of said memorandum in writing." Mr. Philbrook knows the meaning of a plain statement in plain English, and therefore it is not to be doubted that from and after the 19th day of November, 1890, he and his clients knew that executor Raveley had accepted from the surviving partners their notes for $20,790.80, in full payment for his testator's interest in the co-partnership. He knew then and ever afterwards that Raveley, acting under the advice of his attorneys, would refuse to prosecute an action against the Newmans for a further accounting, and that the legatees, if they desired to have such an action instituted, must procure the removal of the executor, and the appointment of an administrator with the will annexed, who would be guided by his advice. This is the course which was taken just one year after Mr. Philbrook was advised of the settlement, and, since he allowed a whole year to elapse after receiving the information before taking the only action that the settlement called for, he can hardly complain that the fact was not disclosed two months sooner than it was. As to the fact that Mr. Harrison, after his nomination for justice of the supreme court, continued to advise Executor Raveley in a matter in which he had been employed long before his nomination, and the further fact that he drew up and witnessed the papers which passed upon the settlement, it seems scarcely credible that a normal mind could regard them as evidence of fraud, or as an attempt to corruptly influence the decision of this court. But it is out of these simple circumstances that Mr. Philbrook has constructed his elaborate theory of fraud and corruption. The truth is there is not only no foundation for the argument upon this point, but the fact which it seeks to establish is totally irrelevant. The motives which may have prompted Raveley's attorneys in giving their advice, the advice itself, and the action taken in consequence of it have not in the slighest degree affected the rights of Levinson's mother and sisters. If the advice was correct, as held in the preceding opinion, there never was any ground of complaint. If it was incorrect, the settlement did not bind the estate, and the Newmans remained accountable for the true value of Levinson's interest at the time of his death, or at the option of his representatives for the profits of the business which they continued to carry on.

If these views are correct,—and we have no doubt that they are,—the whole question of fraud and corruption so gratuitously imported into the case may be dismissed from further consideration, and attention confined to the questions upon which the decision of the appeal necessarily depends.

The agreement between the Newmans and Levinson, which by the preceding opinion is held to be a contract of sale, properly bears the construction put upon it. It was within the terms of the agreement and the contemplation of the parties that in some way a purchase by the survivors should be made. If the contract were in other respects free from objection, the case would be the not unusual one where the partners provide for the purchase by the survivors of the interest of a deceased member of the firm. Upon the exercise by the survivors of their right, the sale would be complete, and the surviving partners would become debtors to the estate of the deceased partner, with the duty of accounting with his representative for the value of the deceased partner's interest. Cases are not rare where contracts of this nature have been entered into and enforced. But, when upheld, it is because they are certain and specific in their terms, and unobjectionable upon any equitable consideration. The plan adopted by these partners for arriving at the value of their annual profits by deducting from their assets the amount of their liabilities was feasible and satisfactory while all the partners were living, but upon the death of Levinson, not the profits merely, but the whole of his interest, was in some manner to be determined and withdrawn from the assets of the firm. While all of the partners were alive, it did not matter how the assets were valued, or the liabilities estimated, for what they did not take out as profits they retained in the assets of the firm. But, when one died, it became highly important that his share, then to be wholly withdrawn, should be fairly and fully valued. The apportionment of profits involved no transfer of title to the remaining capital; but such a transfer was necessarily involved in the transaction contemplated upon the death of a partner. Frequently, says Lindley (Partn. p. 429), in order to prevent the ruin consequent on the sale when a partnership happens to be dissolved by the death of a partner, it is provided that the share of the deceased may be taken by the survivors at the value shown by the last settlement agreed to by him, with the addition of any subsequent profit. But here a new valuation was to be made, and, either no method is provided in the contract for arriving at that valuation, or, if a method be found, it can only be the method actually adopted,—the valuation being made by the surviving partners themselves. But, in the first instance, if no mode is prescribed, there is the absence of an essential element of a contract of sale which equity cannot supply,—the price, or the manner of determining the price. If the second, and the mode adopted, be the one contemplated by the contract, then, if the contract be valid, it must result in holding that the surviving partners, trustees of the deceased partner's share, may not only purchase that share, but may fix the value which they will pay for it. But, if we understand respondents, they do not contend, nor could they successfully, for the latter proposition, but they claim that by their agreement with the executor such value was legally ascertained; and herein it is claimed that the executor, in effecting that settlement, was merely carrying into effect the contract of his testator, as expressed in the articles. But something more was necessary. The testator's contract did not determine the amount of the consideration to be rendered by the survivor for his interest, and the exercise of a further act of discretion, judgment, and assent was necessary to ascertain the amount. Morrison v. Rossignol, 5 Cal. 65; Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; Vickers v. Vickers, L. R. 4 Eq. 529. It is said that these were cases where specific performance was sought, while in this instance the contract has been executed. This is true, but we are now dealing with the question of power in the executor, and these cases illustrate the proposition that in making the adjustment with defendants the executor necessarily supplied the missing terms of his testator's contract by the exercise of his own will and discretion.

Had the executor that authority? Defendants claim it for him by virtue of his general powers, and independently of the articles. At the common law such power was unquestionably his, but at common law the executor or administrator held the title of the personal property of the decedent, while with us title to personalty as well as to realty vests in the heirs, subject only to the right of the executor to take possession of it for specific purposes. At common law, then, the representative could sell personal property without restraint, so long as his acts were not fraudulent, but here his power to sell is dependent upon the assent of the superior court. Code Civ. Proc. §§ 1517, 1561; Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89; 2 Woerner, Adm'n, § 331. The provisions of the articles for the transfer of Levinson's interest were incomplete, in that no price was fixed, and that no disinterested person was named who should fix the price. The executor, by assenting to the valuation put by the Newmans on the partnership interest, assumed to supply the omission of the contract, and to fix a sum at which they might take the interest. It is not claimed that the executor derived authority to make the sale from the will of deceased. As the articles fall short of conferring that power, he could necessarily derive it only from the court in the manner prescribed by statute. But under the statute it could be sold only "in the same manner as other personal property," namely, by authority and consent of the superior court. Had the contract of partnership determined the price, or prescribed some legal mode of ascertaining the price, the cases cited in the preceding opinion would be directly in point. Then the executor would have needed only to abide by the terms of the contract. Janin v. Browne, 59 Cal. 37. The wisdom or policy of the contract would have been none of his concern. But, under the facts, the necessity for the supervisory power of the court to order a sale, and for the caution of the statute that before confirming the sale of the partnership interest the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner (Code Civ. Proc. § 1524), was as manifest as if there had been no contract.

But it is further said that the inventory and appraisement were made in the manner usual during Levinson's life, and that this established a custom by which the articles are to be interpreted. But a customary mode of valuing assets, with a view of determining and withdrawing profits, is radically different from the requisites of a fair and reasonable estimate of all assets with a view to segregating the share of a deceased partner for purchase by the others. We think the conclusion inevitable that the executor exceeded his authority in the settlement with defendants; that he did not, as is admitted, follow the statutory mode in making the settlement, and that there was no power for him to do so under the articles.

Leaving aside for the moment the question whether or not the good will was included in the settlement, we think the evidence overwhelmingly establishes, as the trial court held, that the sum found by the Newmans under the inventory and appraisement to be the value of Levinson's interest, and by the Newmans paid into the estate of Levinson, and received by the executor thereof, was not only a just amount, but, indeed, a very liberal amount. The evidence seems to be without conflict, and at least is strongly in favor of the respondents, that the appraised value put by the Newmans upon the interest of their deceased partner was greater than its actual worth. It was paid over and received, with knowledge then or soon afterwards acquired of the claim of the Newmans that by the payment they took to themselves the deceased's interest and title in the assets of the co-partnership, and acquired the right to continue to conduct the business under the firm name. Thereafter the heirs, who were all of age, and who were represented throughout all court proceedings by their attorney, petitioned for, and, despite the protests of the executor, obtained, a decree of partial distribution, distributing to them as of the property of the estate a portion of the moneys thus obtained from the Newmans. At the time when this decree was sought and obtained the source from which the moneys came, and the circumstances under which it had been paid over to the estate, and the claims of the Newmans in regard thereto, were well known to them. Their opposing claim during all of this time seems to have been solely the one that the good will had not passed to the Newmans, and was still personal property, and a part of the assets of Levinson's estate. Having, under these circumstances demanded and received the moneys so paid by the Newmans, the price having been fair, and the transaction without fraud, we are of opinion that they are estopped from questioning the settlement while retaining the benefits of it, and from denying that there passed to the Newmans whatever would have passed under the terms of the contract had it been free from the defect above discussed. What, then, would have passed, and what are appellants estopped from denying did pass? Unquestionably there passed to the Newmans Levinson's interest in the assets, as shown by the inventory and appraisement upon which the settlement was based. But the articles provide further that the survivors shall have the right to continue the business under the firm name of Newman & Levinson. This clause may be construed either as dependent or independent of the covenant to purchase. If construed as dependent, then the contract was that, upon purchasing under the inventory and appraisement, the survivors would acquire the right to continue the business under the firm name. In this view appellants would also be estopped from denying that there passed to defendants the right to conduct the business under the firm name. If, however, this clause is to be construed as independent, it is of itself valid and operative, and conferred this right upon defendants regardless of other considerations. In either case it must follow that the right to conduct the business under the firm name passed to the defendants.

There thus comes under consideration the question which originally, and for a long time, was the sole point of difference between the parties,—the question of the disposition of the good will; for it appears that, while the heirs from a very early date insisted that the good will still remained a part of the property of the estate, and should be inventoried and appraised as such, they made no objection to the valuation put upon the deceased partner's interest, nor to the sale of that interest, saving that therein the good will had not been valued. There was no concealment nor secrecy nor fraud in this. The heirs were informed that the good will was not included, the contention of the executor and of the Newmans under the advice of counsel being that the good will, under the circumstances, did not become a part of the assets of the estate, but vested in the surviving partners. While some of the earlier cases lean to the doctrine that, upon the death of one partner, the good will goes to the survivors, the great weight of later decision is to the contrary. Thus, it is said by Bates (2 Bates, Partn. § 658): "It was once thought that upon the death of a partner his interest in the good will ceased, and it survived to the surviving partner as his own property. This was doubted in Crawshay v. Collins, 15 Ves. 218, and it is not now nor anywhere regarded as the law in trade partnerships, and, though inseparable from the business, is an appreciable part of the assets in which the estate of a deceased partner can participate." Lindley says: "In the event of dissolution by death, it has been said that the good will survives, and there is a clear decision to that effect; but this is not in accordance with modern authorities. They are wholly opposed to the notion that the value of the good will as such belongs to the survivor." 2 Lindl. Partn. § 443. And our Code declares (Civ. Code, § 993): The good will of a business is property transferable like any other. It is not necessary to enter upon a discussion of the character of this intangible property known as "good will." The Code solves many doubts by defining it to be the "expectation of continued public patronage." Civ. Code, § 992. Now, the Newmans had purchased the interest of the estate in the assets as shown by the inventory, and had likewise acquired, as has been discussed, the right to continue the business under the firm name. We are unable to perceive any difference between the acquirement of a right to conduct this business under a firm name and the acquirement of the good will of the business. In other words, every possible "expectation of continued public patronage" to the business was gone when the right to conduct it under the firm name was parted with. If there were left anything of value, however shadowy and unreal, it might be ground for saying that the good will yet remained to the estate, but the interest in the assets, together with the interest in the right to conduct the business under the firm name, having passed to the Newmans, nothing in the nature of good will was left.

But there is another and equally convincing view which may be taken of these matters. Counsel have cited some cases in which it is said that it is the duty of the survivors to sell the property, and the business as a going business, and also to continue the business until this can be done. It may be that when a firm name is not composed of the name of the partners, but is a trade name only, different equities may arise, but we are sure in this case the Newmans could not have been required, in the interest of Levinson's estate, to sell the right to continue the business in the firm name nor to sell the good will. There is not only the good will which belongs to the firm, but in a successful business each partner may have gained a business standing and a reputation which is of value to him. One who sells the good will of a business warrants by that very act that he will not endeavor to draw off any of the customers. Civ. Code, § 1776. If the surviving partners can be required to do this, they are practically prohibited from pursuing the same business at that place, and that may be their only means of gaining a livelihood. When a partnership is dissolved by death, the survivors are absolved from all obligations except to close out the partnership affairs and to account to the estate. They do not owe a duty to the estate of the deceased to abstain from business even in the same line as that in which the partnership was engaged. We are forced to believe in this case that the articles of co-partnership failed to provide effectively for a transfer of the interest of Levinson's estate in the co-partnership to the surviving partners. The executor and his counsel were of the opinion that it did so provide, and acted accordingly. Though we are convinced that they were mistaken, we do not doubt that the estate of Levinson realized much more from the property than would have been possible if the firm had gone into liquidation, as they must have done in the absence of the agreement. We think, therefore, that the agreement which the parties supposed they had made was to the material advantage of all concerned, and, had they provided for a valid method of determining the value of the interest of Levinson, it would have been just as well as legal. For the lack of such method, however, the transfer to the Newmans was unauthorized and void. The legatees, however, of Levinson's estate, were all of age, and the estate was solvent. Knowing all of the essential facts, they demanded and received the proceeds of the sale over the protests of the executor and of the Newmans. These protests amounted to the claim that, unless the transfer to the Newmans was valid, the money should be returned to them. If the transfer was regarded as invalid, plainly that should have been done. The court could not distribute the money except upon the theory that it properly belonged to the estate. The Levinsons solicited and obtained such an adjudication, and they received the money so distributed. No rights were or could have been reserved by the protest, styled a "stipulation," which was filed by the Levinsons. The money was not voluntarily paid after the protest was made, but the payment was forced by the legatees. The protest does show, however, that the legatees knew, or at least suspected, that the executor and the surviving partners claimed that the money in the hands of the executor was all that was coming to the estate from the partnership. It is stated, after admitting that the money was received by the executor "on account of the interest of said estate in the partnership assets," as follows: "But it is not admitted by said petitioners, or any of them, that no further sum remains due, or is to become due, from said surviving partners, or either of them, or assigns, to said estate, or to said petitioners, or any of them." There would have been no purpose in guarding against the implication if it had not been believed that the claim was that this was all. That the legatees well knew the claim made by the surviving partners abundantly appears from the other evidence. This was a ratification of the sale on the part of the legatees which can be avoided only for fraud discovered afterwards, and then only upon a rescission and a restoration of all that they have received, or a showing of some excuse for not doing so. The action is to compel the surviving partners to account for the interest of Levinson in the co-partnership. But the moneys which were distributed upon the application of the legatees were paid for the entire interest of Levinson in the co-partnership. To compel an accounting is to set aside or ignore that transaction. The money was not paid on account, and the legatees must have known that no such sum was due from the surviving partners to the estate, except upon the theory that they had purchased the interest of Levinson. The acceptance of the sum by the executor materially affected the condition of the surviving partners. But for that the concern would most likely have gone into liquidation, and large liabilities for goods would not have been incurred. They did not understand that they were assuming these liabilities and the risks of trade for the benefit of the estate of Levinson, but for themselves.

115 Cal. 36

## GOLDSMITH v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. No. 399.)

(Supreme Court of California. Nov. 20, 1896.)

CITY OF SAN FRANCISCO — INDEBTEDNESS — PAYMENT WHEN FUND EXHAUSTED.

Where the fund out of which a claim against a city can be paid is exhausted, and the holder obtains judgment on the claim, he cannot have a writ of mandate to compel the board of supervisors to allow, and order paid, the judgment. Lewis v. Widber, 33 Pac. 1128, 99 Cal. 412, distinguished. Pacific Undertakers v. Widber (Cal.) 45 Pac. 273, followed.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Application by Max Goldsmith for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to allow, and order paid, a judgment obtained against the city by plaintiff. From a judgment denying the writ, the applicant appeals. Affirmed.

Mullany, Grant & Cushing, for appellant. H. T. Creswell, for respondents.

HENSHAW, J. This is an application for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to allow, and order paid, a judgment against the city obtained by plaintiff. Plaintiff had contracted with the city to furnish subsistence and supplies for the prisoners in the jails of the municipality for the fiscal year 1892–93, pursuant to the terms of section 69 of the consolidation act. The supplies were furnished during the year. The demands of the plaintiff for the last three months were refused payment for lack of funds. Plaintiff entered suit and obtained judgment, and, upon the refusal of the supervisors to order the judgment demand paid, he applied for this writ of mandate. The supervisors, for answer, showed that the general fund for the fiscal year 1892–93 was totally exhausted, and that the claim of plaintiff, transformed into a judgment, was payable solely out of this fund. The reduction of the original claim to a judgment did not increase its dignity so as to authorize plaintiff to demand payment of it from any fund not subject to the primary demand. Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033. It is sought to distinguish this claim from the many which this court has been called upon to discuss, and to bring it within the principle of Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128. But, to the contrary, it is in all essential features identical with that considered in Pacific Undertakers v. Widber (Cal.) 45 Pac. 273. The reasoning there set forth completely covers the facts and the law of this case, and leaves little to be added. That hardships result from an observance of the law may be deplored, but this fact cannot afford reason for subverting the law, or frittering it away. The judgment is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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115 Cal. 27

## IVERSEN v. SUPERIOR COURT. (S. F. 407.)

(Supreme Court of California. Nov. 12, 1896.)

### APPEALABLE ORDER—REQUIRING DISTRIBUTEES TO DELIVER SPECIFIC PROPERTY TO ADMINISTRATOR.

An order of the probate court requiring distributees to deliver to an administrator specific property in their hands under a decree of distribution, made several years after such decree, without complaint on oath, or petition, or citation made therefor by the administrator or any other person, is not a special order made after final judgment, and is therefore not appealable.

Department 2. Writ of review to superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by Caroline Iversen for a writ of review to the superior court to vacate, annul, and set aside certain orders of such court. Orders vacated, annulled, and set aside.

D. I. Mahoney, for petitioner. J. C. McKee, for respondent.

HENSHAW, J. This is an application for a writ of review. No controversy over the facts is presented, but respondent rests his opposition to the granting of the writ upon demurrer alone. The admitted facts are that administration upon the estate of one Celia O. Soher, deceased, had duly and regularly proceeded until a decree of distribution therein had been made and entered, distributing certain property of the estate, consisting of diamond rings, gold watches, diamond and pearl breastpins, and other pieces of jewelry, to the heirs of Celia O. Soher, one of whom is the petitioner herein. The administrator's final account was settled, and the decree of final distribution entered upon August 26, 1891. Upon January 27, 1896, the court, sitting in probate in the matter of said estate, made the following order: "It is hereby ordered that Emile Soher, Caroline Iversen, and Miriam Peturel deliver forthwith to Adolph Soher, administrator of the estate of Celia O. Soher, deceased, any and all property of said estate in the possession or under the control of said parties, or either of them, and particularly the following property, viz.: [Here follow the items of jewelry before mentioned.]" Petitioner herein came into possession of the property under the decree of distribution, and holds the same for the heirs and the other distributees named in the decree as owners thereof. The order above quoted was made without complaint on oath, or petition, or citation made therefor by the administrator or any other person. Petitioner having failed to comply with this order, thereafter the court issued its further order that the petitioner appear and show cause, upon a date therein named, why she should not be punished for contempt in disobeying the order of the court, and not delivering said property.

The only ground of demurrer calling for a consideration is that the order sought to be reviewed is a special order, made after final judgment; that petitioner has a remedy by appeal; and that, therefore, the writ of review will not lie. But, to show the untenableness of this position, it is necessary only to refer to the cases of In re Calahan's Estate, 60 Cal. 232; In re Walkerly's Estate, 94 Cal. 352, 29 Pac. 719; and In re Smith's Estate, 98 Cal. 636, 33 Pac. 744. No attempt is made to uphold the validity and legality of the proceeding. It is claimed merely that petitioner has not been harassed by them. The orders under review are clearly in excess of the jurisdiction of the court. Let the orders under review be vacated, annulled, and set aside.

We concur: TEMPLE, J.; McFARLAND, J.

(114 Cal. 559)

## PEOPLE ex rel. YOUNG v. BABCOCK.

(S. F. 413.)[1]

(Supreme Court of California. Oct. 20, 1896.)

City and County of San Francisco — Superintendent of Schools—Appointment.

Act March 14, 1883, entitled "An act to establish a uniform system of county and township governments," by section 25, subd. 21, empowering boards of supervisors in their respective counties to fill by appointment all vacancies in any county office, refers to the board of supervisors, of five members, which section 13 declares each county shall have, and does not repeal Act April 19, 1856 (Consolidation Act) § 31, authorizing the board of education of the city and county of San Francisco to fill by appointment a vacancy in the office of superintendent of schools of such corporation; the supervisors constituting the board of 12 which the consolidation act provides shall be elected in the city and county of San Francisco, being municipal officers.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the people, on the relation of Charles S. Young, against Madison Babcock. Judgment for defendant, and plaintiff appeals. Affirmed.

Atty. Gen. Fitzgerald, M. M. Estee, C. W. Cross, and James Alva Watt, for appellant. Rodgers & Paterson, for respondent.

SEARLS, C. This is an appeal from a final judgment in favor of defendant upon sustaining a demurrer to the complaint of the relator. The complaint may be epitomized thus: (1) Andrew J. Moulder, the duly elected, qualified, and acting superintendent of schools for the city and county of San Francisco, died on the 14th day of October, 1895, whereby the office of such superintendent of schools became vacant. (2) On the 4th day of November, 1895, the plaintiff, Charles S. Young, was, by the board of supervisors of said city and county of San Francisco, appointed superintendent of schools in and for said city and county, to fill the vacancy caused by the death of said Moulder. (3) Said Charles S. Young thereupon and in due time qualified, took and filed his oath of office, filed his bond as required by law, etc., as such superintendent. (4) The defendant, Madison Babcock, claims to be the superintendent of schools in and for said city and county, and since November 4, 1895, has usurped and intruded himself into said office, to the exclusion of said Charles S. Young, who on the 21st day of November, 1895, demanded to be let into possession of said office, which was refused by defendant Babcock, etc. Plaintiff demands judgment (1) that defendant, Madison Babcock, is not entitled to the said office, and that he be excluded therefrom; (2) that Charles S. Young is entitled to said office, and that he be admitted to the possession and enjoyment thereof, etc.

The single question presented on this appeal is as to the authority of the board of supervisors of the city and county of San Francisco to appoint a superintendent of schools of said city and county, to fill the vacancy caused by the death of Andrew J. Moulder. The act of April 19, 1856, usually known as the "Consolidation Act," provided for the election in the city and county of San Francisco of a board of supervisors, consisting of 12 members; of a board of education, consisting of 12 members, and, among other officers, of a superintendent of common schools. By the thirty-first section of the act it was provided, "In case of a vacancy in the office of superintendent, the board of education may assemble and appoint a person to fill the vacancy until the regular election next following." Section 9 of the act authorized the board of supervisors of the city and county to fill vacancies which might occur in the elective offices of the city and county, where no other provision was made by law to fill the same. This last provision had no application to vacancies in the office of superintendent of schools, for the reason that other provision was made therefor. In 1863 an act was passed amending the law in reference to the board of education of the city and county of San Francisco, but retaining the provision for filling vacancies in the office of superintendent by the board of education. The power thus conferred upon the board of education by the consolidation act and the amendments thereto, which constitute the charter of the city and county, is still vested in that body, unless wrested from it by the act of March 14, 1883, entitled "An act to establish a uniform system of county and township governments" (St. 1883, p. 299), or by the several county government acts since passed. Have they repealed the law as it existed under the consolidation act?

Section 1 of article 11 of the constitution of 1879 provides that "the several counties, as they now exist, are hereby recognized as legal subdivisions of this state." Section 4 of the same article provides that "the legislature shall establish a system of county governments which shall be uniform throughout the state; and by general laws shall provide," etc. Section 5 of the article provides that "the legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office." Section 3 of article 9 is as follows: "A superintendent of schools for each county shall be elected by the qualified electors thereof at each gubernatorial election; provided, that the legislature may authorize two or more counties to unite and elect one superintendent for the counties so uniting." This section of the constitution, as will be observed, makes the superintendent of schools a county officer. Under the consolidation act, and the various amendments thereto, there existed, as we have seen, prior to the adoption of our Codes, in the city and county of San Francisco a superintendent of schools. Section 19 of the Political Code retained in force (1) "all acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts"; (2) "all acts consolidating cities and counties, and acts amending or supplementing such acts." The statute of March 14, 1883, entitled "An act to establish a uniform system of county and township governments" (St. 1883, p. 299), enumerates in section 57 the officers of counties, among which is "a superintendent of schools." Subdivision 21 of section 25 of the same act provides that the boards of supervisors in their several counties shall have power "to fill by appointment all vacancies that may occur in any office filled by the appointment of the board of supervisors and elective county or township offices, except in those of judge of the superior court and supervisor. The appointee to hold office for the unexpired term."

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[1] Rehearing denied.

The question of the status, powers, duties, and duration of the terms of office of the several officers of the city and county of San Francisco has recently, and in the case of Kahn v. Sutro, 46 Pac. 87, been considered and determined by this court. The conclusions in that case reached may be in part summarized thus: (1) San Francisco is both a city and a county. (2) Some of its officers are city officers, and others are county officers. (3) The supervisors, 12 in number, authorized by the consolidation act, are endowed with municipal functions unknown to the county government act, and, while identical in name with the body authorized by the latter act, are yet separate and distinct from the supervisors or board of supervisors of such latter act. (4) Justice Temple, who filed a dissenting opinion in the case, and Chief Justice Beatty, who concurred therein, are of opinion that all the officers of the city and county of San Francisco are municipal officers, and that none of them are governed as to the duration of their term of office by the county government act of 1893. It will thus be perceived that, so far as the supervisors are concerned, the members of the court are a unit in the opinion that they are municipal officers, and not county officers, within the purview of the county government act. It must follow that the supervisors of the city and county of San Francisco are charter, and not legislative, officers. See In re Carrillo, 66 Cal. 3, 4 Pac. 695. The consolidation act was not repealed by the constitution of 1879. Section 1 of the schedule thereto (section 1, art. 22); In re Stuart, 53 Cal. 746; Wood v. Board, 58 Cal. 561; In re Guerrero, 69 Cal. 88, 10 Pac. 261. Consolidated city and county governments are subject to the control of general laws. Ex parte Keeney, 84 Cal. 304, 24 Pac. 34; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615. The question involved here, however, does not relate to the power of the legislature to amend the consolidation act by providing a different mode of filling vacancies in the office of superintendent of schools from that designated in such consolidation act, but rather to that other question, has the legislature done so? We think this question must be answered in the negative. When the legislature, by section 25 of the county government act, as amended in 1893, established the general permanent powers of the board of supervisors, "under such limitations and restrictions as are prescribed by law," it was dealing with boards of supervisors created by the same statute. Section 13 is as follows: "Each county must have a board of supervisors consisting of five members." It is to this board of county officers, and not to that other board of municipal officers, composed of 12 members, existing in San Francisco under the same name, but exercising other and more extended functions, that we may suppose the power is given by subdivision 21 of section 25 of the same act "to fill by appointment all vacancies that may occur in any office filled by the appointment of the board of supervisors, and elective county or township officers, except in those of judge of the superior court and supervisor, the appointee to hold office for the unexpired term." The law does not favor the repeal of statutes by implication, and it is only by means of implication that we can reach the conclusion that it was the legislative will to repeal the clause in the consolidation act which devolves the duty of filling vacancies in the office of superintendent of schools in San Francisco upon the board of education. The county government act of 1883, with its several amendments, is a general law; but it is not a general law relating to municipal corporations, and hence cannot by implication repeal the consolidation act of the city and county of San Francisco. In the general county government act the legislature has kept steadily in view those entities known as "counties," and, while some of the provisions of the act relate to the city and county of San Francisco, it is in its aspect as a county that it is dealt with. The duties and compensation of its officers, as county officers are legitimate subjects of legislation under such county government act. But the attempt to apply this law to the board of supervisors of the city and county—to a municipal body unknown to the law, except as found in the consolidation act—is to wrest it from its legitimate object, and by indirection to amend and alter that act by taking from the board of education a power vested in that board, and conferring it upon another body created and existing by virtue of the consolidation act, viz. the board of supervisors in and for the city and county. To repeat, such an interpretation leads to an amendment of the charter of the municipality, not by a general law with that declared object, but by a law passed with another object in view, and defining the powers and duties of boards of supervisors not identical in their origin, in the number of their members, in the duration of their terms of office, or in the source or extent of their powers, with the board of supervisors in and for the city and county of San Francisco. We are of opinion that the power to fill vacancies, given to boards of supervisors by the county government act, applies to the boards of supervisors in and for the several counties of the state other than the city and county of San Francisco, and that as to the latter the power to fill vacancies in office comes from the consolidation act, and does not include vacancies in the office of superintendent of public schools, which are to be filled by the board of education. It follows that the judgment appealed from should be affirmed, and we so recommend.

We concur: VANCLIEF, C.; BELCHER, C.

McFARLAND and HENSHAW, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

TEMPLE, J. I concur in the judgment.

(114 Cal. 667)

### RIDER v. REGAN et al. (No. 16,019.)[1]

(Supreme Court of California. Nov. 5, 1896.)

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — SALE OF HOMESTEAD BY ONE SPOUSE— BONA FIDE PURCHASERS.

1. Act March 25, 1874, § 1 (St. 1873–74, p. 582), provides that, if either husband or wife shall become hopelessly insane, the probate court, on application of the sane spouse, may make an order permitting the applicant to sell or mortgage the homestead. Section 2 provides for notice by publication and personal service on the nearest male relative of the insane spouse in the state, or, if no such relative reside in the state, then on the public administrator. Section 4 declares that, if the court makes the order, any conveyance shall be as valid as if the property was the absolute property of the person making such conveyance. *Held* not unconstitutional as depriving the insane spouse of vested rights in property without due process of law. Henshaw, Temple, and Harrison, JJ., dissenting.

2. Nor is such act objectionable for not requiring the applicant to give security for proper application of the proceeds of the sale.

3. On an order of the probate court made under an act enabling a husband or wife to sell or incumber the homestead in case the other spouse becomes hopelessly insane, M. conveyed to her brother a homestead declared on community property, for a nominal consideration, that was never paid. The grantee mortgaged the land to plaintiff to secure a loan, part of which was paid to M., who reloaned it to her brother, the balance being applied on a former mortgage executed by M. and her husband; and the brother subsequently conveyed the premises, in consideration of love and affection, to M., subject to plaintiff's mortgage. *Held*, that if these transactions constituted a mortgage by M. to plaintiff, through the agency of her brother, instead of a sale to the latter, and was not, therefore, authorized by the order, which directed a sale, yet plaintiff's rights were not affected, since he had neither actual nor constructive notice that the brother was not the absolute owner of the property.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Matthias Rider against James Regan and others to foreclose a mortgage. Defendant Edward Kelly, by his guardian ad litem, alone answered, and from a decree of foreclosure, and from an order denying his motion for a new trial, appeals. Affirmed.

Stafford & Stafford, for appellant. Reddy, Campbell & Metson, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by defendant Regan to secure payment of his promissory note, made payable to plaintiff or order, for the sum of $1,500, with interest thereon at the rate of 8 per cent. per annum. The defendants Edward and Mary Kelly are husband and wife, and were made parties defendant on the ground that they claimed some interest in or lien upon the mortgaged premises, which consist of a lot of land 35 by 80 feet, with appurtenances, situated in the city of San Francisco. Edward Kelly alone, by his guardian ad litem (he being insane) answered plaintiff's complaint, denying that defendant Regan ever owned or had any authority to mortgage the lot, and alleging that, at the time the mortgage was executed, he (Kelly) was, and ever since had been, sole owner of the mortgaged premises. He also filed a cross complaint, the substance of which is that in October, 1877, while he and defendant Mary C. Kelly were husband and wife, he purchased the mortgaged lot with money earned by him during the marriage, and that it thereby became community property of himself and wife; that in June, 1880, while he, with his wife and family, were residing on said lot, she, in due form, made and recorded a declaration of homestead thereon, which was never abandoned; that in August, 1884, he, after due examination before the superior court, was found to be insane, and by order of said court was committed to the insane asylum at Napa, Cal., and is now, and ever since has been, confined in said asylum, and during all that time has been, and is now, hopelessly insane, and incompetent to transact any business. These facts alleged in the cross complaint were found by the court to be true, and are not questioned. The following additional facts appear by the record, and are undisputed: In October, 1883, while defendant Edward Kelly was sane, he and his wife executed a mortgage on said homestead lot to secure their promissory note for $600, payable to the German Savings & Loan Society one year after date. In October, 1888, suit was commenced to foreclose this mortgage, and while it was pending, to wit, in December, 1888, the defendant, Mary C. Kelly, filed in the superior court her petition praying for an order authorizing her to sell said homestead premises pursuant to an act of the legislature, entitled, "An act to enable certain parties therein named to alienate or incumber homesteads," approved March 25, 1874. St. 1873–74, p. 582. It is admitted that her petition stated all the requisite facts, according to said act, and, among them, that neither said Edward nor Mary C. Kelly had any means, property, or estate except said homestead premises and a few articles of homestead furniture and wearing apparel; that said Mary was dependent for the support of herself and three minor female children, offspring of the marriage, upon the assistance of her relatives; and that her husband had no relatives in this state except said female children. Notice of the application was published, and also personally served on the public administrator, as required by the second section of the act, and the public administrator appeared by counsel for Edward Kelly. After hearing the court made an order authorizing the petitioner to sell the homestead premises. Thereafter, on April 11, 1889, Mary C. Kelly, by deed of grant, bargain, and sale, conveyed said homestead to the defendant James C. Regan, who on May 4, 1889, executed to plaintiff the mortgage to foreclose which this action was brought. The court below found that on May 4, 1889, when the mortgage in suit was executed, the defendant Edward Kelly "had no right, title, or interest in, or claim to," the mortgaged premises, and decreed a foreclosure of the mortgage as prayed for in plaintiff's complaint. The defendant Edward Kelly, by his guardian ad litem, appeals from the judgment and from an order denying his motion for a new trial.

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[1] Rehearing denied.

1. It is admitted by counsel for appellant that all the proceedings by which the order purporting to authorize Mary C. Kelly to sell the homestead was obtained were regular, and in strict accordance with said act of March 25, 1874. But he contends that said act is unconstitutional and void, for the reason that a sale of a homestead in accordance therewith deprives the insane spouse of a vested right to property without his consent, and without due process of law. And whether it does so or not is the principal question for decision. The legislature has not, by the act in question, encroached upon the judicial department. It has adjudged nothing. The act itself does not directly deprive the insane spouse of any right. It merely declares that upon a specified state of facts, to be found by a court, such court may authorize the sane spouse to sell the homestead property. The first section of the act is as follows: "Section 1. In case of a homestead, if either the husband or wife shall become hopelessly insane, upon application of the husband or wife, not insane, to the probate court of the county in which said homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife, not insane, to sell and convey or mortgage such homestead." The second section provides that notice of the application shall be published for three weeks in a newspaper, and personally served on the nearest male relative of the insane spouse to be found in the state, or, if no male relative be known to reside in the state, then upon the public administrator, three weeks prior to the application, whose duty it shall be "to appear in court and see that such application is made in good faith, and that the proceedings thereon are fairly conducted." The third section indicates generally what the verified petition of the applicant shall contain, besides requiring that it specifically set forth the age of the insane, the number, age, and sex of the children of such insane husband or wife, a description of the homestead, and the value of the same, and such other facts as relate "to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition." The fourth section provides that, if the court make the order, any sale, conveyance, or mortgage made in pursuance thereof shall be as valid and effectual as if the property thereby affected was the absolute property of the person making such sale, conveyance, or mortgage. The fifth section provides that a fee not exceeding $20 be paid the public administrator for his services in any case under the act. The sixth section expressly repeals all acts and parts of acts in conflict with this act. Conceding that the insane husband had a vested property right in the homestead premises, and even that it extended to absolute ownership thereof (which is not admitted), yet "all vested property rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and, if they become divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order." Cooley, Const. Lim. (6th Ed.) p. 438. The statute in question is a general remedial law, intended to enforce the legal obligation of a hopelessly insane husband or wife to apply his or her property, in case of necessity, to the support of the sane wife or husband and their minor children, and therefore is no more objectionable on constitutional grounds than would be a statute to enforce the performance of any other private or public duty or obligation. After stating the rule that private property cannot, by either a general or special enactment, be taken from one person and transferred to another for the private use and benefit of such other person, Judge Cooley says: "Nevertheless, in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even divest legal titles in favor of substantial equities, where the legal and equitable rights do not chance to concur in the same persons." Page 436. Nor can it be truly said that the procedure prescribed by the act in question is not due process of law. The usual and only practical kind of notice of the wife's petition was given the insane defendant by publication during a reasonable period of time, and by personal service of like notice on a public officer, who pro hac vice was constituted guardian ad litem of the insane defendant, and upon whom was imposed the duty of appearing for, and protecting the rights of his ward, and who in this case did appear for him by counsel. The cause was heard and the facts found by the court before judg-

ment was pronounced, and it is not questioned that the facts proved and found justify the judgment, as tested by the provisions of the act in question. If this was not due process of law, in the constitutional sense, it would seem difficult, if not impossible, for the legislature to provide due process by which the property rights of an insane person could be affected in any case. The insane defendant is afforded all possible opportunity to be heard in defense of his rights. In addition to the guardian ad litem provided by the act, the court, at request of appellant's wife, appointed the learned counsel for appellant to that office, who appears to have ably and zealously performed the duties thereof, both in the court below and in this court.

2. The act is further objected to on the ground that it does not require of the sane spouse any bond or other security for the proper application of the proceeds of the sale. But this objection does not touch the question as to due process of law. It goes only to the quality or nature of the relief which necessarily follows the process, whether that process was or was not due process of law; and, conceding that the relief provided was defective or excessive, yet the legislature had indubitable power to authorize the courts to grant it by due process of law. It follows that, from the mere nature of the relief granted, no inference can be drawn touching the nature of the procedure or process of law leading up to it. Whether such procedure was due process of law must be determined by other means. And it having been herein above determined that the procedure provided by the act is due process of law, and it appearing and being admitted that both the procedure and the relief granted were in strict accordance with the provisions of the act, it follows that the order granting such relief was valid.

3. It appears that the defendant Regan, to whom the homestead premises were sold, was a brother of the defendant Mary G. Kelly, who sold it; that her deed to Regan recited the consideration therefor to have been $5, which was not paid; that Regan mortgaged the property to plaintiff to secure a loan of $1,500, which he borrowed from plaintiff; that, of the $1,500 so borrowed, $600 was applied by Mary C. Kelly to the satisfaction of the aforesaid mortgage executed by her and her husband to the German Savings & Loan Society in October, 1883; that the remainder of the money loaned to Regan by plaintiff ($900) was given to Mrs. Kelly, and she loaned it to Regan; and that afterwards Regan, for the consideration of love and affection, conveyed the homestead, subject to his mortgage to plaintiff, to his sister, Mary C. Kelly. Counsel for appellant contends that the substance of these transactions was a mortgage of the homestead by Mrs. Kelly to the plaintiff, through the agency of her brother, and not a sale to her brother, according to the purport of her deed to him, and therefore was not authorized by the order of the court, which merely authorized her to sell, and not to mortgage, the homestead. Conceding all this, the rights of the plaintiff as mortgagee are not thereby affected, unless he had actual or constructive notice of the alleged character of the transactions by and between Regan and Mrs. Kelly. There is nothing tending to prove such constructive notice. The deed from Mrs. Kelly to Regan, as previously recorded, both literally and substantially conformed to the order of the court. It purported an absolute sale to Regan, and nothing of its contents indicated anything different. As to actual notice, it is stated in the bill of exceptions that it was proven that at the time of the execution of the mortgage by Regan, and at the time of the loan of $1,500, "plaintiff had no knowledge of any agreement between the defendants Regan and Mary C. Kelly, but at all of said times believed defendant Regan was the absolute owner of said property, in accordance with the terms of the deed of Mary C. Kelly to him, said Regan." Whether or not the appellant has suffered injury in consequence of the transactions herein above stated, for which he is entitled to any remedy against others than the respondent, is a question not involved in this appeal. I think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

McFARLAND, VAN FLEET, and GAROUTTE, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed. It is to be observed, however, that the propriety of trying appellant's alleged title in this action was not raised, and this decision must not be taken as authority for trying adverse and paramount titles in an action to foreclose a mortgage.

BEATTY, C. J. I concur in the judgment of affirmance. It is not necessary to decide or to consider in this case whether the act of 1874 is constitutional or not, as applied to homesteads created by the sole declaration of one spouse upon separate property of the other. The case here is of a homestead declared upon community property acquired subsequent to the passage of the act in pursuance of which it was sold. If the legislature has the power (as unquestionably it has) to provide generally for the alienation of community property by the husband alone, and his control of the proceeds of the sale, I can see no reason why it has not the power to provide, in case of the hopeless insanity of the husband, for the alienation by the wife alone of so much of the community property acquired subsequent to the passage of the act as may have been lawfully dedicated as a homestead. So far as the act of 1874 goes beyond this proposition, it may be seriously doubted whether it is operative, but I can see no reason to refuse to give it effect in a case not involving any question of vested rights.

HENSHAW, J. I dissent, under the conviction that the act in question is unconstitutional. Section 1 (Act March 25, 1874) of that act is as follows: In case of a homestead, if either the husband or the wife shall become hopelessly insane, upon application of the husband or wife not insane to the probate court of the county in which said homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife not insane to sell or convey or mortgage such homestead." Section 2 provides for publication and service of notice of the application. Section 3 makes necessary the filing of a petition, and prescribes what it shall contain. Section 4 declares that, if the court shall make the order contemplated by section 1, the same shall be entered upon the minutes, and thereafter any sale, conveyance, or mortgage made in pursuance of such order shall be as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, or mortgage in fee simple. It is first to be noted that the statute is applicable, not to any particular class or kind of homesteads, but to all homesteads, whether declared upon community property, or upon the separate property of one or other of the spouses; whether declared by their joint act, or by the act of either. While the homestead exemption is only to the amount of $5,000, yet real property of any value may be impressed with the homestead character; and, when so impressed, that character attaches to all of the property. Thus, a homestead may be declared upon the separate property of the wife of the value of $40,000 or $50,000. Should the wife become hopelessly insane, that homestead, at the instigation of the husband, could be subjected to sale. Next, it is to be observed that the authority to order the sale is not made to depend upon a determined need or advisability therefor. No question of the necessity of the support of the sane or insane spouse, or of minor children or other dependent persons, is necessarily involved. The bald fact that one party to a marriage has become hopelessly insane, and that there is a homestead, whether upon community property, or upon the separate property of the insane spouse, is all that is necessary to warrant the order of sale. Again, it is to be seen that the act makes absolutely no provision for distribution or disposition of the funds arising from the sale. The power of the court ceases when by its order it authorizes the sale to be made. The interest of the insane person is in no way protected. Neither the money received, nor any part of it, is required to be devoted to his support, or to the support of any person dependent upon him. The result might be, as in this case it was, that the property of the insane owner was sold, and the moneys turned over to a third person, who had not the slightest legal claim upon him or it. There are yet other matters in which this act is at least peculiar. Not only does it authorize the sale of the land of an insane person, without protecting his interests in the proceeds of the sale, but it fails even to provide for the appearance of a guardian. The proceedings are begun and the sale made by a person standing in no fiduciary relation to him. There is no supervision by the court of the sale. No bond is exacted of the seller. The sale may be a gift, as in fact this was, or the price may be entirely inadequate. Yet no one is empowered to check any fraud which may be committed upon the unfortunate owner. He is stripped of his property, without hearing and without redress, because, having a homestead, he has become insane.

There is a species of legislation to which Judge Cooley has given the name "prerogative remedial legislation," that is not obnoxious to the law. It is based upon the recognized power of the legislature, as parens patriæ, to pass proper rules and regulations for superintendence, disposition, and management of the property of infants, lunatics, and others under disability. Within the legitimate scope of such legislation is the power which may be conferred upon one standing in a fiduciary relation to a minor or incompetent, to change the character of the estate, and even to dispose of its proceeds, when it is to the interest of the minor or incompetent that such should be done. But in all such legislation there is no determination of adversary rights, no deprivation of any person of his property. Says Judge Cooley: "This species of legislation may perhaps be property called 'prerogative remedial legislation.' It hears and determines no rights. It deprives no one of his property. It simply authorizes one's real estate to be turned into personal." Cooley, Const. Lim. p. 122. In Paty v. Smith, 50 Cal. 153, this court gravely doubted the power of the legislature to direct a sale of the real estate of an infant by one other than a duly-appointed guardian. That act provided, however, that the person making the sale should account for the proceeds to the probate court, and this court assumed that the statute contemplated the appointment of that person as guardian by the probate court. In Brenham v. Davidson, 51 Cal. 352, the act under consideration authorized the guardian of an infant to sell the real estate, subject to the approval of the probate court, for the purpose of enabling the guardian to reinvest the proceeds in other property for the benefit of the ward. It was declared that such an act was not an assumption of judicial power by the legislature, and this court quoted with approval the language of Judge Cooley to the following effect: "The rule upon this subject, as we deduce it from the authorities, seems to be this: 'If the party standing in position of trustee applies for permission to make the sale, for a purpose apparently for the interest of the cestui que trust, and there are no adverse interests to be considered and adjudicated, the case is not one which requires judicial action; but it is optional with the legislature to grant the writ by statute, or to refer the case to the courts for consideration, according as one course or the other, on consideration of policy, may seem desirable.'" But in these cases, and in the many others which we have examined from sister states, the acts have been upheld because it was apparent from them that the interest of the minor or incompetent was fully protected, and that the statutes were, in their operation, beneficent. Thus, in Rice v. Parkman, 16 Mass. 326, the court says: "The only object of the authority granted by the legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. * * * No one imagines that under this general authority the legislature could deprive a citizen of his estate." Authorities need not be multiplied upon so plain a proposition. We are here confronted with an act entirely different in character, an act which assumes to authorize one not standing in a fiduciary relation to the incompetent to make a sale of his real estate for purposes not connected with the incompetent's interest, necessities, or convenience, and without making any provision to secure to him his just share of the proceeds of the sale. We are not in this concerned with a definition of the particular character of the wife's interest in a homestead declared upon the community property. Whether that interest amounts to an estate, or whether it be a mere expectancy, it is unquestionably true that the husband, in whom is vested the sole right of control and disposition of the community property, has a legal interest therein. This legal estate has a money value. When a sale of the homestead is made, it involves a sale of an estate in reality belonging to him. By the act under consideration he is neither secured in that property, nor is it devoted, of necessity, to any legitimate purposes. Our attention has not been directed to the decisions of any courts in which an act like this has been construed and upheld; nor would we, against the great weight of reason and authority, be inclined to follow them if any such could be found. Respondent, it is true, makes reference to the case of Forbes v. Moore, 32 Tex. 195. It is there said: "During the insanity of the husband the wife is the head of the family, and, as such head, has the legal right to dispose of so much of the common property of husband and wife, or, in case there be none, of the separate property of the husband, as may be necessary to supply the wants of herself and his or her children." But in the later case of Heidenheimer v. Thomas, 63 Tex. 287, this language is considered, and it is said that, in so far as it seems to indicate a rule different from the true one, it must be regarded as obiter, and of no binding force. And in Railway Co. v. Bailey, 83 Tex. 19, 18 S. W. 482, the court quotes with approval the language of Heidenheimer v. Thomas, supra: "We are of the opinion that no such power rests in the wife of an insane person; at least, in reference to community property, or the separate property of the husband. The law provides for just such a case, and renders unnecessary the exercise of any such power by the wife." We are not here called upon to say whether or not the legislature has the power to accomplish what seems to have been the principal purpose of this act, namely, to subject the community property or the separate property of an insane spouse to the support of those legally dependent upon him. It is enough to say that the attempt which finds expression in an act such as this is inadequate, improper, and unconstitutional, and amounts to but the confiscation of the property of a person, without provision for the distribution of that property, and for no other reason assigned than that he has met with the most lamentable misfortune of becoming hopelessly insane. The judgment and order should be reversed, and the cause remanded.

We concur: TEMPLE, J.; HARRISON, J.

(115 Cal. 85)

## WOODBURY v. NEVADA SOUTHERN RY. CO. (L. A. 243, 244.)

(Supreme Court of California. Nov. 24, 1896.)

APPEAL BY CORPORATION—DISMISSAL—RIGHTS OF STOCKHOLDERS—SUBSTITUTION OF ATTORNEYS.

1. In an action against a corporation, pending an appeal by the defendant, certain stockholders, claiming to be the governing body of the corporation, filed a motion, supported by ex parte affidavits, to dismiss the appeal, as taken without authority. *Held* that, in the absence of sufficient evidence to establish affirmatively the facts alleged, the motion should be denied.

2. In an action against a corporation, pending an appeal by the defendant, a motion, supported by ex parte affidavits, was filed in the appellate court by certain stockholders, claiming to control the corporation, to substitute another attorney for the attorney of record. *Held* that, in the absence of sufficient evidence to establish affirmatively that the moving parties are in control, the motion should be denied.

3. Under Code Civ. Proc. § 946, providing that an appeal stays proceedings upon the judgment or order appealed from, but that the court below may proceed upon any other matter not included in such order; and section 284, providing that the attorney in an action may be changed at any time by order of the court, upon application, an application, pending an appeal, to substitute another for the attorney of record, should be made in the trial court.

In bank. Appeal from superior court, San Bernardino county; J. S. Noyes, Judge.

Action by R. W. Woodbury against the Nevada Southern Railway Company. Pending an appeal by the defendant from a judgment in favor of plaintiff, certain stockholders moved to substitute another attorney for the attorney of record, and to dismiss the appeal. Motion dismissed.

A. B. Hotchkiss, for appellant. H. C. Dillon, for respondent.

McFARLAND, J. Several actions to enforce alleged mechanics' liens were consolidated, and judgments were rendered against the defendant, the Nevada Southern Railway Company, a corporation, for a large sum of money, to wit, $151,710.79, together with attorney's fees, costs, etc. It appears that other large interests are, to some extent, incidentally involved in the case. On April 15, 1896, an appeal was taken to this court by the said railway company, defendant, by its attorney, A. B. Hotchkiss, who is an attorney and counselor in all the courts of this state. The transcript on appeal was filed May 27, 1896. Afterwards two motions were made to this court, and submitted for decisions. One is a motion made by respondent to dismiss the appeal. The other is a motion purporting to be made by the appellant, the said railway company, for a substitution of attorneys. The notice of this second motion is addressed "to A. B. Hotchkiss, Esq., attorney of record for said appellant," and is signed, "The Nevada Southern Railway Company, by M. A. Conkling, Its Attorney"; and, in the notice, Hotchkiss is informed that the said railway company will apply for an order of this court to change the attorney for said company, appellant, by substituting said Conkling as its attorney in the place of said Hotchkiss. These two motions are based upon substantially the same grounds, namely, that said appeal was taken without the authority of said appellant, and, particularly, that since the taking of the appeal the appellant has ordered that Conkling be substituted as its attorney in place of said Hotchkiss, and that said appeal be dismissed. Hotchkiss, for himself and for the appellant, makes certain preliminary objections to the hearing of these motions, and contends that the procedure adopted to bring before this court the matters sought to be presented by said motions is irregular and unwarranted, and that the said motions cannot, therefore, be considered. But we do not deem it necessary to pass upon these objections, or to consider other objections to the competency of certain evidence submitted on the hearing of the motions, because, waiving all of said objections, we do not think that the evidence submitted warrants the granting of either of said motions. The motions were submitted here upon ex parte affidavits, which is a very unsatisfactory method of presenting issues which involve important rights and large property interests. If these motions should be granted, some of the parties would be forever precluded from raising in any form questions which they seek to have decided on the appeal sought to be dismissed, and which involve large sums of money. Evidently, therefore, the motions should not be granted unless the showing made by the moving parties is strong and clear, and the showing made is not of that character. There are a number of affidavits made on behalf of each of the contesting parties, and they are sharply conflicting. It would be useless to state here the contents of the various affidavits. It is sufficient to say that the evidence which they furnish, considered as a whole, does not affirmatively establish the alleged facts upon which the motions are based, or show who, among contesting stockholders, have the control of the corporation appellant. If, upon the hearing of the appeal, the judgment of the court below shall be affirmed, the moving parties in these motions will have obtained substantially what they are now demanding. On the other hand, if the judgment shall be reversed it should be an easy thing in the court below, where questions of fact can be fully investigated, to determine who constitute the proper governing body of said corporation, and such governing body can then make such disposition of the case as it may deem advisable. For these reasons we are satisfied that the motions should be dismissed. The motions to dismiss the appeal and for substitution of attorneys are both denied.

I concur: GAROUTTE, J.

HARRISON, J. I concur. In addition to the reasons given in the opinion of Mr. Justice

McFARLAND for denying the motions, the motion for the substitution of attorneys for the appellant should have been originally presented to the superior court. Section 946, Code Civ. Proc., provides that the perfecting of an appeal stays all further proceedings in the court below "upon the judgment or order appealed from," or "upon the matter embraced therein," and also declares that "the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from"; and section 284, Id., provides that the attorney in an action may be changed at any time "before or after judgment. * * * (2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." The appellate jurisdiction of this court can be exercised only upon the matters appealed to it, which in the present case is the judgment rendered by the superior court against the appellant. This judgment was for a large amount of money, and it does not appear that any undertaking was given to stay proceedings thereon. The enforcement of the judgment, as well as any proceedings to vacate it or to grant a new trial, must be taken in the superior court. These are matters not embraced in the judgment appealed from, and consequently remain within the jurisdiction of that court to proceed upon; and, irrespective of all statutory provision, it is eminently fitting that the court which has jurisdiction of the proceedings should determine who is authorized to represent the parties thereto as their attorney. There would be a manifest impropriety for this court to direct a substitution of attorneys to conduct the litigation in reference to the matters that have not been appealed, and the statute contemplates that the same attorney shall represent the party in both the trial and the appellate courts. If any substitution is to be made, it should be made in the court of original jurisdiction, and, if requisite, the action of that court in the matter can then be properly certified to this court.

We concur: VAN FLEET, J.; HENSHAW, J.

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115 Cal. 67

## DAVIS v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 332.)

(Supreme Court of California. Nov. 24, 1896.)

RECOVERY OF TAXES PAID—SPECIAL ASSESSMENT—STATUTE.

Pol. Code, § 3819 (Laws 1893, p. 32), authorizing actions against counties for the recovery of illegal taxes paid under protest, does not apply to a special assessment levied by the city and county of San Francisco, and collected for a fund in which the county, as such, has no interest. Easterbrook v. City and County of San Francisco (Cal.) 44 Pac. 800, followed.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Andrew M. Davis against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. H. T. Creswell and W. C. Belcher, for respondent.

McFARLAND, J. A general demurrer to the complaint was sustained, and, plaintiff having declined to amend, judgment was rendered for defendant. Plaintiff appeals from the judgment. The purpose of the action is to recover of the city and county of San Francisco, under the provisions of section 3819 of the Political Code (Laws 1893, p. 32), certain alleged taxes, averred to have been paid by appellant under protest. But the alleged taxes were, in fact, founded upon special assessments for a specific purpose, under an act of the legislature approved March 23, 1876 (St. 1875–76, p. 433), generally known as the "Dupont Street Act," to which the said section 3819 of the Political Code does not apply, and for which no action can be maintained against said city and county. This was expressly decided by this court in Easterbrook v. City and County of San Francisco, 44 Pac. 800, and upon the authority of that case the judgment in the case at bar must be affirmed. See, also, Elberg v. San Luis Obispo Co. (Cal.) 41 Pac. 475, and Pacific Mut. Life Ins. Co. v. San Diego Co., Id. 423. It is proper to state that the Easterbrook Case had not been decided when this appeal was taken, or when the briefs in this case were filed. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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115 Cal. 50

## PEOPLE v. CRESPI. (Cr. 177.)

(Supreme Court of California. Nov. 21, 1896.)

CRIMINAL LAW—EXAMINING MAGISTRATE—JURISDICTION—IMPEACHMENT OF WITNESS—EVIDENCE.

1. The powers and jurisdiction of the officials designated by Pen. Code, §§ 807, 808, as magistrates, while acting as such, are not derived from the statutes relating to their several offices, but from such sections and from Const. art. 1, § 8, authorizing the prosecution of indictable offenses by information after examination and commitment by a magistrate; and a police judge in a city, being ex officio a magistrate, possesses jurisdiction to conduct such examinations, without regard to whether or not it is, in terms, conferred by the statute creating his office.

2. A defendant on trial for a criminal offense cannot be permitted to impeach the prosecuting witness by placing him on the stand, and, on his denial of statements imputed to him, contradicting him by other witnesses.

3. To rebut evidence introduced to prove a conspiracy by which certain druggists were making dishonest profits by the improper filling of prescriptions, the testimony of a physician practicing in the locality, that he knew of no such practice, and had heard of no complaint, was admissible, though he was not shown to have any connection with the parties charged, such fact affecting only the weight of his evidence.

4. Permitting a prosecuting witness in a trial for criminal libel to testify that he was married and had a family is not reversible error.

5. In a prosecution for a criminal libel, a

statement in an instruction that libels tend to incite breaches of the peace, and that it is the policy of the law, in the interest of its preservation, to discourage such libels by punishment of the libeler, is not error.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Cesare Crespi was convicted of criminal libel, and from the judgment, and from an order denying a new trial, he appeals. Affirmed.

Van Ness & Redman, for appellant. W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, Dep. Atty. Gen., for the People.

HENSHAW, J. The defendant, convicted of criminal libel in the superior court of the city and county of San Francisco, appeals from the judgment, and from the order denying him a new trial. The trial was had upon information filed in the superior court after examination held in the police court of said city and county.

Appellant contends that his examination was without authority of law, and that, therefore, jurisdiction was never acquired by the superior court. This is based upon the provisions of the act of 1893 relative to the police court of San Francisco (St. 1893, p. 9). Section 2 of that act declares: "Sec. 2. The police court of the city and county of San Francisco shall have jurisdiction: First. Of all violations of city ordinances or orders of the board of supervisors of the city and county of San Francisco. Second. Of all misdemeanors punishable by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. Third. Of all examinations of felonies committed in the city and county of San Francisco. Fourth. Said court, or any judge thereof, shall have the same powers in all criminal actions, cases, examinations and proceedings as are now or are hereafter conferred by law upon justices of the peace." From the foregoing it is argued that the police court has no jurisdiction to try this particular kind of misdemeanor, for which the maximum penalty exceeds $1,000 fine and one year's imprisonment. This is quite correct. It is next insisted that, as the statute expressly authorizes the police court to hold examinations in all cases of felony, but makes no mention of examinations for offenses less than felony, it must be construed as a withholding of jurisdiction in this particular. Notwithstanding the unreasonable and absurd anomaly which would result if the legislature should have conferred jurisdiction upon the court to examine the graver offense, and should have denied it power to investigate the lesser, still, if, by oversight or intent, such an omission or hiatus in the law should be found to exist, naught would be left for us to do but to recognize the fact. We think, however, that no such situation exists; and this, aside from the contention of respondent that subdivision 4, above quoted, makes good any apparent deficiency, and confers jurisdiction to hold examinations in the case of misdemeanors like the one under consideration. At the time of the adoption of our present constitution, the criminal procedure was remodeled by that instrument in one important particular. Article 1, § 8, provided that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law." Criminal libel was one of the crimes required to be prosecuted by indictment. Magistrates are defined and enumerated in the Penal Code. Sections 807, 808. Police judges in towns and cities are magistrates. It has been prescribed by law that all offenses formerly cognizable only by indictment may now be prosecuted either by indictment or by information filed after examination. The chapters and sections of the Penal Code treating of the powers and duties of magistrates make no distinction between the different judicial officers who may act in such capacity. Justices of the supreme court, judges of the superior court, justices of the peace, and police judges, when sitting as magistrates, have the jurisdiction and powers conferred by law upon magistrates, and not those which pertain to their respective judicial offices. They derive their powers and jurisdiction from the constitution, operating with the acts of the legislature upon the subject. Therefore, if it should be held that the statute of 1893, relative to the police court of the city and county of San Francisco, did not confer jurisdiction upon the police judges to hold examinations in misdemeanors such as this, the oversight or deficiency is fully made good and repaired by the provisions of the constitution and of the Penal Code. It is the same jurisdiction, and drawn from the same source, as that conferred upon and used by justices of the peace. In the section defining their criminal jurisdiction (Code Civ. Proc. § 115), no authority whatever will be found for the holding by them of examinations, either upon felonies or misdemeanors. They derive it, as do police judges, from their character, not of justices of the peace, but of magistrates.

1. A part of the libelous matter was a published charge that the complaining witness, Almagia, himself a newspaper editor or proprietor, was paid by "the camorra" to libel, and vilify certain people. By "camorra" is understood to have been meant a clique, ring, cabal, or confederation of Italians in the city, banded together for dishonest and dishonorable purposes. Defendant undertook to prove the existence of this camorra, and Almagia's connection with it. He called Almagia to the stand, as his own witness, and asked him, with specifications of time, place, and persons present, if he had not stated that he had in-

stituted the prosecution of defendant at the instance of others. Almagia answered that he had not. Defendant then sought to impeach him by showing that he had made this statement. The court refused to admit the impeaching evidence. This ruling is complained of. It was clearly right. It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him. Indeed, he was apparently questioned for the sole purpose of impeachment. Such practice is not permissible. People v. Jacobs, 49 Cal. 384; People v. Mitchell, 94 Cal. 556, 29 Pac. 1106.

2. In connection with the statement of defendant concerning the relation of the prosecuting witness to the so-called "camorra," and for the purpose of showing the dishonest character of such camorra, evidence was introduced by the defendant to prove the control by said camorra of the Italian Benevolent Society of San Francisco, and the improper making of money out of that society by druggists who were connected with both the society and the camorra. It was sought to be shown that the druggists referred to were realizing dishonest profits out of the improper putting up of prescriptions ordered by or through said benevolent society; and, to this end, witnesses were called who testified that various persons had complained that medicines obtained from druggists who were alleged to be members of the camorra had been barren of beneficial result, while medicines obtained upon the same prescriptions from other druggists, not members of the camorra, had proved efficacious in effecting the results for which intended. In rebuttal of this testimony the prosecution called as a witness Joseph Pescia, a physician practicing his profession in the city and county of San Francisco. Dr. Pescia, over the objection and exception of defendant, was allowed to testify that he knew nothing personally of the use of inferior medicines, and that, in his practice, no complaints had been made to him. The point is made that these rulings of the court were erroneous, because it was not shown that Dr. Pescia had any relation with the benevolent society, or any of the parties to the controversy, which would render his testimony of any value upon the matter. That may well be, but the complete answer is that the value or weight of the testimony was for the jury alone. It would certainly have tended to disprove the charge, if, in rebuttal, the prosecution had called all of the practicing physicians of San Francisco to give like evidence. That they called but one certainly affects the weight to be given to that one's testimony by so much as it fails to establish a perfect rebuttal, but the evidence was none the less admissible, even though of slight importance.

3. Almagia was allowed to testify that he was a married man, the father of a family. The admission of this fact is complained of. True, the evidence tended neither to prove nor disprove the criminal charge, but, if it be so that "he that hath wife and children hath given hostages unto fortune," then the fact might affect his credibility before the jury, and, in any event, could have done defendant no harm.

4. In advising the jury, the court spoke as follows: "It is proper to remind you that this is not an action brought by Almagia against Crespi to recover damages for injuries or supposed injuries sustained by the alleged libel. It is not a private, but a public, prosecution, conducted by the people of the state purely for public purposes. *The publication of a libel has a tendency to provoke a breach of the public peace, which the law is solicitous to maintain and preserve. Persons feeling themselves injured by such publications are incited, in many instances, to seek satisfaction by personal violence inflicted upon the supposed libeler.* It is the precautionary policy of the law, in the interest of the preservation of the peace of society, to discourage such violent remedies, involving a breach of the peace; and the law has therefore provided for the punishment of the libeler, as being one who wantonly puts the public peace at hazard, by printing and publishing untrue and malicious attacks on private character." The defendant detaches the italicized portion, and complains of it. But neither segregated nor with its context do we perceive anything in this language but a clear and correct exposition of the law, and the cause of its existence. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

115 Cal. 68

## McALPINE et al. v. LAYDON et al. (S. F. 405.)

(Supreme Court of California. Nov. 24, 1896.)

CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY—MASTER AND SERVANT—UNSAFE APPLIANCES.

1. Where the defendant pleaded that plaintiff's intestate was guilty of contributory negligence in standing where he did at the time of the accident, and one witness testified that deceased was not standing in a proper place, while another testified that he was standing just where he should stand, under the requirements of his duties, *held*, that the evidence did not warrant a nonsuit on the ground of contributory negligence.

2. Upon an issue as to the negligence of a master in not providing a proper head block for a pile driver used in pulling up piles, the testimony showed that generally the head blocks on pile drivers used for that purpose were cross bolted to prevent splitting; that, in the opinion of experts, they were unsafe unless so made; and that the head block on defendant's pile driver was not cross bolted, as a result of which it split, causing the death of plaintiff's intestate. *Held*, that the question as to defendant's negligence should have been submitted to the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by H. S. McAlpine and others, heirs of W. S. McAlpine, against Darby Laydon and others, for damages for the death of plaintiffs' intestate. An order of nonsuit having been set aside, and new trial granted, on motion of the plaintiffs, defendants appeal. Affirmed.

Van Ness & Redman, for appellants. A. Morgenthal, for respondents.

HENSHAW, J. The action is prosecuted by the heirs of W. S. McAlpine to recover damages of defendants for negligently occasioning his death. At the time of the accident the Young America pile driver, owned and operated by defendants, was engaged in pulling out piles driven in the Bay of San Francisco. McAlpine was employed in connection with the work as a raftsman. A pile, suddenly leaving its bed, released the strain, and a hook struck the head block, splitting it and knocking off a piece, which fell about 75 feet, striking McAlpine upon the head and killing him. Defendants were granted a nonsuit, but upon motion the judge reopened the case for a new trial, and from his order defendants prosecute their appeal. Newly-discovered evidence was one of the grounds urged, but the court granted the motion believing it had erred in ordering a nonsuit. The claim of plaintiffs was that the head block had been improperly bolted and fastened; that, for the work of pulling piles, it should have been cross bolted, to prevent the very splitting which occurred. The grounds of motion for a nonsuit were: First, the failure of plaintiffs to show negligence upon the part of defendants; and, second, the contributory negligence of deceased, in placing himself where he was when struck.

In considering these matters, it is to be remembered that the trial court, in passing upon the motion for a nonsuit, was not called upon to substitute its judgment for that of the jury, and thus to decide the motion in accordance with what it might conceive to be a preponderance of the evidence. If, upon all of the material issues joined, the plaintiffs had offered some evidence in legal contemplation fairly tending to prove them, then, even though there was conflicting evidence offered by other witnesses for plaintiffs, the determination of the questions, and the decision upon the conflict, was for the jury. This court, in reviewing the ruling of the trial judge, is governed by the same considerations.

The second ground urged upon the motion for nonsuit, namely, the contributory negligence of deceased, may be briefly disposed of. One witness called by plaintiffs testified that deceased should not have been where he was at the time of the accident. Another witness, the foreman of the dredger, swore that deceased was standing where he should have been,—in his proper and usual place. Both of these witnesses were in the employ of defendants. Such being the evidence, the nonsuit could not be supported upon this ground.

Coming to the consideration of the first ground urged for a nonsuit (that is to say, the alleged failure of the plaintiffs to show that defendants were guilty of negligence), plaintiffs' claim in that regard was that defendants' negligence consisted in failing to cross bolt the head block, and that for pile pulling, as distinguished from pile driving, the unbolted head block was a radically faulty, unfit, and dangerous appliance, and liable to the very accident which befell, and resulted in the death of, McAlpine. An employer is not bound to furnish for his workmen the safest machinery, nor the latest and best appliances, in order to save himself from responsibility for accidents resulting from their use. If the machinery or apparatus be of an ordinary character, and reasonably fitted for the purposes for which it is designed, the employer, in this regard, has fulfilled his duty. The burden is upon the injured servant to show that the machinery or appliances were so defective and inadequate as to make the use of them by the employer negligent and culpable. The plaintiffs undertook this burden, but upon the question whether or not the head block was reasonably appropriate for the use to which it was subjected, as upon the question of McAlpine's contributory negligence, the evidence offered by the different witnesses called by plaintiffs is in sharp conflict. But, as has been before said, we are not here concerned with a decision upon that conflict. If there be found evidence in the record reasonably tending to establish plaintiffs' claim that the appliance in question was unsafe and inadequate, then, whether a conflict upon that point be raised by the evidence of plaintiffs' other witnesses, or be raised by evidence produced by the defendants, the question still remains open for decision by the jury. The trial court, in passing upon the motion for a new trial, and reviewing its rulings upon the motion for a nonsuit, concluded that it had erred, and that there was evidence in plaintiffs' case tending to establish the unfitness of the appliance in question. In this we think the court was correct. The witness Pengally superintended the construction of the pile driver Young America, and was shown to be an expert upon the matter. Of his testimony it must be said that it is in some respects unsatisfactory, and that its statements are at times self-contradicting; but enough may be clearly gathered therefrom to show that the witness testified that, if the pile driver Young America was to be used for pile driving, the head block in use was sufficiently strong and secure without cross bolting. If, however, it was to be used for pile pulling, then it was an unsafe and unfit appliance unless cross bolted. Asked whether, when he constructed the Young America, he cross bolted the head block, he replied: "I do not say that I did not cross bolt it. I think I did. If I omitted to do it, it would be because I thought it was not necessary. If a pile driver had to be used to draw piles, and there was any extra strain coming upon the wood, I would take extra precaution to fasten it accordingly; but, for ordinary pile driving,—a solid piece of white oak that size,—I do not see how it is possible to split." Asked further, whether he would consider the head block used upon the Young America at the time of the accident to be a safe apparatus for pulling piles, without any cross bolts, he answers: "I would not consider it so for pulling piles. I mean to say, if bolts are put there it is certainly safer and stronger, but it is a question of judgment as to whether it is not strong enough without bolts." Again, Robert Cheesman, an expert who had constructed 15 or 20 pile drivers, testifies, in effect, that he always used cross bolts for safety, to keep the head blocks from splitting. And J. R. McAlpine, a cousin of deceased, testified that shortly after the accident he examined six different pile-driving and pile-pulling machines in the harbor, and that the head blocks of each and all of them were cross bolted, saving that upon the Young America. There was thus at least some evidence in the case tending to show that the appliance in question was unfit and unsafe, and upon this ground, also, the trial judge should not have granted the nonsuit and withdrawn the case from the jury. Such, as has been said, was the conclusion which he reached upon the motion for a new trial, which order was therefore properly granted, and is sustained. The order appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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115 Cal. 79

## CHAPMAN v. NEARY et al. (S. F. 247.)

(Supreme Court of California. Nov. 24, 1896.)

APPEAL — REVIEW — EVIDENCE — STATEMENTS BY THIRD PERSONS.

1. In an action by an attorney to recover fees alleged to have been payable in certain installments as the case progressed, the fact that the court found for defendant as to the amount of the first installment is not ground for reversing findings for plaintiff as to the others.

2. In an action by an attorney to recover fees, conversations between defendant and another attorney, who was associated with plaintiff in the case in which the services were rendered, are inadmissible against plaintiff, such conversations having taken place in the absence of and without the knowledge of plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by M. C. Chapman against Mary A. Neary and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Henry E. Highton, for appellants. W. W. Foote, Wm. R. Davis, and Young & Powers, for appellee.

BELCHER, C. This is an action to recover for professional services alleged to have been rendered by the plaintiff as an attorney at law for the defendant Mary A. Neary. The court below found the facts and gave judgment in favor of the plaintiff, from which, and from an order denying a new trial, defendants appeal.

The action in which the services are alleged to have been rendered was commenced March 30, 1888, in the superior court of Alameda county, by the defendant herein, Mary A. Neary, then Mary A. Godfrey, to obtain a divorce from her husband, George Godfrey. The defendant in the action denied the plaintiff's right to a divorce, and filed a cross complaint, asking that a divorce be granted to him. The trial of the cause was commenced September 25 and concluded October 29, 1888, and it consumed just 19 days of the intervening time. On November 30, 1888, the court announced from the bench that the plaintiff had failed to make out her case, and the defendant had made out a case on his cross complaint, and thereafter, on January 9, 1889, it made and entered its judgment and decree granting to the defendant and cross complainant a divorce from the plaintiff in said cause. The plaintiff moved for a new trial on a statement of the case, and her motion was denied April 15, 1889. Thereupon she appealed from the judgment and order. The appeal from the judgment was dismissed, at the request of the appellant, on June 21, 1889, and the appeal from order refusing a new trial was dismissed, upon like request, on August 24, 1891. On the next day after the appeal from the judgment was dismissed, June 22, 1889, the appellant Mrs. Godfrey was married to her co-defendant here, Nicholas E. Neary.

It is averred in the complaint in this case that the plaintiff was an attorney and counselor at law, and as such was engaged and retained by the plaintiff in the divorce case at the time the action was commenced; that he continued to render services as such attorney for the plaintiff in that action, without any specific agreement or contract as to his compensation therefor, until some time in November, 1888, when he and Mrs. Neary, then Mrs. Godfrey, entered into an agreement that, in consideration that he would continue to render professional services for her in said action, she would pay him for his services $1,000 down, $1,000 more when the motion for new trial should be decided by the superior court, and $1,000 more when the cause should be finally disposed of in the supreme court; that, after the making of said agreement, and pursuant thereto, plaintiff continued to render valuable professional services to and for the plaintiff in said action until August 24, 1891, when said cause was finally disposed of in and by the supreme court; that under and according to said agreement there became due and payable to the plaintiff at once the sum of $1,000, of which only $750 was paid, and on April 15, 1889, when the motion for new trial was denied, there became immediately due and payable to plaintiff the further sum of $1,000, and on August 24, 1891, when the appeal was finally dismissed in the supreme court, there became due and payable the further sum of $1,000, no part of which sums had ever been paid; wherefore judgment was asked for the sum of $2,250, with interest. The answer of Mrs. Neary denies that she made the specific agreement, or any agreement, with the plaintiff, as alleged in the complaint, and avers that after the motion for new trial in the divorce case was denied she and the plaintiff agreed that he should receive, in full compensation for his services theretofore rendered in said cause, the sum of $750, and that no further services should be rendered by him; that the said sum of $750 was paid by her to plaintiff, and was by him then and there accepted as a full compensation for all his services rendered in said cause; and that the relation of attorney and client between the said parties was then and there dissolved, and no further services were ever rendered by plaintiff in said cause. The court below found that Mrs. Neary agreed to pay the plaintiff for his services in the trial of the case of Godfrey against Godfrey, from the commencement to the conclusion thereof in the superior court, the sum of $750, and that she had paid him that sum, and no more. It also found that on or about the 30th day of October, 1888, after the trial of the case was concluded, and before the motion for a new trial had been disposed of, plaintiff and Mrs. Godfrey entered into an agreement whereby, in consideration that he would continue to render his professional services in said action on motion for a new trial and on appeal to the supreme court, she was to pay him for such services the further sum of $2,000 in addition to the $750 to be paid for the trial of the case in the superior court, the payments to be made as follows: one thousand when the motion for new trial should be decided, and the other thousand on the final disposition of the appeal; that under and in pursuance of said agreement plaintiff did continue to render further and valuable professional services in said action on motion for new trial and on appeal to the supreme court, up to and including August 24, 1891, when said action was finally decided by the dismissal of the appeal on account of the remarriage of the plaintiff therein; that by reason of the dismissal of the appeal plaintiff was not required to render as much service on the appeal as was contemplated when the agreement was made; and that the reasonable and fair value of all his services was the sum of $1,250, in addition to the $750 already paid; and for that sum, with interest thereon, judgment was entered.

The case is very ably and elaborately argued by counsel upon both sides, but, in view of the conclusion reached, we deem it necessary to notice only a few of the points made.

1. The fact that the complaint avers that under the agreement between the parties the first payment to the plaintiff was to be $1,000, while the court found that it was to be only $750, is no ground for a reversal. It was a disputable question as to what the amount of that payment was to be, and the finding was within the issues raised, and was justified by the evidence.

2. There was a clear conflict of evidence upon many of the issues presented, but it would subserve no useful purpose to set the evidence out. After a careful inspection of the record, we think there was evidence tending to support each of the findings, and the judgment cannot, therefore, be reversed on this ground.

3. There was no error in denying the defendants' motion for nonsuit. When the motion was made, the plaintiff had made out a prima facie case, and there was no material variance between the averments and the proofs. The case of Owen v. Meade, 104 Cal. 179, 37 Pac. 923, cited by appellants, is not in point.

4. The point that the court erred in sustaining objections to certain questions propounded to Mrs. Neary and Mr. Davidson, one of her attorneys in the divorce case, cannot be sustained. The questions related to transactions and conversations between Mrs. Neary and Mr. Davidson in the absence and without the knowledge of the plaintiff, and under no circumstances could the plaintiff's rights be affected by the evidence sought to be elicited. It was therefore clearly inadmissible under any known rule of law.

We advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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115 Cal. 74

## WOOLRIDGE v. BOARDMAN et al. (Sac. 202.)

(Supreme Court of California. Nov. 24, 1896.)

FRAUDULENT CONVEYANCES—PROOF OF INSOLVENCY—SUFFICIENCY OF EVIDENCE—ADMISSIBILITY OF EVIDENCE—TAX LISTS.

1. In an action to set aside a transfer of stock as in fraud of creditors, the debtor testified that at the time of the transfer his assets were double his liabilities. Other testimony valued his assets at only about half the valuation thus given, and the debtor's petition in insolvency stated the assets to be of a value much less than that now claimed. The petition in insolvency was filed six months after the transfer, and it did not appear that any business reverses had occurred in that time. *Held*, that the evidence justified a finding that the debtor was insolvent at the time of the transfer.

2. In an action to set aside a transfer of stock as in fraud of creditors, a tax list made out by the debtor just prior to his insolvency, and within six months after the transfer in issue, was admissible as tending to show what taxable property was owned by the debtor.

3. An objection to such tax list as a whole on the ground that the valuations affixed were the estimates of the assessor, and not the debtor, was properly overruled.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewitt, Judge.

Action by E. Woolridge, assignee of A. F. Boardman & Co., against A. F. Boardman, Mary Boardman, and others, to set aside a transfer of stock as made in fraud of creditors. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

F. P. Tuttle and W. B. Lardner, for appellants. Jo Hamilton and G. W. Hamilton, for respondent.

BRITT, C. A. F. Boardman and William Watts, individually and as partners composing the firm of A. F. Boardman & Co., filed their petition in insolvency on the 28th day of March, 1895, and were thereupon duly adjudicated insolvent debtors. Subsequently plaintiff was elected their assignee. As such assignee he obtained judgment in this action requiring the defendant Mary Boardman, wife of said A. F. Boardman, to reconvey to him, the plaintiff, 990 shares of stock in a certain mining corporation, of the value of $2,970, which Boardman had transferred to her as a gift on September 22, 1894; this on the ground that such transfer was fraudulent and void as to the creditors of the husband. A motion of defendants Boardman and wife for new trial was denied; hence the appeal.

The chief contention of appellants is that the evidence did not sustain the finding of the court that Boardman gave his wife the stock intending thereby to hinder, delay, and defraud his creditors. It would be unprofitable labor to abstract at length the evidence in the record touching the pecuniary condition of Boardman at the time of the transfer assailed by the plaintiff. Boardman gave testimony to the effect that in September, 1894, the assets of his firm were worth $30,000, while the indebtedness was less than half of this amount, and counsel insist that the evidence in this particular was without substantial conflict. But we find discrepancies concerning the items making up said total which tended to cast discredit on his estimates. Thus he valued certain stock in trade then on hand at $6,000, when other testimony in the case placed it at $2,400. He testified that certain lands were worth at that time $2,900, but in his petition in insolvency rated them at no more than $1,100. Substantially the same credits in favor of the firm, which, according to his testimony at the trial, were worth in September, 1894, their nominal amount,—over $10,000,—he stated in said petition to be uncollectible beyond one-half their face. Confessedly, a little more than six months after the gift in question, both Boardman and his partner were insolvent; and, in our opinion, the matters to which we have alluded, and other evidence in the case of similar tendency, warranted the conclusion that Boardman's circumstances were not materially worse when he commenced proceedings in insolvency than when he gave to his wife the mining stock. Indeed, the business of the partnership seems to have resulted in a small profit during the intervening period. We concede the point of appellants that the insolvency of the concern in March is of itself no foundation for an inference that it was insolvent in the preceding September (Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557); but the subsequent insolvency, occurring after lapse of no great interval of time, and when the business had suffered no considerable reverse by flood, fire, or other casualty, was a fact pertinent to the inquiry whether the like condition did not exist at the time of the gift to the wife, and to illustrate the intent of the donor (Butler v. Collins, 12 Cal. 457; Bump, Fraud. Conv. § 254). It is said that the insolvency was precipitated by an unexpected attachment; but the claim on which this issued was outstanding at the time of the gift, and therefore the attachment was a contingency which Boardman was then bound to take into account in balancing the probabilities of his solvency or insolvency. Id. § 261; Elwell v. Walker, 52 Iowa, 256, 265, 3 N. W. 64. The condition of insolvency was a circumstance tending to show fraudulent intent. Emmons v. Barton, 109 Cal. 663, 671, 42 Pac. 303, 305. There was, besides, other evidence concerning the same issue. Three weeks before the gift in controversy here, Boardman transferred to his wife, without valuable consideration, shares of stock in the Auburn Orange Company worth $4,000; and some later dispositions made by him, but unnecessary to detail, tended to withdraw smaller portions of his property from the reach of creditors. It appears also that only two days after the transfer of the mining stock to Mrs. Boardman the firm of A. F. Boardman & Co. settled an account of more than $4,000 with an importunate creditor by giving him their note (which has never been paid), telling him they could pay him nothing, as they could collect nothing. Notwithstanding some matters in proof which consisted well enough with good faith in the transaction impeached, we are satisfied that the finding of fraud made by the court upon all the facts before it cannot be disturbed.

Said insolvents resided in Placer county, and most of their assets were situated there. At the trial the court received in evidence the statement of the property owned by A. F. Boardman & Co. on March 5, 1894, rendered to the county assessor for purposes of taxation under section 3629, Pol. Code. This was subscribed by Boardman, and showed only real estate valued at $200 above mortgage deductions, and personalty consisting of horses, harness, vehicles, and farming utensils valued at $320. Defendants objected generally to the introduction of this document on the ground that it was incompetent, irrelevant, and immaterial. It was not shown that Boardman fixed or suggested the value which was placed on the property. This was the duty of the assessor; and, if the objection had been confined to the valuation, it would have been the duty of the court to exclude the same. Railroad Co. v. Mayne, 83 Cal. 566, 23 Pac. 522. But, being a list ostensibly accurate of the property owned by the firm at that time, verified by Boardman's signature, the statement was admissible to show what taxable property was then claimed by the firm; not as conclusive, but as any other declaration of Boardman on the subject. Since the paper was competent and relevant for some purposes, defendants cannot complain that the objection made to it as a whole was overruled. Some minor points are raised, but not much pressed. We find, on examination, that they are not well taken. The order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(115 Cal. 84)

### RAUER v. JUSTICES' COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 308.)

(Supreme Court of California. Nov. 24, 1896.)

JUSTICE OF THE PEACE—JUDGMENT—PRESUMPTIONS —CERTIORARI—APPEAL—RECORD.

1. The entry of a judgment in a justice docket, regular on its face, is prima facie evidence that it was rendered on the date shown.

2. The petition for a writ of certiorari to review a judgment of a justice court is no part of the record on appeal from the judgment dismissing the writ.

Commissioners' decision. Department 2. Appeal from superior court of city and county of San Francisco; A. A. Sanderson, Judge.

Certiorari by J. J. Rauer to review a judgment of the justices' court of the city and county of San Francisco. From a judgment dismissing the writ, petitioner appeals. Affirmed.

G. H. Perry, for appellant. Kennedy & Gray, for respondent.

BRITT, C. Rauer, the petitioner, brought an action in the justices' court against one Fields, in which action judgment was entered in favor of Fields for costs. To review such judgment Rauer obtained the writ in the present proceeding from the superior court. Upon the hearing, after return made, the writ was dismissed. Petitioner claims that the provision for the recovery of costs against him was not part of the judgment as originally rendered in the case of Rauer v. Fields, but was inserted therein a month after the trial, and that in this the justices' court exceeded its jurisdiction. The alleged fact of an antedated clause in the judgment does not appear from the justice's docket entries returned with the writ. Those show a judgment for costs apparently rendered on the day Rauer v. Fields was tried. They are prima facie evidence that such was the truth, and are not rebutted by anything else in the record. Code Civ. Proc. §§ 93, 912. The petition for the writ, alleging matters inconsistent with the docket in this particular, is no part of the record on appeal, and cannot be considered here. Code Civ. Proc. § 1077; Reynolds v. County Court, 47 Cal. 604. The judgment dismissing the writ should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment dismissing the writ is affirmed.

(114 Cal. 480)

### CRAIG et al. v. BROWN, Secretary of State. (S. F. 709.)

(Supreme Court of California. Oct. 8, 1896.)

ELECTIONS—BALLOTS—PARTY NAME.

The party designation, "National Democratic," on the official ballots, is not calculated to deceive. Beatty, C. J., and Garoutte, J., dissenting.

In bank. Petition by William Craig and others for writ of mandamus to L. H. Brown, secretary of state. Denied.

E. R. Taylor, William Thomas, W. W. Foote, Patrick Reddy, Garret W. McEnerney, and R. Y. Hayne, for petitioners. Atty. Gen. Fitzgerald, for respondent.

HENSHAW, HARRISON, VAN FLEET, and TEMPLE, JJ. We are of opinion that the application for a writ of mandate should be denied, holding that the designation, "National Democratic," is not calculated to deceive.

McFARLAND, J. I concur in the judgment; but I also think that the question—under the peculiar form which this petition for a writ takes—was determined by the secretary of state when he accepted and filed the certificate, and that his action cannot be reviewed on this proceeding.

GAROUTTE, J. I dissent.

BEATTY, C. J. I dissent. I cannot distinguish this case from the Dolan and Ewing Cases,[1] in which we held that candidates nominated by petition are not entitled to a party designation which might mislead voters.

(114 Cal. 484)

### McDONALD v. HINTON, Registrar. (S. F. 684.)[2]

(Supreme Court of California. Oct. 9, 1896.)

ELECTIONS—CERTIFICATES OF NOMINATION—FILING BY REGISTRAR.

The registrar is not bound to file every certificate of nomination that is in due form, but, where certificates are presented from each of two conventions claiming to represent the same political party, it is for him to determine, in the first instance at least, which represents the party. Beatty, C. J., and Harrison and Garoutte, JJ., dissenting.

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[1] No opinions filed.

[2] Rehearing denied.

In bank. Petition by McDonald for writ of mandamus to Hinton, registrar. Denied.

Eugene Lent, William F. Humphrey, Jos. Rothschild, Chas. J. Heggerty, D. Friedenrich and P. F. Dunne, for petitioner. Garret W. McEnerney, for respondent. T. C. Spelling, for interveners.

PER CURIAM. The writ should be denied. Whether a registrar, in filing or refusing to file a proffered certificate of nomination by a convention, acts ministerially or judicially, it is clear that he cannot be commanded by mandamus to do an act which the law does not require him to do. Now, sections 1186 and 1187 of the Political Code clearly contemplate that a political party which at the last election polled at least 3 per cent. of the entire vote can be represented by only one convention. A contrary view would certainly defeat the purpose of the law. Therefore, when each of two or more bodies of voters claims to be the convention contemplated by the Code, the registrar must determine, in the first instance, at least, which one of the bodies was "an organized assemblage of delegates representing" the particular political party named. To say that the presentation of a certificate in due form is conclusive of the essential fact upon which the alleged right rests is to announce the principle that each party to a controversy is the exclusive judge of his own case. If the issue were presented here whether or not the convention which the petitioners represent was the convention which in fact represented the Democratic party, then this court would have to consider whether or not it would, upon mandamus, hear evidence, and, after a trial here, itself determine the essential fact in dispute. But this proceeding was submitted upon the admission that the convention represented by petitioners only "claimed to be," but was not, a convention representing said political party, and upon the theory that the registrar was bound to file their certificate merely because it was in due and regular form. Therefore the question whether or not this court should, upon mandamus, inquire into the fact, and determine whether said convention did or did not represent said political party, is not before us. It therefore does not appear that the registrar has refused to do any act which the law enjoins upon him as a duty. The petition for the writ of mandamus is denied, and the proceeding dismissed.

We dissent: BEATTY, C. J.; HARRISON, J.

GAROUTTE, J. I dissent. There are three constructions to be placed upon this statute: (1) That the action of the registrar is final and conclusive. (2) That it is the duty of the registrar to decide as a fact whether or not the certificate presented to him comes from the regular and genuine Democratic or Republican party which it purports to represent, and that such decision by him is reviewable by this court. (3) That it is the duty of the registrar to file all certificates which upon their face comply with the statute.

To hold that the action of the registrar is final I cannot indorse for a moment. Every court which has given the question any consideration whatever has held against such a construction. It is placing a power so tremendous in the hands of the registrar that such a construction should not be held if possible to avoid it. The language indicating such intention upon the part of the legislature must be so plain as to admit of no doubt. If the language needs construction, it should be construed in some other direction. If the rejection of a certificate by the registrar is final, if it is beyond all review by courts, he could refuse to file all certificates purporting to come from opposing political parties, and, in effect, hold the result of the election in the hollow of his hand. The secretary of state, by refusing to file a certificate presented to him coming from one of the great political parties, could absolutely prevent that party, through its electors, from voting for a candidate for president of these United States. It is needless to say that the court is bound to look further for the true construction of this act.

The second construction suggested cannot be maintained. It seems impossible that it was ever intended for this court to enter into a trial of fact as to which set of claimants constituted the regular, true, genuine Democratic or Republican party. It is admitted by counsel that such question of fact is not to be determined by the principle or principles represented by these respective claimants; but it is insisted that such question of fact must be decided by an investigation as to the regularity of the organization, that respective abstracts of title must be furnished, and that the legal title must prevail. Such an investigation would open up most interesting fields. As in titles to real estate, I see no way of cutting off the investigation until it goes back to the original or paramount source of title, whether that original title originated in the city, state, or nation. I do not know what particular principles of law could be invoked in the investigation of such a fact. Its determination would depend upon the validity of the action of a committee; and this validity would depend upon the regularity and validity of motions to adjourn, to reconsider, to lay on the table, to postpone, as to what constitutes a majority, a quorum, a special meeting, a legal committee, and a thousand other matters purely of parliamentary usage. In the trial of such a question Blackstone and Kent would be entirely displaced by Cushing or Roberts. That character of investigation had better come for consideration before a high-school debating society, rather than a court of last resort. Again, let us assume that the members of the genuine central committee which guided the destinies of its party all resign. The power to perpetuate the organization rested in its hands alone, and now that committee is no more. Thus a great party would be placed in a sorry plight. It would be in the position of a trust without a trustee; and I presume, upon the happening of such a grave emergency, a court of equity would fill the breach, and appoint a new committee. Let us assume a case where the committee would neither resign nor take any steps to nominate a ticket to be voted for by its party electors. We thus have a present, live organization; it is regular; there is no flaw in its title; it is beyond suspicion; it represents and stands for the Republican party, but it does nothing. Under such circumstances, is it possible that no Republican ticket could be placed in the political field for which Republicans might cast their votes? Time is too short for me to indulge in other suggestions showing absurd results. It is not because they do not exist, for there are more and worse; and I am of the opinion that this construction must not be maintained if there is any other road to travel, however long and rough it may be.

I think the third construction contended for should be adopted, and that when a certificate is presented to the registrar, which is in the form required by the law, he is bound to receive and file it. Penalties are provided against forging certificates, and it is further provided that affidavits as to the truthfulness of the facts therein recited must be attached. In a limited way these provisions seem to afford the registrar some protection; but, however that may be, if the protection against fraud is insufficient, it is the fault of the law. The statute provides that the registrar must "then and there forthwith" act upon the certificate presented, either by accepting or rejecting it. The very language itself clearly indicates that there shall be no hearing upon the facts. The language, ex necessitate, precludes such hearing. If the registrar is not first to investigate the facts, then certainly the law does not contemplate that the court shall subsequently investigate them. The construction which I think should be adopted is simply this: All certificates, valid upon their face, should be received and filed, and, if two or more certificates are presented by persons claiming to represent the same party, they should each be filed, and the nominees therein contained have an equal chance upon the ballot. The only serious result to flow from such holding is that it tends to disorganize and disintegrate party organizations. It casts upon each elector the duty of making a personal investigation as to the candidate whom he desires to support with his suffrage. It forces him to rely upon his own knowledge, rather than depend upon party names or party symbols. Possibly this construction may, for this reason, be seriously objectionable, but such objection is entirely overshadowed by the objections raised to the other constructions suggested. Of all the evils, it is certainly the least, and, this being so, it will be assumed that the legislature intended the statute to be so construed. The intention of the legislature in this regard could be made plainer, and probably the objections here suggested could be avoided, by future legislation. Possibly the whole law should be repealed by reason of its many crudities and contradictions. The writ should be granted.

(115 Cal. 105)

## EVERETT et al. v. LOS ANGELES CONSOL. ELECTRIC RY. CO.

(L. A. 62.)

(Supreme Court of California. Nov. 27, 1896.)

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

For opinion in department, see 43 Pac. 207. Affirmed.

John D. Pope, for appellant. W. J. Hunsaker, for respondent.

PER CURIAM. Upon further consideration of this cause in bank, we adhere to the views expressed in the opinion filed in department 1 (43 Pac. 207), and for the reasons therein given the judgment and order are reversed.

TEMPLE, J. I dissent. This action was for damages for the death of Charles E. Everett, which was caused by a car of defendant. The main question presented on this appeal is whether this court can say, as matter of law, that the deceased was guilty of negligence which contributed proximately to his injury, in the face of the verdict of the jury, which is in favor of the plaintiffs, who are heirs at law of the deceased. This is not a question as to what the evidence, taken as a whole, may be considered fairly to establish, or whether the facts which we think plainly established by the evidence show such negligence on the part of the deceased, but whether the conclusion of the jury could be rationally drawn from the evidence. And this must be determined, also, in view of the exclusive province of the jury to pass upon the credibility of the witnesses. The facts may be stated thus: Deceased was an experienced bicycle rider, about 40 years old, in the possession of all his faculties, and familiar with the operation of the street railway. At least, he lived in the vicinity, and had often been on this street. Defendant had two tracks on McClintock avenue, there being 7½ feet between them. It was in the suburbs of Los Angeles, and the street was unfinished. Outside of the two tracks the ground was higher, and too rough for travel on foot or on bicycles. The rails were raised some two inches above the roadbed. Just before the accident, deceased was seen on the north-bound track, going south. He was going at the rate of 6 miles per hour. On the south-bound track a car was following at the rate of 10 miles per hour. At that time a car was approaching on the north-bound track, and, although it was not so near as the car which was approaching from behind, deceased turned, evidently to avoid it, to the south-bound track, and in front of the nearer car on that track. At about a block and a half away, the motorman of the south-bound car rang his bell "good and hard," to warn deceased of his danger. Upon this subject the motorman testified as follows: "I was the motoneer in charge of car No. 109 at the time Mr. Everett was killed. When I first observed him, I was about two blocks away from him, I should think. I just turned around the curve off from Olin onto McClintock avenue. He was on a wheel, on the north-bound track. I was on the south-bound track. He traveled on the north-bound track, I should think, a block and a half or two blocks; something like that. Then he crossed over onto our track, the south-bound track. When he crossed over, he was about a block and a half or two blocks ahead of me. We were going considerably faster than he was. I did not notice him look back. I saw him all the time after I left the curve. I had been ringing the bell, off and on, ever since I left the curve at Olin street. I rang the bell for the purpose of giving notice to the man on the bicycle. I should think I was then a block away from him, when I was ringing it good and hard. I had been ringing it for about two blocks constantly. When I rang the bell purposely to give him notice, I might not have been as far as a block away from him. He did not do anything when I rang, in regard to looking back, but kept right on. I called out to him when I was within about fifty feet of him, I should think. I do not remember what I said. When I was within about thirty or fifty feet of him, I threw off my currents and applied my brakes, and reversed my car, and did all that I could to stop the car from that time. I attempted to stop the car because I didn't think he heard me. I supposed all the time he did, until that time. Immediately before I put on the brakes, I rang the bell as hard as I could. Other persons called out to him besides myself; everybody in the front end of the car. There was a big crowd there, and a heavy load on the train. They called out as loud as they could hollo. He paid no attention to them. If he was a man of good hearing, he must have heard the noise. There was enough noise made in the front of that car to raise the dead, I should think. He made no attempt to get off the track at all, that I saw. I did not attempt to stop my car sooner because I expected every minute to see him get out of the road. It is the general custom of people riding bicycles to get out of the road. They generally manage to get out of the road. There is no difficulty in a man getting out of the road, if nothing is in the way." On cross-examination this witness said: "When I first began to ring my bell to warn him, I must have been a couple of blocks away, and I kept on ringing it. He paid no attention to the ringing of the bell, and did not seem to know that I was coming behind him. I did not slacken speed at that time." The south-bound train was not so near as the north-bound train, but its passengers called to deceased, and made signs to him, trying to warn him of his danger. The north-bound train had not passed when the accident occurred, but stopped on the happening of the accident, something like 100 feet away. The motorman testified that he reversed the current 30 or 50 feet before the car struck the deceased, but several other witnesses testified that speed was not slackened at all till it struck the deceased, and some that the current was reversed some 5 feet away. There was testimony to the effect that the car moved from 50 to 60 feet before it was stopped, after the accident. Upon this question of distance there was a conflict. Upon the day of the accident, more cars than usual were run on this road, because of races. There was a strong wind from the south, which would tend to prevent the deceased from hearing.

Now, Everett was guilty of gross negligence in going upon the south-bound track without looking to see if a car was dangerously near. But he was not a trespasser there, and, in my opinion, he had just the same right to believe that, if a car did approach from behind, it would not run over him, but would stop or slacken its speed, and see that he did have fair warning and an opportunity to get out of the way, that the motorman would have had to suppose he would leave the track and avoid the danger, if it had been obvious that Everett knew the true state of affairs. The real question is, however, admitting the negligence of Everett, within the rule applicable to such cases, was it the proximate cause of the injury? or, rather, whether the jury could not reasonably draw any other conclusion from the evidence than that his negligence contributed proximately to the injury. The rule upon this subject is thus stated by Mr. Justice Sanderson in Needham v. Railroad, 37 Cal. 409, as follows: "Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury." The rule is stated with equal clearness by Mr. Justice Garoutte in Esrey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 501. He said: "By her own negligence, she placed herself in a position of danger; but defendant was aware of her danger, and did not exercise ordinary care to protect her from the danger that surrounded her. Under these conditions, the law gives the injured person a right of action, and this right of action is based upon the principle that a failure to exercise ordinary care by a defendant, under such circumstances, amounts to a degree of reckless conduct that may well be termed willful and wanton; and, when an act is done willfully and wantonly, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Some text writers and courts declare the same principle in another form, by holding that under these circumstances the contributory negligence of the party injured is not the proximate cause of the injury, but that the negligence of the defendant, being the later negligence, is the whole proximate cause. As has been said by one of our reviews, 'The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible.'" Upon this question plaintiff contends that the most reasonable conclusion from the evidence is that the motorman knew a sufficient time before the car struck the deceased that he was unheeding, and did not know of his danger, and that Everett would inevitably be injured unless he slackened his speed. To sustain the verdict, it is only necessary to find that the motorman should have believed, from what he saw, that injury was likely to happen unless the speed was slackened. The defendant must maintain the position that there was no negligence on the part of the motorman, because he believed, and, notwithstanding what he knew, had a right to presume, that the deceased either knew of his danger, or would discover it in time to leave the track before injury resulted.

I have carefully examined the evidence, and I believe the conclusion reached by the jury is fully warranted by a preponderance of the evidence. And, if we apply the rule which has heretofore always obtained in such cases, I am unable to understand how any one can reach the opposite view. It is, of course, true that there is evidence which will warrant a statement more favorable to the defendant than that which I have stated; but, even upon the view most favorable to the defendant which can be drawn from the evidence, in my opinion it is plain that the motorman must have actually known that deceased was unheeding long enough before the injury to have slackened his car sufficiently to have prevented the injury. To do this, it would only have been necessary to have reduced the speed to 6 miles per hour from 10 miles per hour. If, as defendant claims, the motorman had attempted to stop when within 20 feet of deceased, he had then 50 feet within which to stop before the injury could occur, for while the car moved 10 feet Everett moved 6. This supposing that both continued at the same speed, but as soon as the car commenced to slow up the difference of speed would diminish; and, if the car had slowed a little, Everett would have escaped. The motorman testified that he commenced ringing good and hard a block away, and had rung, off and on, from the time he was two blocks away. If we assume this distance to be 400 feet, he must have thus pursued Everett for 1,000 feet; and during all that time, according to his own testimony, Everett did not look back, and did not seem to know that he was approaching from behind. Several witnesses testified that, when about 40 feet away, a passenger called to the motorman that, if he did not stop, he would kill the man. After that time, according to the testimony, the car ran 100 feet before it struck the deceased. In fact, I cannot doubt that, had the motorman made an honest effort to stop the car when 5 feet away, Everett would not have been injured. Even from that point the car ran 12½ feet before it struck Everett, and, of course, as soon as the speed diminished the discrepancy of speed would be less. If these cars cannot be so handled, it is criminal to allow their use on the streets. I think it matter of common knowledge that they can be. Now, could this court say that the jury could not reasonably conclude from this evidence that, at some point of time when the injury could have been avoided, the motorman knew, or should have known, that Everett was unheeding, and that injury was likely to result unless he checked his speed? Can we say, as matter of law, that such was not the fact?

It has been suggested that the rule invoked does not apply when the person injured is negligent at the very time of the injury, as it is claimed Everett was here. I deny that there is any such qualification of the rule, beyond this: that such negligence on the part of plaintiff may contribute proximately to the injury. In such case the defendant would not be the last who had a clear opportunity to avoid the injury. If Everett did not know of his peril, he had no such opportunity. If one lies upon a railway track to sleep, and is injured, his negligence continues to the injury. But the rule has been held to apply to such a case. Williams v. Railroad Co., 72 Cal. 120, 13 Pac. 219. On no question are the authorities more numerous, and I think it will be found that, in a vast majority of them, such was the case as fully as in the case at bar. One who does not know of his danger does not have the last opportunity to avoid the injury. If these views be correct, they furnish a complete answer to the contention of appellant that the motorman was guilty of no negligence, and that the accident was due wholly to the negligence of the deceased; for, conceding gross negligence on the part of Everett, in going upon the track and continuing there without looking back, still, if, as we must concede to the verdict, the motorman knew, as we must also concede, that he was ignorant of his danger, and after such knowledge the motorman could, by the use of ordinary diligence, have prevented the injury, defendant is liable. I am convinced that all these propositions are established in favor of the verdict, by a clear preponderance of the evidence.

It is really not necessary to discuss the rule by which the conduct of Everett should be tried, but I cannot permit the apparent claim that the same rule which has become crystalized into a rule of law in regard to crossings of steam-railway tracks applies here, to pass unchallenged. Negligence is always relative to circumstances, and the circumstances of the two cases vary greatly. It is true, a general statement as to the duty of those using the public highways may be made which will include all cases. All such persons are bound to use ordinary care to avoid injuring others, and to escape injury to themselves, and may expect the like care from others. What conduct this rule would dictate in any given case will depend upon the special facts of that case. One has no right to obstruct unnecessarily a street car, but he has no better right to obstruct any other vehicle. As to all, he is bound to use the same diligence not to delay. On the other hand, all are bound to use ordinary care not to obstruct or injure him, and he may use the street, relying upon such diligence on the part of others, including those in charge of street cars. If one were to step blindly into the street, closely in front of a push cart, and receive injury, his negligence would deprive him of a right of action. It was his duty to look and avoid danger. The same duty, and no other, rests upon him as to a street car; but as the danger is greater, and the conditions different, a different degree of diligence may be required. The rule in regard to a steam railroad, requiring that a person approaching a crossing must stop, look, and listen, implies that, if a train is imminent, he must stop until it passes. In such case it is not expected that the train will stop for him, and it would be unreasonable to require it. Not so as to street cars. As a hypothetical case, I may state that on Market street, in San Francisco, during a portion of every day, four cars per minute pass on the cable road any given point. There are two other tracks upon the street also operated. The track is thronged with trucks, drays, express wagons, and other vehicles. They have frequent occasion to pass from one side of the street to the other. It is safe to say that at such time such crossing generally stops a car upon each track of the cable road. Yet they have a right to cross, and to drive on the track, although a car is near at hand, and will be required to stop. In other words, the car must beat its way along, like any other vehicle in a crowded street. Neither should move so closely in front of another that a collision is likely to occur. All must use ordinary care not to obstruct others, and all may rely upon the use of that care on the part of others not to injure them. These considerations do not similarly affect a train on a steam railroad, even at the crossings; for the train is not expected to wait for others to pass, and its velocity and momentum would ordinarily prevent it. In conclusion, I wish to say that, in my opinion, if a man of ordinary prudence in the place of the motorman would have seen that perhaps Everett was not aware of his danger, and that injury might occur unless he stopped his car, then it was his duty to stop and make sure. I do not think the jury was misled to the injury of defendant by any instruction given, and, in my opinion, the jury was fully instructed upon all points on which instructions were required by defendants. Judgment and order should be affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.

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115 Cal. 39

## LEVY v. SCOTT, Sheriff. (Sac. 96.)

(Supreme Court of California. Nov. 21, 1896.)

FRAUDULENT CONVEYANCE—CHANGE OF POSSESSION—TRUSTEE FOR CREDITORS—CONVERSION—EVIDENCE.

1. A person engaged in other business in one city bought a stock of shoes in another, on the recommendation of a friend on whose counsel he relied. He did not quit his own business to

give his personal attention to the shoe trade, but this was left to his clerks. About two weeks later he met the former owner of the store, and, learning, by comparison, that the business was not up to its old volume, engaged him to manage the business for him. *Held*, that there was an unequivocal and substantial change of possession, following the sale.

2. A creditor of B. induced him to satisfy the indebtedness by a bill of sale of his stock, and other creditors immediately attached it. To avoid litigation, an arrangement was perfected whereby the purchasing creditor reconveyed to B., and, in consideration of a release from his creditors, he in turn made a bill of sale to M. *Held*, that the transaction was an absolute sale to M., though he bore the relation of trustee to the creditors, and that a purchaser from M. acquired a good title.

3. In an action for the conversion of property, plaintiff may show what it would cost to purchase in the open market, and replace, the property.

4. Where a sale of personal property is attacked for fraud, the purchaser should be allowed to show all the circumstances connected with the purchase and with the payment of the consideration.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by E. J. Levy against J. Scott, sheriff, for the conversion of property. From a judgment in favor of defendant, and from an order denying plaintiff a new trial, plaintiff appeals. Reversed.

H. H. Hotaling, Samuel Rosenheim, Henry Ach, and Frank H. Short, for appellant. E. D. Edwards and J. P. Meux, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying plaintiff a new trial. The action was for the recovery of certain property, or for the value thereof, levied upon and sold by the defendant, the sheriff of Fresno county, under a judgment obtained by the Sussex Shoe Company, a corporation, against Henry Bruck. The judgment in favor of defendant, Scott, was rendered under and in accordance with the verdict of the jury.

Plaintiff claimed as owner. Defendant's contention was that the property belonged to Henry Bruck, that plaintiff's claim of ownership was simulated and invalid, and that, in any event, his claim of title was void against the Sussex Shoe Company, an attaching creditor of Henry Bruck, for that any sale of the property by which plaintiff obtained title thereto was not followed by an immediate and continued change of possession thereof, but that Bruck, the original owner, continued in possession and control of the same. Appellant claims that the verdict of the jury is against the law and the evidence, and that the evidence, uncontradicted, shows that he was the bona fide owner of the property. After a painstaking and careful review of the evidence, we have been unable to discern anything upon which the verdict of the jury may be legally supported. It is quite true that evidences of fraud are not left lying patent in the sunlight, that fraud itself is always concealed, and that the truth is to be discovered more often from circumstances, from the interests of the parties, and from the irregularities of the transaction, coupled with injury worked to an innocent party, rather than from direct and primary evidence of the fraudulent contrivance itself. Nevertheless, the evidence of these matters, facts, and circumstances, taken together, must amount to proof of fraud, and not to a mere suspicion thereof; for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties. So, in this case, while there are circumstances, in and of themselves unusual, or perhaps in their nature suspicious,—circumstances upon which respondent builds a somewhat plausible "theory" of collusion and fraud,—these circumstances comport equally with the theory of honesty and fair dealing, and there is nothing in them inconsistent with the claim that the transactions of plaintiff, from beginning to end, were upright and honorable.

The following are the facts: Henry Bruck was a retail boot and shoe dealer in the city of Fresno. His business affairs becoming involved, A. L. Bryan, president of the A. L. Bryan Shoe Company, a corporation engaged in the manufacture and sale of boots and shoes at San Francisco, went to Fresno, and demanded of Bruck that he pay to said company the sum of about $1,000, then owing by Bruck to that corporation. This was in November, 1893. Bruck was unable to satisfy the claim, and Bryan demanded and received from him a bill of sale of the shoe store. Bruck, upon executing the bill of sale, left the store, and went to San Francisco; Bryan taking charge of it through his own agents and employés. Here some point is made as to the character of the paper executed by Bruck to Bryan. It is unnecessary to discuss its character, for, as will hereafter appear, whatever interest or title was by it conveyed by Bruck was thereafter by Bryan reconveyed to him. Upon Bryan's return to San Francisco, or shortly thereafter, he learned that the Board of Trade of San Francisco, to protect the interest of some of its members, who were also creditors of Bruck, had caused to be levied an attachment upon the store and goods. To avoid litigation, an arrangement was effected whereby Bryan reconveyed to Bruck, and Bruck, in consideration of a release and discharge by his San Francisco creditors of their claims against him, made to Mr. Marvin, representing the Board of Trade, a bill of sale of his property in the store. So soon as this sale was effected, Marvin and Bryan notified Seabury and Ostreicher, the two clerks who had been by Bryan put in charge of the business, that they were to continue in possession of the store as the agents and clerks of Marvin, and the attachment upon the property was released. Bryan's possession continued for about a week, being subordinate, however, during a part of that time, to the possession of the sheriff under attachment. Ostreicher had been Bruck's former clerk. His employment was continued, and his services during that time were paid for by Bryan. Seabury, who was in charge, was a salesman of the Bryan Shoe Company. He was continued in charge by Marvin, with Ostreicher as clerk, and the signs in and about the store were changed, to indicate that Marvin was the owner. Marvin's ownership thus continued for about a week, during which time he was endeavoring to find a purchaser for the business. This he at last succeeded in doing, in the person of Levy, the plaintiff. Levy was not a shoe merchant, nor familiar with the shoe business, but he had an intimate friend in one Frank, who was skilled in the trade, and who had been a former partner of Bruck in the business. Frank, at that time, was in business in Oakland. Levy's business was in San Francisco. Levy was induced to make the purchase upon the representations of Frank that the business could be made profitable, and that Levy could have the advantage of his knowledge and experience in the purchase of supplies. Levy bought, taking an assignment of the bill of sale to Marvin, and paying for his purchase the amount which the Board of Trade of San Francisco had agreed to accept, viz. 50 per cent. of the face value of the creditor's claims. He paid for his purchase in indorsed promissory notes, the obligations of which he afterwards met. As soon as Levy's purchase was effected, Marvin telephoned to Seabury that he had sold the store to Levy, and that Levy would come to Fresno, or send somebody there the next day, to take possession. This, in fact, Levy did. He sent one Williams, a shoe salesman, from San Francisco to Fresno the next day, and himself followed Williams to that city. Upon their arrival Seabury left. Levy then entered into the actual custody and possession of the property, and put Williams and Ostreicher to work for him. New signs were painted, with his name thereon as owner. One of them was hung upon the sidewalk, the other placed within the store. The insurance policies were assigned to him. He took out a trader's license for the conduct of the business, and gave his clerks instructions for the management thereof. Levy remained in Fresno no longer than was necessary to transact this business and effect these changes, seemingly not more than a day, when he returned to San Francisco. Williams continued working in the store for about ten days or two weeks, when he was discharged by Levy. During all of this time Bruck was not in or about the store, nor, indeed, did Levy even know him. About this time Levy and Frank, who had gone to an auction house to look over a stock of boots and shoes, there met Bruck, who was at that time living in San Francisco. Frank, knowing Bruck, having been a former partner of his, made him acquainted with Levy. Levy asked Bruck about the kind and character of the business done by the store when owned by him, and, upon Bruck's reply, stated that the volume and character of the business then being done were not up to his expectations, nor equal to that done by Bruck, and told Bruck, who was then out of employment, that, if he found nothing to do, and was willing to go back to Fresno, he would employ him. This resulted in the employment of Bruck by Levy, and he was sent down to take, and did take, the place of Williams. Bruck stated to Ostreicher, upon entering the store, that he had been employed by Levy in the place of Williams. Thereafter the business was conducted by Bruck and by Ostreicher, from December, 1893, until July, 1894. In July, 1894, differences arose between Bruck and Ostreicher, and upon Ostreicher's representations to Levy as to the conduct of Bruck in relation to the business, Bruck was discharged by Levy, who wrote, under cover to Ostreicher, directions to Bruck to turn over the business to Ostreicher, who, by the same communication, was put in charge thereof. Bruck, on being discharged, went to San Francisco for the twofold purpose of seeking another situation, and of learning from Levy the reason of his discharge. He was there about a week. His explanations seem to have satisfied Levy that Ostreicher, and not himself, was in the wrong, and the result was that Ostreicher was in turn discharged by Levy, and Bruck reinstated in the management of affairs. To assist Bruck in the management of the business, a new clerk, one Smith, was likewise employed by Levy. The business then continued under this management until the 8th of the following month, when the Sussex Shoe Company, a creditor of Bruck, made execution levy upon the store and the stock, upon a judgment against Bruck given the 16th of July, 1894, and under this execution the property was sold as the property of Bruck. During all of these months, therefore, Levy continued in the uninterrupted possession of the property. The clerks and managers of the store at Fresno would notify Levy, or his agent, Frank, of the goods required in the business, and these goods would be purchased either by Frank or by Levy. It is uncontradicted that, during this time, Levy purchased and paid for goods to a large amount, buying of the merchants in San Francisco, and personally paying them therefor. The purchases so made and paid for by Levy amounted to between $5,000 and $6,000. The property was assessed to Levy, and the taxes paid by him out of the proceeds of the sales of the business. Statements as to the condition of the business were made, sometimes to Frank, and sometimes to Levy, by both Bruck and Ostreicher. The Sussex Shoe Company's claim was for $914.72. At the time Levy purchased the store it contained goods which had been purchased from the Sussex Shoe Company to the amount of $244.80. At the time of the levy there were in the store goods to the amount of $848.75 which had been purchased by Levy subsequent to the sale by Marvin to him, and which had never belonged to Bruck.

The first claim of respondent is that the evidence shows that the purchase by Levy was pretended; that, in truth, Levy merely advanced moneys to Bruck, which Bruck used, in the name of Levy, to repurchase his business from the Board of Trade; and that thus Bruck was, during all of the time, the real owner of the property. It is next claimed that the evidence shows that the sale to Levy, even if it be held to be a sale, was not followed by the immediate and continued change of possession necessary to validate the sale against an attaching creditor of Bruck. The unusual or suspicious circumstances to which we have adverted, and upon which alone the first contention can be based, are found in the following facts: Levy did not go to Fresno after his first visit, but allowed the business to be conducted by his clerks and by Bruck, without giving it immediate personal supervision. But that he did this is not proof of fraud, and is not even surprising, in view of the further fact that his business was not that of a shoe dealer; that he had no personal knowledge of such business; that he bought, as it were, upon speculation, and upon the recommendation of his friend, Frank; that Frank was familiar with the shoe business, and was his trusted agent in the conduct of the business affairs. Moveover, it appears that Levy was engaged in another and entirely different business in San Francisco. It is not easy, under the circumstances, to see what good his presence could have worked if he had repeatedly gone to Fresno, and it is not surprising, therefore, that he did not go. There is also found in the evidence a statement by Ostreicher, when asked who was in charge of the store, to the following effect: "Then I guess Bruck was in charge of the store, the way it seems to me." But, whatever effect is to be given to the guess of the witness, it is entirely overcome by his further statements and explanations. He says that, when Bruck came, he stated that he had made arrangements with Mr. Levy to go to work for him in that store, to manage it for him; that he himself, as well as Bruck, were both employed and discharged by Levy; that Levy's signs were put up, and the insurance changed; that the bills that came to the store were made out for the most part against Levy; that those not made out against Levy were made out against the name of Frank, the purchasing agent of Levy; that it was recognized in the wholesale shoe trade that Frank was conducting the business for Levy as his personal agent. The friendship between Frank and Bruck is urged as a suspicious circumstance to support the theory that the sale to Levy was but colorable, and in the interest of Bruck and Frank. But to this it need only be said that there is not the slightest evidence in support of it, while there is overwhelming evidence that Levy put into the business, besides the purchase price, large sums of money of his own, and no money belonging to any one else.

From what has been said, it results that there is no evidence in the case impeaching the purchase by Levy as colorable merely, or showing that by collusion and secret contrivance Bruck was the real owner. Nor does the further claim, that the purchase by Levy is void because not followed by an immediate and continuous change of possession, find any better support. That the change of possession in this case was immediate is incontestably and indisputably shown. The continuous change which the statute contemplates does not demand, at the peril of avoiding the sale, that the vendor shall never again, at any time or under any circumstances, be found in the possession of the property sold. It does, however, require an unequivocal and substantial change of possession, so long continued as to give notice to the world that ownership has been parted with. As is said in Stevens v. Irwin, 15 Cal. 503: "The possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely when it is bona fide and openly done, and is kept for such a length of time as to give general advertisement to the status of the property, and the claim to it by the vendee." The cases of Godchaux v. Mulford, 26 Cal. 316, Ford v. Chambers, 28 Cal. 13, and Porter v. Bucher, 98 Cal. 454, 33 Pac. 335, are to the same effect. In the present case we think that the change was fully sufficient to satisfy the requirements of the statute. Neither Bruck nor Levy had dealt with the Sussex Shoe Company from the time when Levy purchased the business, and no part of the claim of the Sussex Shoe Company against Levy, for which it procured judgment, was for purchases made after Levy acquired ownership of the business. It cannot be claimed, therefore, that the corporation was deceived into giving credit by the fact that during part of the time Bruck managed the business for Levy.

Some attempt is made to attack the sale by Bruck to Marvin, and the claim is made that the sale was not a sale, but was a mere assignment to Marvin for the benefit of creditors. The transaction, however, was not an assignment. It was an absolute sale. It is true that, as between Marvin and the creditors whom he represented, and who had to him assigned their claims, Marvin was a trustee, and accountable to them for the disposition of the money which he might receive by a subsequent sale of the business; but, as between Marvin and Bruck, the transaction was a simple sale, Bruck selling out all his property and interest in the business, and receiving therefor a release of the claims of all of the creditors whom Marvin represented. If Marvin, then, representing the San Francisco creditors of Bruck, obtained from Bruck an unimpeachable title, as, under the evidence, he clearly did, Levy in turn succeeded to that title. The transfers from Bruck to Marvin, and from Marvin to Levy, are both supported by full and valuable consideration paid.

In contemplation of a new trial, it should be added that the court erred in refusing to allow plaintiff to prove what it would cost to purchase in open market and replace the property levied upon by the sheriff and sold. Civ. Code, § 3336; Cassin v. Marshall, 18 Cal. 689; Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729. The court should also have permitted the plaintiff to explain the custom of the Board of Trade in demanding indorsed notes, and all matters connected with his purchase and payment of the property. The exclusion of this evidence, under the circumstances, tended unjustly to place the defendant in a false position before the jury. We think the foregoing will remove any difficulties which may be experienced upon a new trial of the cause. Other alleged errors presented for consideration by plaintiff have not, therefore, been considered; but, for the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

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115 Cal. 57

## PEOPLE v. TARBOX. (Cr. 179.)

(Supreme Court of California. Nov. 24, 1896.)

Criminal Law — Filing of Information — Commitment by Magistrate — Waiver of Public Examination—Evidence—Rape — Sufficiency of Evidence.

1. A judgment of conviction will not be reversed because of an order denying a motion to set aside the information on the ground that it was filed before the record of the preliminary examination or order of commitment had been filed, where the order of commitment had been in fact made and entered of record by the magistrate.

2. Under Pen. Code, § 995, providing that an information must be set aside where the defendant had not been legally committed by a magistrate before the filing thereof, the making of an order of commitment, and its entry on the docket of the magistrate, are sufficient to constitute a legal commitment, which will support an information, though such order is not indorsed on the depositions returned into court by the magistrate.

3. The constitutional guaranty of a speedy and public trial to one charged with crime (Const. art. 1, § 13) does not prevent the defendant from waiving his right to a public examination before a magistrate; and he cannot complain of an order excluding the public, made on his request, as required by Pen. Code, § 868.

4. Proof of the corpus delicti, to authorize the admission in evidence of statements made by a defendant, need not in any manner connect him with the commission of the offense.

5. In a prosecution for the rape of a girl under the age of consent, where the only evidence of the corpus delicti was the fact of the girl's pregnancy, and the evidence offered to connect the defendant with the commission of the offense went only to the extent of showing his possible opportunity, without showing any act of impropriety on his part, or excluding equal opportunity of others, the additional testimony of the examining magistrate as to a statement made by defendant, after his arrest, to the effect that, "if the girl went back on him, he would have to take his medicine; there was no use denying it,"—the witness being unable to remember the language, or what qualifying words were used,—is insufficient to sustain a conviction.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

George Tarbox was convicted of rape, and appeals from the judgment and an order denying a new trial. Reversed.

Blackstock & Ewing, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. The defendant was prosecuted upon an information for the crime of rape, alleged to have been committed, at the county of Ventura, on September 28, 1895, upon the person of Sena Crane, a female under the age of 14 years, was found guilty by the jury, and was sentenced to imprisonment in the state's prison for the term of seven years. From that judgment, and from an order denying his motion for a new trial, he appeals.

The information upon which he was tried was filed in the superior court on March 9, 1896, and the depositions, transcript, and order of commitment were not returned to the superior court by the examining magistrate until March 10, 1896. Upon his arraignment the defendant moved to set aside the information, upon the ground that it was filed before any commitment, deposition, or other record showing that he had had a preliminary examination, had been returned or filed in said court, and upon the further ground that no order of commitment was indorsed upon the depositions afterwards returned. Said motion was denied, and the defendant excepted. Good practice requires that the return of the examining magistrate should be made and filed before the information is filed, but we are not prepared to say that the filing of the information after the examination was had, and the order holding the defendant to answer was in fact made, was more than an irregularity, which would not justify a reversal of the judgment where it does not appear that it affected any substantial right of the defendant. Section 1258 of the Penal Code provides: "After hearing the appeal, the court must give judgment without regard to technical error or defects, or to exceptions, which do not affect the substantial rights of the parties."

Section 995 of the Penal Code specifies two grounds upon which an information must be set aside upon the defendant's motion: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county." The question arising under the first subdivision above stated is, when is the defendant legally committed? We think that occurs when the magistrate has acted judicially, and has made and signed the order of commitment. His judicial functions then cease, and the return of the depositions and order of commitment is a mere ministerial duty. In People v. Wallace, 94 Cal. 499, 29 Pac. 950, it was said: "It is doubtless true that the order holding to answer must be in writing; but when, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action on his part is necessary to authorize the district attorney to file an information against the defendant for the offense named in the order." In that case—as in the case at bar—the order holding the defendant to answer before the superior court was entered upon the justice's docket, but was not indorsed upon the complaint or depositions.

It was also specified, as an additional ground of said motion, that the defendant was not accorded his right to a public examination before the magistrate, because the examination was held with closed doors, all persons being excluded except the defendant, his attorneys, the prosecuting attorney, the reporter, and the witness under examination. The order of exclusion was made at defendant's request. Section 868 of the Penal Code provides: "The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody." It is argued, however, that the defendant had no power to waive the provisions of section 13, of article 1, of the constitution, which provides: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial." In People v. Swafford, 65 Cal. 223, 3 Pac. 809, an order of exclusion was sustained. The record being silent, it was assumed that the defendant assented to or demanded the order. That cause was reviewed and materially qualified in People v. Hartman, 103 Cal. 245, 37 Pac. 153, and upon that case appellant relies to sustain his contention. But People v. Hartman is not in point. Not only was the order of exclusion in that case made against the objection of the defendant, but, as was there held, there is no provision of the Code relating to or authorizing such exclusion during the trial in the superior court. There can be no question that a defendant has the "right" to a public examination before the committing magistrate; but, under the provisions of the Penal Code above quoted, he may waive that right whenever he deems it to his interest to do so.

Appellant further contends that the court erred in receiving the testimony of Frank Hobart, the committing magistrate, touching statements alleged to have been made by the defendant after his arrest and before his examination. The objection to this testimony was that the corpus delicti had not been shown at the time it was received, or at all. The testimony of the medical witness was that on March 6, 1896, he made an examination of Sena Crane, that he believed her to be then pregnant, and that she was then advanced in pregnancy about 4½ months; and it was shown by the testimony of her father and mother that she became 14 years of age on February 3, 1896. As the pregnancy had its inception before she had attained the age of consent, the fact that the crime of rape had been committed by some one was shown, and defendant's objection was therefore not well taken. Proof of the corpus delicti need not in any manner connect the defendant with its commission.

It is specified, among the grounds of defendant's motion for a new trial, that the verdict is contrary to the evidence in several particulars: (1) That it was not shown that the offense was committed within the county of Ventura. (2) That it was not shown that Sena was not the wife of the defendant at the time of the commission of the alleged offense. (3) That it was not shown that the defendant committed the alleged offense. The evidence upon the first and second points was far from being satisfactory; but, if no other ground existed for granting a new trial, it should have been granted upon the ground last stated. The only evidence that a rape had been committed upon the person of Sena Crane was the fact of her pregnancy; and the only evidence, aside from the alleged admission of defendant, testified to by the examining magistrate, tending to connect the defendant with its commission was the fact that for about a year he had been in partnership with Sena's father in the butchering business; that during that time he lived with Crane's family, which consisted of Mr. and Mrs. Crane and their six children and Mrs. Crane's father; that Sena sometimes rode with the defendant on the wagon used in his business, and sometimes attended social gatherings with the defendant; but no act of impropriety was at any time discovered in defendant's conduct. Thus far the evidence only showed a possible opportunity for the commission of the offense by the defendant, but did not exclude similar opportunities by others. If the evidence had stopped there, it is clear that there could have been no conviction; for the opportunity to commit an offense can have no weight, apart from other circumstances, unless it excludes all reasonable opportunity for its commission by another, and, standing alone, is insufficient to sustain a conviction. In this state of the evidence the prosecution called Frank Hobart, the justice of the peace before whom the defendant was brought upon being arrested, and asked him whether the defendant made any statements to him, and the witness replied as follows: "He wanted to know if I could give him an order to see the girl. I told him, 'No.' He said, if the girl went back on him, he would have to take his medicine; there was no use denying it. And just what one he used to qualify, just what he meant, is more than I can remember,—whether it was to deny the case, deny the charge, deny the act, or what the word was." The district attorney: "State what was said,—not what you remember. A. It is no use denying it." Upon cross-examination he was asked: "You say, 'No use to deny it.' You say you don't know what he meant then? A. I don't know; I know the impression made upon my mind." The constable, Frank Tryce, was present during said conversation, and was examined by the prosecution, and testified, in substance, that he heard the defendant ask for an order to see the girl; that defendant said something else, but he could not state it; that the other part he could not remember, "only by Judge Hobart bringing it to my mind, speaking about it." Upon cross-examination he testified, in substance, that Hobart wanted to know if the witness understood it as he did; that they did not understand it alike; that nothing was said by the defendant with reference to his guilt or innocence; that defendant did not intimate that he was guilty; that Hobart asked witness how he understood the conversation with defendant, and the witness replied: "I told him as I understood it. Q. What was the occasion when he said whatever he did say? A. Yes; he said something. He said he didn't believe that the girl had sworn to that complaint until he had seen it. Q. That was the reason he wanted to see it? A. Yes, sir." The girl, Sena, refused to be sworn, and no other evidence was given tending to show defendant's guilt. The defendant offered no evidence.

The testimony in chief of the witness Hobart, as well as the testimony of Tryce, shows that he (Hobart) failed to remember some material part of the defendant's statement. He could not tell "whether it was to deny the case, deny the charge, deny the act, or what the word was." It is well settled that the witness may testify to a part of an entire conversation, if he heard only a part, and such part appears to be complete and intelligible; but if the witness is unable to state what he heard, and especially where the witness states that the word or the part he fails to remember was used to qualify something, or was essential to an understanding of the meaning of the part given, such testimony is not sufficient to justify a verdict of guilty. The witness said: "And just what one he used to qualify, just what he meant, is more than I can remember." He could only arrive at the meaning of the defendant from the words he used, and if, from a consciousness that some word or expression which formed part of the statement had escaped his recollection, he felt bound to declare that "just what he meant is more than I can remember," it was obviously impossible for the jury to supply his want of recollection, and ascertain what the defendant in fact said or meant. "With respect to all verbal admissions, it may be observed that they ought to be received with great caution." 1 Greenl. Ev. § 200. "In the proof of confessions, as in the case of admissions in civil cases, the whole of what the prisoner said on the subject at the time of making the confession should be taken together. This rule is the dictate of reason as well as humanity." Id. § 218. In People v. Gelabert, 39 Cal. 663, the alleged confession was made partly in Spanish, and partly in broken English, and the witness stated that he did not understand all that the prisoner said in Spanish. He was permitted to testify to the alleged confession against defendant's objection. Upon appeal the judgment was reversed, the court, by Wallace, J., saying: "Here it is certain that to some extent the witness failed to comprehend all that the prisoner said. How important the portion not understood may have been we cannot know. It might have, if correctly and fully detailed, relieved the prisoner from the serious contradiction which, as here given, it fixed upon him." In People v. Keith, 50 Cal. 139, it was said: "The witness Rosenberg testified to only a portion of the conversation in which the defendant admitted the homicide; and, standing alone, the evidence of a part of the conversation would have been inadmissible."

No objection was made to the introduction of the evidence here under consideration, nor was any motion made to strike it out; and whether such objection or motion should have been sustained, if it had been made, need not be considered or decided, inasmuch as, upon another trial, such other or additional evidence may be produced as to make its consideration unnecessary. What we now decide is that the evidence, consisting of the alleged admissions of the defendant, is not sufficient to overcome the presumption of the defendant's innocence, and therefore insufficient to justify the verdict of the jury. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

McFARLAND, J. I concur in the judgment of reversal, although I am not as entirely clear that it is correct as I would like to be. I am the more inclined to concur because it seems likely that the jury erroneously based their verdict more upon the circumstance that neither the prosecuting witness nor the appellant testified than upon the sufficiency of the evidence actually introduced. The girl may have refused to testify because she could not truthfully incriminate the appellant; and, as to a defendant in a criminal action, under the Code, "his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

115 Cal. 136

## THOMAS v. PACIFIC BEACH CO. (L. A. 111.)

(Supreme Court of California. Nov. 30, 1896.)

LIMITATION OF ACTIONS — BREACH OF CONTRACT TO CONVEY—IMPLIED PROMISE—DEMAND FOR DEED—ACCRUAL OF CAUSE OF ACTION.

1. An action by a vendee of land, to recover the purchase price on the ground of the failure of the vendor to convey, is not, in the absence of any stipulation in the contract for repayment, an action founded on contract in writing, within the meaning of Code Civ. Proc. § 337, providing that such actions may be brought in four years.

2. Such action must be regarded as an action of implied assumpsit upon the breach of the contract to convey, within the provisions of Code Civ. Proc. § 339, subd. 1, requiring actions founded on contracts not in writing to be brought within two years.

3. Plaintiff contracted for the purchase of real estate on a part cash payment and balance on time, the last payment being due in December, 1888. It was stipulated that, upon such payments being made, the defendant would convey on demand. Subsequently, before the last payment became due, defendant offered to accept a certain sum in full of all demands for principal and interest. *Held* that, as the modification thus made in the contract entitled plaintiff to his deed upon the payment of the sum agreed upon without demand, his cause of action for the failure of defendant to convey must be regarded as accruing at that time.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by R. A. Thomas against the Pacific Beach Company. A demurrer to the complaint having been overruled, the defendant appeals. Reversed.

McDonald & McDonald, for appellant. Hunsaker & Stevens and Henry J. Stevens, for respondent.

VAN FLEET, J. The single question involved in this appeal is whether the action is barred by the statute of limitations, and the question arises upon the face of the complaint under the demurrer interposed. The action, which was commenced September 24, 1894, is to recover back, with interest, the purchase money paid by plaintiff to defendant under five several contracts of even date for the conveyance of land. Each contract covers a separate parcel or lot of land, and each is counted upon in a separate count. The five counts are identical in averment, excepting only in the description of the lot and price to be paid, and the first will serve as a type of all. Its substance is: That on the 12th day of December, 1887, plaintiff and defendant entered into a written contract, by the terms of which defendant agreed to sell to plaintiff lot 11, in block 358, of Pacific Beach, for $500, with interest on deferred payments at 10 per cent. per annum, payable, $167 at the date of agreement, $166 and interest June 12, 1888, and $167 and interest December 12, 1888; and that in consideration of the making of such payments the defendant would execute to plaintiff, upon his demand, a grant deed conveying the land described. That plaintiff made the first two payments as stipulated. That thereafter, on or about October 10, 1888, defendant agreed with plaintiff, in consideration of the payment by the latter on that date, and before the maturity of the third and last payment under the contract, of the sum of $171.60, to accept such sum in full discharge of said third payment, principal and interest, "and in full performance by plaintiff of his part of said contract first set forth; and thereupon, pursuant to said subsequent agreement, plaintiff paid to defendant said sum of $171.60, and defendant accepted the same in full payment and performance by plaintiff of his part of said contract." That thereafter, in September, 1891, plaintiff demanded a deed according to the terms of the contract, which defendant has failed, neglected, and refused to make; and that on the 7th day of October, 1893, plaintiff demanded of defendant the repayment of the amount paid under the contract, and offered to restore to defendant everything of value received thereunder, which offer defendant refused; and that no part of said sum or the interest has been repaid. The position of respondent is that the action is one in the nature of special assumpsit upon a "contract, obligation or liability founded upon an instrument in writing, executed in this state," within section 337, Code Civ. Proc., and could be brought any time within the four years' limitation therein prescribed after the right accrued. Appellant's contention, on the other hand, is that the action is not one founded upon the writing within the last section, but is implied assumpsit upon the defendant's breach of the written contract to convey, for recovery of the purchase money paid, and is subject to the bar of subdivision 1 of section 339 of said Code, which requires the action to be brought within two years.

Is the action upon an obligation founded upon an instrument in writing, within the intent of section 337? The language of this section has been construed as having reference to actions to recover upon an obligation or liability created by some express promise or stipulation in the written instrument, and not to actions on such objections as merely spring from or grow out thereof in some less immediate way. The meaning of the statute was first considered by this court in Chipman v. Morrill, 20 Cal. 130. That was an action for contribution by one of three makers of a joint promissory note, who had paid the whole of a judgment recovered thereon. The action was brought upon the theory that it was within the four-years limitation, as being upon a liability founded upon the written instrument,—the note. This theory was held to be erroneous, the court saying: "The statute provides that 'an action upon any contract, obligation or liability founded upon an instrument of writing,' except in certain designated cases, shall be commenced within four years, and an action upon a contract, obligation, or liability not thus founded, with certain exceptions, shall be commenced within two years. The question is whether the present action is, in the meaning of the statute, 'founded upon an instrument of writing.' Our conclusion is that it is not thus founded; that the statute, by the language in question, refers to contracts, obligations, or liabilities resting in or growing out of written contracts, not remotely or ultimately, but immediately,—that is, to such contracts, obligations, or liabilities as arise from instruments of writing, executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word 'founded' were omitted, and the statute read, 'upon any contract, obligation or liability upon an instrument in writing.'" In the recent case of McCarthy v. Water Co. (Cal.) 48 Pac. 956, 959, an action was brought against a corporation by one of its directors for services rendered by him as superintendent, under a resolution of the board of directors, which provided for his appointment, but did not fix any compensation. It was contended that the resolution constituted an instrument in writing, and that the action, being upon a liability growing out of and founded thereon, was within the four-years limitation. "But," say the court in that case, "a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought." And the court cite with approval the case of Chipman v. Morrill, supra. See, also, Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545. Applying this construction in the present case, and we are of opinion that the action cannot be said to be founded upon the written contract, within the meaning of the statute. There is in this contract no express stipulation or agreement to do the thing which the action seeks to enforce. The contract was to convey the title upon payment of the price, but there is no agreement to repay in default of such conveyance. The action is to recover the money so paid, by reason of a refusal to convey, and is necessarily based upon the implied promise of the grantor that it would so repay the money in default of making title. In Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546, cited by respondent, there was an express promise to pay back the money should the title prove bad. Had there been such promise in the present contract, the action would present an instance of an action upon a "contract, obligation or liability founded upon an instrument in writing." Actions of the character of the one at bar have been uniformly treated as actions resting in implied assumpsit as for money had and received (Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Shively v. Water Co., 99 Cal. 259, 33 Pac. 848); and, under the facts alleged, we think this case must be so regarded and as governed by the two-years limitation prescribed by subdivision 1 of section 339.

Such being the nature of the action, it remains to be determined when the plaintiff's right accrued. It was held in Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839, that, under a contract to convey land, no demand for a deed or for the return of the purchase money is necessary to perfect the right of the vendee to sue for the recovery of the money for default in making the conveyance. It would follow, then, that the right of action would accrue at the date of the last payment, and the statute of limitations would run from that time. Respondent contends, however, that this case is not within the rule there announced, for the reason that there was not in the contract there sued upon the express stipulation for a demand found in the contract in suit; that under this agreement a demand was thus made a condition precedent, and, the suit having been commenced within due time after the making of such demand, the action is not barred. But while the original contract did contain such provision, it is alleged in the complaint that by a subsequent agreement between the parties the plaintiff paid, and defendant received, the sum of $170.60, "in full performance by plaintiff of his part of said contract." It was competent for the parties to thus alter their original agreement, and we think the effect of such modification was to entitle plaintiff to his deed immediately upon payment and receipt of the money so stipulated to be received, without further act or demand on his part. Conceding, therefore, that the contract as originally entered into would not be within the doctrine of Chatfield v. Williams, the plaintiff, under the facts alleged, is in no better situation.

But moreover, assuming, as contended by respondent, that the modification in question did not obviate the necessity of demand, and we must yet hold the action too late. Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand, but must make it within a reasonable time. Palmer v. Palmer, 36 Mich. 494; Hintrager v. Traut, 69 Iowa, 746, 27 N. W. 807; Steele's Adm'r v. Steele, 25 Pa. St. 154; Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43. What is deemed a reasonable time has been uniformly held to be a period coincident with that provided in the statute of limitations for barring the action. See cases above cited; Busw. Lim. § 159; Wood, Lim. § 125; Ang. Lim. § 96. As we have seen, the action is governed by the two-years limitation, and the demand was not made until more than that time had elapsed, and therefore too late to conserve plaintiff's right. The demurrer should, therefore, have been sustained. Judgment and order reversed, and cause remanded, with directions to sustain the demurrer to the complaint.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.

I dissent: TEMPLE, J.

115 Cal. 95

## GUILD GOLD-MIN. CO. v. MASON. (Sac. 119.)

(Supreme Court of California. Nov. 27, 1896.)

CONTRACT—REDUCTION OF ORE.

Where the contract for reducing mineral ores does not dequire any specific percentage of the assay value of the ore to be extracted, the person by whom the ore is to be reduced is not, in the absence of negligence, liable for the amount of mineral left in the tailings.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by the Guild Gold-Mining Company against Lysander Mason. There was a judgment for defendant, and plaintiff appeals. Affirmed.

F. P. Otis, C. E. Arnold, and J. W. Wiley, for appellant. Goodwin & Goodwin, for respondent.

HAYNES, C. Appellant is the owner of a gold mine in Tuolumne county, and respondent owns and operates chlorination works in that county. This action was brought by the plaintiff upon an alleged contract made by it with the defendant, whereby the defendant was to work and reduce for the plaintiff certain sulphurets for the price or compensation of $17 per ton, and to return to plaintiff at least 90 per cent. of the assay value thereof. The sulphurets were worked by the defendant, and the gold bullion obtained therefrom was returned to plaintiff; but, if the contract was as the plaintiff alleged it to be, the defendant should have returned $720.95 more than was actually returned to the plaintiff. The defendant alleged the contract to be, in effect, that he would work the sulphurets for $17 per ton, and return the "bar,"—that is, the total amount of bullion obtained from the sulphurets; in other words, that he did not agree to obtain and account for at least 90 per cent. of the assay value, but that he would only account for so much gold as he obtained from the sulphurets, less his working charges of $17 per ton. The cause was tried by a jury, and a verdict returned for the defendant. Plaintiff's motion for a new trial was denied, and it appeals from the judgment and from the order denying said motion.

Counsel for appellant concedes that there is a conflict in the evidence as to what the agreement was between the parties, and that therefore the defendant's version of it, having been adopted by the jury, is conclusive upon appeal; but insists that it appears from the testimony of the defendant himself that he did not return to plaintiff all the gold obtained by him from the sulphurets he worked for the plaintiff. This contention cannot be sustained. The defendant testified, in substance, that he did deliver all the gold he obtained, and we find no testimony to the contrary. But we understand counsel's contention in this regard to be that defendant should have obtained 90 per cent. of the assay value of the sulphurets, and that he failed to do so; and he makes the estimate that there is in the tailings retained by the defendant, and which he never offered in return, $530, which the assay of the tailings shows remained therein, and was not extracted by the defendant. The evidence shows that after the defendant had worked part of the sulphurets he was dissatisfied with the result, and communicated that fact to the plaintiff. He also admits that he stated to the plaintiff, at the time the contract or agreement was originally made, that he ought to obtain 90 per cent. of the assay value of the sulphurets. If, from fraud, lack of skill, or from carelessness or negligence in working the sulphurets, a large amount was lost in the tailings, it might be that the plaintiff would have had a cause of action for negligence or want of skill, and the assay of the tailings would have shown approximately the amount of damages. But there is no allegation in the complaint of a character tending to sustain such a cause of action, but the cause of action is based upon an agreement that he would obtain and return, or return, whether obtained or not, at least 90 per cent. of the assay value of the sulphurets delivered to him, and more if more should be obtained. Nor is there any allegation or evidence of any custom or agreement that the tailings should belong to or be delivered to the plaintiff. The evidence tends to show that the sulphurets were rebellious and difficult to work, but there is no evidence tending to show that the defendant did not honestly and faithfully work them, nor that he did not return to plaintiff all the gold obtained. Some alleged errors of law occurring upon the trial are specified in the statement, but none of these are noticed or commented upon in appellant's brief. We have examined these exceptions, however, but find no error justifying a reversal of the judgment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

115 Cal. 100

## RAUER v. WOLF et al. (S. F. 441.)

(Supreme Court of California. Nov. 27, 1896.)

DISMISSAL—SETTING ASIDE—DISCRETION.

It is not an abuse of discretion to refuse to set aside a dismissal for failure to file an amended complaint within the required time, where the affidavits of the attorneys, as to the existence of an oral stipulation for the extension of the time to file the complaint, are contradictory.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. J. Rauer against J. Wolf and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

G. H. Perry, for appellant. Wal. J. Tuska, for respondents.

BELCHER, C. The plaintiff brought this action to recover damages for the alleged breach of a written contract entered into by the defendants, of San Francisco, with H. Brunhild & Co., of the city of New York, relative to the sale on the Pacific coast of a certain brand of champagne. The contract was dated February 5, 1891, and was to run for five years. The complaint was filed May 20, 1895, and alleged that, prior to the commencement of the action, H. Brunhild & Co. transferred and assigned to the plaintiff all their right, title, and interest in and to their claim and demand against defendants for damages under the contract. A general and special demurrer to the complaint was interposed and sustained, and plaintiff was allowed 10 days to amend. No amended complaint was filed, and on October 16, 1895, judgment was entered dismissing the action, and awarding costs to defendants. On November 8, 1895, the plaintiff, pursuant to previous notice, moved the court to set aside the said judgment, upon the ground that it was taken against him through his inadvertence and excusable neglect. In support of the motion, plaintiff read his own affidavit and the affidavit of one J. I. Macks, and his proposed amended complaint; and, in opposition thereto, the defendants read the affidavit of their attorney, Wal. J. Tuska, and the deposition of Henry Brunhild, taken in the city of New York. The court denied the motion, and from that order the plaintiff appeals.

Section 473 of the Code of Civil Procedure provides that the court may, "upon such terms as may be just, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." It is well settled, however, that applications for relief in such cases are addressed to the sound legal discretion of the trial court, and that its action in granting or refusing such an application will not be disturbed on appeal unless it clearly appears that the court abused its discretion. Woodward v. Backus, 20 Cal. 137; Watson v. Railroad Co., 41 Cal. 17; Dougherty v. Bank, 68 Cal. 275, 9 Pac. 112; Buell v. Emerich, 85 Cal. 116, 24 Pac. 644. The question, then, is, does it appear that the court below abused its discretion in denying the plaintiff's application?

Plaintiff's affidavit read in support of the motion simply stated that the court had made an order requiring plaintiff to exhibit to defendants' attorney the assignment from L. Froman under and by which he commenced said action; that, upon making search for said assignment he discovered that it had been lost or mislaid; that his assignors resided in the city of New York, and that he wrote to them for a new assignment; that the assignors delayed sending the new assignment, and the same did not reach him until October 21, 1895; "that, as deponent is informed and verily believes, defendants' attorney, understanding that said assignment had been lost or mislaid, and understanding that a new one had been sent for, promised and agreed to extend the time to file an amended complaint until such time as said assignment should arrive." In his affidavit, Macks stated that he was acquainted with Tuska, defendants' attorney, and that he fully explained to Tuska the facts connected with the loss of the assignment first obtained, and had written and sent for another assignment; that Tuska promised and agreed to extend the time for filing an amended complaint until a new assignment was obtained; that on October 15, 1895, he presented to Tuska a stipulation extending plaintiff's time to file an amended complaint, and at the same time informed Tuska that he expected the assignment in a few days, but that Tuska, contrary to and in violation of his promise, refused to sign said stipulation or to grant further time; that on the next day he again saw Tuska, and again requested more time, but Tuska refused and stated that a default had already been entered. The proposed amended complaint was verified on the day of the hearing, November 8, 1895, and, as to the assignment, averred in the same language as in the original complaint that it was made to plaintiff by H. Brunhild & Co. Mr. Tuska, in his affidavit, stated: That until the 16th day of October, 1895, he never knew Mr. Macks to be in any wise connected with the said cause, and that before that day he never had any interview or conversation with him about the cause or about the assignment in his affidavit referred to, or about any extension or extensions of time to be given or granted to the plaintiff to file an amended complaint, or for any other purpose. That he was never informed by Macks, or by any person connected with the plaintiff's cause, that plaintiff had an assignment from H. Brunhild & Co., or that the same had been lost, or that Macks or the plaintiff had written or sent for another assignment; and that he did not promise or agree to extend the time for filing an amended complaint until a new assignment was obtained. That the only person whom he ever knew or spoke to on behalf of or representing the plaintiff in the cause, until the 16th of October, was Mr. Perry, plaintiff's attorney of record. That on August 30th a motion made by him on behalf of defendants for an exhibition and inspection of the assignment alleged in the complaint to have been made by H. Brunhild & Co. to plaintiff was granted, but no such exhibition or inspection was ever made or granted. That on the same day, August 30th, the defendants' demurrer was argued before the court, and sustained; and, at the request of Mr. Perry, he consented that plaintiff might have 20 days' further time within which to file an amended complaint. That the 20 days expired on the 19th of September, and on the 21st day thereafter Mr. Perry requested him to grant 10 days' further time, which he did. That on September 30th Mr. Perry again requested a further extension of 10 days, and he complied with this request. That the last extension expired October 10th, and that about 9 o'clock of that night Mr. Perry's clerk came to his room, and asked for a further extension of time to file an amended complaint, saying that Mr. Perry's time had been so engrossed that he could not find the necessary time to prepare an amended complaint. That he did not wish to take advantage of Mr. Perry, and so consented to a further extension of 5 days, and at the same time told the clerk that he would grant no further extensions. That the last extension expired on October 15th, and no amended complaint was served or filed on that day, and no application was made for any further extension. That on the morning of October 16th he directed the clerk of the court to enter the default of plaintiff, and to enter judgment thereon in favor of defendants for costs. That on the 16th of October, after the default was entered, Mr. Macks called at his office, introduced himself, and asked him to grant a further extension of time to file an amended complaint. That "this was the first appearance of Mr. J. I. Macks on the scene; the first knowledge I had of his existence or his connection with the cause. I declined to set aside the default, or to grant the requested time. My refusal was absolute and unqualified." That he had read the affidavit of the plaintiff, and that he never had an understanding with him or with any one connected with his office, and never promised or agreed to extend the time to file an amended complaint until such time as the assignment referred to should arrive. "Mr. Perry, the only person with whom I dealt in this cause representing the plaintiff, never requested of me such an indefinite and unlimited extension, but always limited the time in the stipulations prepared by him for the periods as I have already stated above, except the last extension, which I reduced from ten to five days." Mr. Brunhild, in his deposition, stated that his firm was engaged in the liquor-importing business in the city of New York, from July, 1890, to August 23, 1893; that the firm became insolvent, and on the last-named day its business was sold out to Leopold Froman, and the firm went out of existence. He did not, however, state that his firm ever sold or assigned to Froman any contract it may have had with defendants, or that it ever sold or assigned to the plaintiff any claim for damages it may have had against defendants.

It will be observed that it does not appear from his affidavit or otherwise that Mr. Macks had any connection with the case, or any authority to ask for an extension of time to file an amended complaint. It will also be observed that the statements of Mr. Tuska as to the extensions of time granted, and the circumstances under which they were granted, were in no way controverted or denied. Under the showing made, it cannot, therefore, in our opinion, be said that the court below abused its discretion in denying the plaintiff's motion. The order should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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115 Cal. 98

## KENNEDY & SHAW LUMBER CO. et al. v. PRIET et al. (S. F. 452.)

(Supreme Court of California. Nov. 27, 1896.)

MECHANICS' LIENS — MATERIAL MEN — PERSONAL JUDGMENT AGAINST OWNER—VALIDITY.

In consolidated actions by several material men to foreclose their respective liens the contractor made default, and the owner answered that he was ready to pay to the persons claiming to be lienholders the balance due to the contractor, "whenever the respective amount due to each lienholder is determined." It was found that A. and B. had no liens. It was further adjudged that, after paying the claims of the lienholders, the balance of the amount admitted to be due to the contractor should be paid by the owner to A. and B. in proportion to their claims. *Held*, that the owner's offer did not run to A. or B., and that the personal judgment in their favor against him was void.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Consolidated actions by the Kennedy & Shaw Lumber Company and others against Pierre Priet and others to foreclose mechanics' liens. From a personal judgment in favor of two of plaintiffs, defendant Priet appeals. Reversed.

D. H. Whittemore, for appellant. W. H. Jordan, for respondents.

HENSHAW, J. The Kennedy & Shaw Lumber Company, the Depew Planing-Mill Company, and others commenced their actions to foreclose mechanics' and material men's liens upon the property of appellant, Priet. The actions were consolidated. Fletcher, the contractor, suffered default. Priet, the owner, answered, setting up a contract with Fletcher, and naming the sum due and unpaid thereon. He averred that he was "ready to pay said sum of $5,884.50 so due to said Fletcher to the said persons so claiming to be lien holders in proportion to their respective claims, whenever the respective amount due to each lienholder is determined." The court held the contract between Priet and Fletcher to be void. It decreed liens to all of the other plaintiffs excepting the respondents herein. It was held that they had no liens. A judgment was awarded the lienholders for the sale of the property, and the court, then subtracting the aggregate amount due the lien holders from the $5,884.50 above mentioned, adjudged that Priet should pay the difference, amounting to $1,700, to these respondents. It was intimated upon a former appeal in the case that this portion of the judgment (which is the portion here appealed from) was erroneous. Lumber Co. v. Priet, 45 Pac. 336. Respondents' arguments have not modified our views. The judgment is a somewhat curious attempt to treat the action as a creditors' bill. Respondents, not being lienholders, could neither have any recourse against the owner's property nor any personal judgment against him. Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. 516; Lumber Co. v. Williams (Cal.) 31 Pac. 1128. Yet a personal judgment was what was given them. No support can be found for this judgment in the offer of the answer above quoted. Not being lienholders, the offer did not run to them. The portion of the judgment appealed from is ordered vacated and annulled.

We concur: TEMPLE, J.; McFARLAND, J.

115 Cal. 152

## KAUFMAN v. SUPERIOR COURT. (S. F. 438.)

(Supreme Court of California. Nov. 30, 1896.)

DISMISSAL — RIGHT OF PLAINTIFF TO DIRECT — FAILURE OF CLERK TO ENTER ORDER — ERRONEOUS ENTRY.

1. An order of dismissal having been erroneously entered, the defendants moved to correct the entry. Pending the motion, the plaintiff filed a dismissal of the action, entering directions therefor in the clerk's order book, and paying the fees. There was no demand for affirmative relief on the part of defendants on file at the time, but the clerk refused to enter the judgment, on the ground that the cause had been already dismissed. On hearing the motion the former order of dismissal was set aside, and immediately thereafter the defendant filed an answer and cross complaint setting up an affirmative demand. *Held*, that under Code Civ. Proc. § 581, providing that an action may be dismissed by the plaintiff at any time before trial, on payment of costs, where affirmative relief has not been sought by the defendant, the plaintiff was entitled to a dismissal in accordance with his directions to the clerk.

2. The failure of the clerk to comply with plaintiff's directions, and the subsequent filing of a cross complaint by defendant, could not defeat plaintiff's right to have the action dismissed.

3. The plaintiff's right to dismiss was not affected by the fact that there was already on the record an erroneous and invalid entry of dismissal.

In bank.

Application by C. H. Kaufman for a writ of prohibition against the superior court of San Francisco county. Writ granted.

Frank Shea, for petitioner.

HENSHAW, J. This is an application for a writ of prohibition to restrain the superior court, and William T. Wallace, judge thereof, from proceeding further in the action commenced in said court by C. H. Kaufman against Joseph E. Shain and others. The following facts are pertinent to this consideration: In 1889, Kaufman, who, as receiver of the estate of one Mackenzie, an insolvent, had in possession the sum of $5,769.52 belonging to his said estate, commenced an action in interpleader against the creditors of Mackenzie, rival claimants of the fund. He paid the money into court, and obtained an order thereof restraining the defendants from proceeding against him and harassing him with litigation concerning it. Certain of the defendants demurred to the complaint, and the demurrers, coming on for hearing, were sustained in the absence of plaintiff and his attorney. A minute entry was made by the clerk to the effect that the court ordered the action dismissed. Thereafter, upon August 18, 1891, said Kaufman, believing the action to have been dismissed, in which belief the judge seems to have shared, sought and obtained an order permitting him to withdraw the money deposited by him, and, in pursuance of the order, did withdraw it. A judgment of dismissal had not at that time been entered, but such judgment was entered and recorded by the clerk upon March 14, 1894. Upon May 2, 1894, the attorney for Davis, another of the defendants, gave notice that he would move to correct the minute entry above referred to, and to vacate the judgment of March 14th. Notice was likewise served that an order would be sought compelling Kaufman to return into court the money so by him withdrawn. These motions were argued and submitted for decision upon May 25, 1894. Upon May 28, 1894, while the motions were under submission, Kaufman, by his attorney, filed with the clerk of the court a dismissal of the action, and wrote an order on the clerk's order book, according to custom, directing entry of judgment of dismissal of the action, and at the same time paid the legal fees for entering such judgment, taking a receipt therefor. At this time there was not on file on the part of any of the defendants to the action any cross complaint, counterclaim, or claim of affirmative relief whatsoever. The clerk did not enter this judgment as directed, justifying his refusal to do so upon the fact that a judgment of dismissal (that of March 14th) was already of record. The demand for a judgment of dismissal was, however, filed, as appears by the affidavit of the deputy clerk who filed it. The dismissal was entered in the clerk's register. The time of its entry is in dispute; but it is an immaterial matter, which need not be determined. Upon August 20, 1894, the court made its order correcting the minute entry by striking therefrom the order of dismissal of the action, and at the same time set aside the judgment entered upon March 14, 1894. Immediately thereafter, and on said day, defendant Davis filed an answer and cross complaint. Kaufman appealed from this last order, but his appeal was not sustained. Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393. Upon February 19, 1896, the remittitur was filed in the matter of this last appeal, and defendant Davis gave notice that he would apply to the court for an order compelling Kaufman to repay the moneys into court. Upon the following day, the clerk, at the request of plaintiff's attorney, entered the judgment of dismissal demanded upon May 28, 1894. Kaufman is still assignee of the estate of the insolvent, and in another department of the said court his accounts as assignee have been presented for and are awaiting settlement. He insists that the order which the court is about to make, compelling him to repay the moneys into court, and all other and further threatened proceedings in said action, will be in excess of jurisdiction, and void; and he bases this upon the contention that he had a right to dismiss the action upon May 28, 1894, and that the action was legally dismissed upon said date.

Under section 581 of the Code of Civil Procedure an action may be dismissed by the plaintiff at any time before trial, upon payment of costs, provided a counterclaim has not been made, or affirmative relief sought, by the cross complaint or answer of the defendant. This language is general. The article "an" is equivalent to "any," and the provisions of the section are applicable to an action in interpleader such as this, as well as to other forms and causes of action. The plaintiff, Kaufman, then, had the legal right to dismiss his action before the filing, upon the part of any of the defendants therein, of an answer seeking affirmative relief. Upon May 28, 1894, he took every affirmative step required by the statute for this purpose. He filed with the clerk of the court a dismissal. He wrote an order therefor in the clerk's order book, and paid the legal fees for entering such a judgment. At that time none of the defendants had made answer. There was on file, neither by answer nor by cross-complaint, any claim to the fund or for affirmative relief. If plaintiff was at that time entitled to dismiss his action, the failure of the clerk to perform his ministerial duties by entering the dismissal in the register, and causing a proper judgment of dismissal to be entered in his judgment book, should not and cannot be allowed to affect the substantial rights of the parties; in other words, if plaintiff at that time had the right to dismiss his action, and had taken all the proper steps to that end, that right could not be impaired or lost by the refusal of the clerk to perform a plain duty, or by the subsequent filing of a cross complaint by one of the defendants, or by both of these circumstances. The judgment afterwards entered by the clerk upon February 20, 1896, will be considered, in determining the respective rights of the parties, as having been entered upon May 28, 1894, if, as has been said, it was the duty of the clerk at that time to have entered it. And that this was the clerk's plain duty there can be no doubt. Plaintiff's right to dismiss his action with legal form and effect could not be impaired by the fact that a judgment of dismissal, improvidently, irregularly, and illegally entered, was upon the books. This irregular judgment of March 14, 1894, was not of the procurement of the plaintiff. He, as well as the judge of the court, accepted it, for a time at least, as being regular and legal. That it proved not to be did not deprive him of his statutory right to dismiss the action of his own motion. He took all proper steps to this end before any answer or cross complaint upon the part of any of the defendants was sought to be filed, and at a time when his right to dismiss was absolute. In Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301, a not dissimilar state of facts was presented. Plaintiff filed a dismissal of his action, but judgment of dismissal thereon was not entered. Thereafter defendant appeared and filed an answer, whereupon plaintiff gave notice that he would upon a later date move the court to strike out the answer, and to enter a judgment of dismissal in the action nunc pro tunc. Defendant, before the date of the hearing of the motion, filed a cross complaint, and contended that the action was not dismissed until judgment of dismissal had been entered, and that, by the filing of his cross complaint, the right of plaintiff to dismiss the action was lost. It was held that the plaintiff had the right to have the action dismissed at any time before trial, upon the mere filing of the dismissal, and to have judgment entered thereon accordingly, and that the judgment so entered is to be regarded as having been made at the date of the notice of the motion. So, here, to preserve the substantial rights of the parties, the judgment entered upon February 20, 1896, will be held to relate to the date of the demand for the dismissal of the action. Let the writ issue as prayed for.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

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115 Cal. 180

## EVANS v. JOHNSTON. (Sac. 78.)

(Supreme Court of California. Dec. 2, 1896.)

DISMISSAL—WHEN EFFECTIVE—ABATEMENT—EVIDENCE.

1. An action is pending, and constitutes good ground for a plea in abatement in a second action for the same cause, until a judgment of dismissal is entered therein, though an order for its dismissal has been made and entered on the minutes of the court.

2. Incompetent testimony will not be stricken out on motion, where given without objection.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by J. F. Evans against Robert Johnston, administrator. Judgment for plaintiff, and defendant appeals. Reversed.

Spencer & Raker, F. C. Spenser, and A. L. Shinn, for appellant. Goodwin & Goodwin, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage of real estate, executed by one Joseph Sivley, in favor of plaintiff, on the 12th day of June, 1885. Said Sivley died December 10, 1886, and was owner of the real estate at the time of his death. The mortgage was given to secure the payment of a note for $400 and interest. It became due June 12, 1886. This suit was commenced June 23, 1894. Defendant, Johnston, was appointed administrator of the estate of Joseph Sivley June 10, 1887, and is still such administrator. July 19, 1887, plaintiff commenced an action in the superior court of Lassen county to foreclose this mortgage, and caused summons to be issued on the same day. Nothing further was done in the case until January 20, 1894, when an order dismissing the case without prejudice to a new action was made by the court, and entered in its minutes. On the 28th day of July, 1887, and within the time allowed by law for the presentation of claims against the estate, plaintiff presented to the administrator his claim upon the note, duly verified, and the same was then allowed by the administrator. It is found that the mortgage was also presented as a part of the plaintiff's claim, but this finding is challenged as one not supported by the evidence. According to the transcript, a copy of the mortgage was not attached to and presented with the claim, nor was it described or reference made to the date, volume, or page of its recordation. The mortgage was, therefore, not presented. The answer contains denials of the presentation of the claim and of nearly all the allegations contained in the complaint, and sets up several defenses, to wit: (1) Payment; (2) a former action for same cause; (3) pending of another action between the same parties on the same cause of action; and (4) statute of limitations. The points presented on the appeal arise upon certain specifications of the insufficiency of the evidence to support the findings. The appeal was taken within 60 days after rendition of judgment.

First, in regard to the plea in abatement. It was shown or admitted that the cause of action in the former case was the same as in this, and the parties are also substantially the same. As already stated, that action was dismissed, on motion of the plaintiff, by the court, and an order to the effect duly entered in the minutes of the court. Again, after this action was commenced, and the plea on abatement had been interposed, the court again, on motion of the plaintiff, ordered the former action dismissed as of January 20, 1894. According to the rule laid down in Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, a dismissal then was a sufficient answer to the plea in abatement. But unfortunately, so far as the record shows, on neither occasion was there a judgment of dismissal entered. Counsel for respondent says that a judgment in due form was entered by the clerk. If so, since the finding was challenged as not being sustained in this respect by the evidence, it was the duty of the respondent to see that the bill of exceptions as settled contained the evidence showing the fact. As the bill does not contain such evidence, we must presume that there was none. Several cases are cited in which this court has held that, until a judgment of dismissal is entered, the action is still pending. Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Page v. Page, 77 Cal. 83, 19 Pac. 183; Page v. Superior Court, 76 Cal. 373, 18 Pac. 385; Barnes v. Barnes, 95 Cal. 173, 30 Pac. 298. It is true that, after an order dismissing the case has been entered in the minutes, a defendant could not then prevent a dismissal by filing an answer containing a counterclaim before the actual entry of judgment. The plaintiff, who in a proper case has himself ordered it to be dismissed, or has obtained an order of dismissal from the court, cannot thus be defeated. Judgment will be entered nunc pro tunc. Kaufman v. Superior Court (filed November 30th) 46 Pac. 904. But until judgment the court has not lost jurisdiction; nor could the defendant appeal from the judgment of dismissal; and if, notwithstanding the order of dismissal, an answer is filed, and the court proceeds with the trial, and judgment is entered, such judgment cannot be attacked, even in a direct proceeding. Barnes v. Barnes, supra. It follows that the plea in abatement should be sustained.

2. The motion to strike out the evidence given by the plaintiff in regard to matters which occurred before the death of Sivley was properly denied. The evidence was admitted without objection.

3. The objection to the finding that the plaintiff presented for allowance his said mortgage or a claim secured thereby, that the same is not supported by the evidence, must be sus-

tained. This has already been sufficiently discussed.

No question is made on this appeal in regard to the statute of limitations. Several other points are made, but they are all such as may not arise upon another trial, or will be differently presented. Judgment reversed.

We concur: McFARLAND, J.; HARRISON, J.

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(5 Cal. Unrep. 533)

## PEOPLE v. THOMPSON. (Cr. 159.)

(Supreme Court of California. Nov. 30, 1896.)

CRIMINAL LAW—APPEALABLE ORDERS.

An appeal from an order fixing the day for the execution of a sentence of death will be dismissed where it appears that the day so fixed has long since passed.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

W. H. Thompson was convicted of a crime, and sentenced to death. From an order fixing the time of execution, the defendant appeals. Dismissed.

Ben. Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. This is an appeal from an order appointing a day for the execution of the judgment of death pronounced against the defendant. At the time the day was so appointed an appeal was pending from an order refusing a new trial, and the point made here (if it can be said that any point was made) was that it was error to execute the judgment pending that appeal. The time for execution of the judgment was fixed for May 22, 1896. As that time has long since passed this appeal is of no further interest, and is therefore dismissed.

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(5 Cal. Unrep. 498)

## UNION TRANSP. CO. v. BASSETT et al. (No. 15,899.)[1]

(Supreme Court of California. Oct. 15, 1896.)

STATE HARBOR COMMISSIONERS—REASONABLENESS OF REGULATIONS—QUESTION OF LAW—INJUNCTION—HEARSAY EVIDENCE—HARMLESS ERROR.

1. Under Pol. Code, § 2524, authorizing the state harbor commissioners to make "reasonable" regulations concerning the management of the property intrusted to them, and to assign suitable wharves for the exclusive use of vessels, the courts may review the regulations of said commissioners, and declare them invalid, if unreasonable.

2. Whether a regulation of the board of state harbor commissioners changing the docking place of a steamboat company, and requiring it to land its passengers and freight at a different wharf from that to which it had previously been assigned, is unreasonable, is a conclusion of law, to be deduced by the court from the facts proved.

3. In an action to enjoin the state harbor commissioners from enforcing a resolution requiring plaintiff steamboat company to change its landing place from the C. wharf to the M. wharf, 400 yards distant, it appeared that nearly all the freight carried by plaintiff and its competitors consisted of wheat and flour, which the shippers generally required should be delivered at the B. and C. wharves, near which the market for produce of this kind had been established for more than ten years; that, as there was no sale for such produce at or near the M. wharf, carriers could not procure it as freight to be delivered there; that there was active competition for freight between plaintiff and another carrier, which had a landing place at the B. wharf; that said order, if executed, would discriminate against plaintiff, to its great detriment, and compel it to suspend business as a carrier of freight on that route; and that, though the C. wharf was overcrowded, there were boats, other than plaintiff's, which might be removed without prejudice to their interests. *Held*, that the resolution was unreasonable, and its execution would be enjoined.

4. In an action to restrain the state harbor commissioners from enforcing a resolution requiring plaintiff steamboat company to change its landing place, the testimony of plaintiff's secretary as to a conversation with one K., in which the latter suggested that he could, for a consideration, effect a compromise, was inadmissible; there being nothing to show that K. was in any way connected with defendants, or that they authorized or knew of his proposal to plaintiff.

5. In an action to restrain the state harbor commissioners from enforcing an order requiring plaintiff steamboat company to change its landing place, the admission of hearsay evidence tending to impugn defendants' good faith in passing the order of removal is harmless, if the court finds that the order is unreasonable, since such finding warrants the relief sought, irrespective of the motives of defendants.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by the Union Transportation Company against Charles Bassett and others composing the board of state harbor commissioners, to enforce the execution of a resolution passed by said board. From a decree for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

F. S. Stratton and Tirey L. Ford, for appellants. Reddy, Campbell & Metson, for respondent.

VANCLIEF, C. The plaintiff is a corporation organized under the laws of this state for the purpose of carrying passengers and freight on steamboats to be run upon the navigable waters of this state, and especially between the cities of Stockton and San Francisco. In February, 1892, plaintiff applied to the defendants for a suitable berth for their boats at some one of the wharves under their control or supervision at the water front of the city of San Francisco. Thereafter, on June 8, 1892, the defendants assigned and set apart berth room for plaintiff's boats at and upon Clay street wharf, which plaintiff thereafter occupied and used as a landing place for its boats, and by discharging freight thereon and receiving passengers and freight therefrom daily, until the commencement of this action. On August 2, 1892, the board of harbor commissioners adopted a resolution by which their former order assigning berths to the steamers of the plaintiff at Clay street wharf was rescinded, and berths were assigned to them on Mission street wharf, to be selected by an agent of the plaintiff and the chief wharfinger. This order was opposed and protested against by the plaintiff on the ground stated in the complaint, and was immediately followed by a protest, signed by about 40 firms of produce and commission merchants, as follows: "Gentlemen: We, the undersigned, produce and commission merchants of San Francisco, learning that steps are being taken to remove the steamers of the Union Transportation Company from Clay street wharf to Mission street wharf, most earnestly protest against such change, for the following reasons: First. The center of the produce and commission business in San Francisco is, and has been for many years, on Jackson, Washington, and Clay street wharves, and it would be injurious to such business to have steamers bringing produce to land as far away as Mission street. Second. It is for the interest of the general public, as well as ourselves, to have a competing line of steamers on the San Joaquin river; and, if the Union Transportation Company's line of steamers should be compelled to go to Mission street wharf, it would preclude the possibility of our having produce shipped by that line, as we would be unable to dispose of it at Mission street wharf. Third. From actual experience, it has been proven that to undertake to transfer the produce business to Mission street wharf results in destroying that business. Wherefore, we most respectfully ask that the steamers Captain Weber and Dauntless be permitted to land at Clay street pier, as heretofore." On August 25th the board passed another resolution relating to the same matter, as follows: "On motion of Mr. Alexander, seconded by Mr. Brown, the following resolutions were adopted: Resolved, that any use heretofore permitted of the Clay street wharf, on the harbor front of city and county of San Francisco, by the Union Transportation Company, a corporation, for the docking of its vessels at said wharf, and the use thereof by said company of any portion of said wharf for wharfage or other purposes, be, and the same is hereby terminated. This resolution to take effect, and such use terminate, on Tuesday, the 27th day of September, 1892. Resolved, further, that said company be notified at least thirty days prior to said September 27th of said notice and resolution, and termination on that day, and of such use; that on said day such further proceedings, by resolutions or otherwise, will be taken to render effectual the termination of any use by said company. Also, that a copy of this resolution be served by the chief wharfinger, or secretary or assistant secretary of this board, on the president, secretary, manager, or other officer or agent in charge of said company's affairs in this city and county; and that a copy be forthwith addressed by mail to said company, at Stockton, California. Resolved, further, that the chief wharfinger be, and he is hereby, instructed to execute the purposes of this resolution, and of any further resolutions hereafter passed in the premises. Resolved, that, after September 27th next, said company be assigned to the use of Mission street wharf, at such berth or place to be mutually agreed upon by the chief wharfinger and agent of said company: provided, however, that nothing in the resolution contained shall be intended or construed as giving or granting to said company any right to the use of said wharf other than that they may now have, or may have already had, by operation of law."

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[1] Reversed in banc. See 50 Pac. 754, 118 Cal. 604.

On October 5, 1892, this action was commenced to enjoin the defendants from enforcing said resolutions and orders; and such injunction pendente lite, or until the further order of the court, was then issued and served on defendants. The grounds for the injunction are stated in the complaint as follows: "That the character of the freight carried by plaintiff is of that nature as to absolutely require its delivery and receipt upon or at the Clay street wharf (or the Washington street wharf, which is the next adjacent wharf thereto), and that those for and from whom it is possible for plaintiff to get freight to carry on said steamers cannot and will not furnish or give any goods, produce, or substance to plaintiff, or any one else engaged in the same or other business, who cannot or will not deliver and receive the same at either of the wharves above named; and it has been the custom for more than ten years last past to receive goods and produce of the character carried by plaintiff at said wharves. That plaintiff, relying upon said order of defendants giving it berth room at said Clay street wharf, made and entered into a large number of freight contracts and agreements with other persons to hereafter carry to and from, and receive and deliver upon, said Clay street wharf, large quantities of freight, for the carriage of which it is to receive large sums of money from said patrons. That during the times herein mentioned the plaintiff has been, and now is, actually engaged in sharp and active competition with other corporations and persons who have had, and now have, berth room at the wharves above mentioned, and who are now engaged in the same business as plaintiff. That said defendants have unreasonably, arbitrarily, and without any cause or reason whatever, save for the purpose of discriminating against plaintiff, and giving to its competitors an advantage over it, made an order and passed a resolution changing the berth and landing place of plaintiff's said steamers from said Clay street wharf to Mission street wharf, which said last-mentioned wharf is distant quite a long way southerly from said Clay street wharf, and is entirely outside of the district within which plaintiff can get any freight or passengers to carry on or continue its business with said patrons, as the said Mission street wharf is so situated that neither passengers, nor persons shipping the character of freight that plaintiff carries, will patronize any vessels landing at the same. And plaintiff further alleges that the going to and coming from said Mission street wharf will be attended with great danger to life and property. And, upon information and belief, plaintiff alleges that said order was made by said defendants arbitrarily, and for the purpose of injuring and damaging plaintiff, and for the purpose of discriminating against plaintiff in the conducting and carrying on its said business, and to prevent it from carrying on the said business, and to prevent plaintiff from exercising its rights as a common carrier, and to prevent it from carrying freight and passengers from and to the city of San Francisco, and to utterly ruin and destroy its business, and render its property useless and of no value, in order that its competitors in said business aforesaid should thus obtain advantage over plaintiff, and that plaintiff should be driven entirely out of business. Plaintiff further alleges that said defendants have notified plaintiff that it must immediately cease landing at said Clay street wharf, and that it must hereafter land at and receive and unload freight from its said steamers at the said Mission street wharf, and not elsewhere. Plaintiff further alleges that the effect of said order, if enforced, will be to drive plaintiff out of the business entirely, and will also make it liable to be proceeded against for breach of contract by the various persons with whom it has contracted to receive, deliver, and carry freight from and to said Clay street wharf for a failure to do so, and that said order is unjust, unreasonable, and unfair, and was not made for the convenience of the public, but will kill and prevent all competition in the future, and will compel plaintiff to hang up its boats and vessels, if the said order is carried into effect." The answer of defendants denies the allegations of the complaint relating to the grounds upon which the injunction was asked.

The court, without a jury, found the facts and conclusion of law as follows:

"Finding of Facts. All and singular the allegations contained and set forth in the complaint, and in the amendment to the complaint, at the trial, are true in point of fact, and were true at the commencement of the action. The order made by the defendants in the month of August, 1892, purporting to change the docking place and berth room of the plaintiff's boats from Clay street, where they then were, was arbitrary, and was made without any just cause, and without any reason or motive therefor on the part of the defendants, other than that of injuring and damaging the plaintiff in its transportation business, and to assist others, its rivals and competitors in the business, in forcing the plaintiff to discontinue the running of its said boats. The orders and action of the defendants in and about the removal of the plaintiff's said boats from said Clay street wharf were not made or taken by the defendants for any reason or upon any ground or with any intent such as they have alleged in their answer therein, but were made only with the intent and for the purpose on their part as is alleged in the complaint in their behalf.

"Conclusion of Law. There must be a decree for the plaintiff as prayed in the complaint, and it is so ordered."

A final decree was entered in accordance with these findings. The defendants' motion for a new trial having been denied, they have appealed from the final decree, and also from the order denying their motion for a new trial.

Appellants contend that none of the findings of fact from which the conclusion of law was drawn are justified by the evidence. The evidence is voluminous, occupying 270 pages of the printed transcript. Then there are 26 specifications of insufficiency of evidence, occupying 9 pages, and consisting principally of statements of "what the evidence fails to show." Eleven of these specifications apply to issues tendered by the affirmative allegations in the answer of the defendant; and these specifications are "that the evidence fails to show" that any one of such affirmative allegations in the answer is true, and that none of such allegations are justified by the evidence. All this, however, is in perfect accord with the findings of the court. Perhaps the attorney for defendants did not intend what he plainly said in these so-called specifications, and they are here referred to only for the purpose of calling attention to the incoherency, indefiniteness, and tiresome prolixity of the statement on motion for new trial. Then there are 49 specifications of errors in law, occupying 15 pages. The principal specification of insufficiency of evidence urged here is that the evidence is insufficient to justify the finding that the order for the removal of plaintiff's boats was unreasonable and unjust. This, however, is not a fact, but, in cases of this kind, is a conclusion of law, deduced by the court from the facts and circumstances proved. Dill. Mun. Corp. (4th Ed.) § 327; Ex parte Frank, 52 Cal. 610. The facts and circumstances found by the court surely support the conclusion of law that the order of the board removing plaintiff's boats was unreasonable and unjust. What were the findings of fact which support this conclusion of law? And were such findings justified by the evidence? The material substance of these findings is as follows: That nearly all the freight carried to San Francisco by plaintiff and its competitors consists of that kind of produce of land, exclusive of wheat and flour, which is customarily landed and delivered at the Clay street and Washington street wharves, and which is generally, by the shippers thereof, required to be delivered at those wharves, for the reason that the market place for such produce, for more than 10 years, has been concentrated and established at and near those wharves, and that carriers could not procure such produce as freight, to be delivered at Mission street wharf, because it is 400 yards south of Clay street wharf, where such produce is seldom delivered, sold, or called for; that, from the time plaintiff commenced to run its boats (June 8, 1892) until it was ordered to remove from Clay street to Mission street, there was an active and sharp competition for freight between plaintiff and another line of boats on the same route, and having a landing place at Washington street wharf, to wit, the California Navigation & Improvement Company; that the order of removal unfairly and unnecessarily discriminated between plaintiff and said California Navigation & Improvement Company, to the great detriment of the former and advantage of the latter, and that said order was arbitrarily made, without just cause, and for the purpose of thus discriminating against plaintiff and in favor of its competitor, and not for the purpose or with the intent alleged in the answer of the defendants; and that, if executed, the order for removal would compel plaintiff to suspend the carrying business on said route, to its great and irreparable injury. I think these findings are supported by a considerable preponderance of evidence, except in so far as they may tend to impute dishonest motives to the commissioners, but that, independently of the motives of the commissioners, the findings support the judgment.

The powers of the commissioners are defined, and their duties prescribed, so far as they relate to the subject of this action, by section 2524 of the Political Code, as follows: "The commissioners shall have possession and control of that portion of the Bay of San Francisco [described], together with all the improvements, rights, privileges, easements and appurtenances connected therewith, or in anywise appertaining thereto, for the purposes in this article provided. * * * The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state which is intrusted to them by virtue of this article; * * * [shall] set apart and assign suitable wharves, berths or landings for the exclusive use of vessels." "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable, or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." Dill. Mun. Corp. § 328. Under the rule thus expressed by Judge Dillon, even if the power to make regulations and to assign berths and landing places to vessels had been given to the harbor commissioners without any express qualification, it would nevertheless have been subject to the limitation that such regulations and orders assigning berths, etc., must be reasonable, otherwise invalid. The legislature, however, did not leave this limitation upon the power of harbor commissioners dependent on implication, but expressly limited it to the making of reasonable regulations, and to the setting apart of suitable wharves, berths, etc., to vessels. Therefore it cannot be doubted that the courts may review the regulations and orders of the harbor commissioners in respect to the requisite attribute of reasonableness, and pronounce them invalid if found to be unreasonable. As applicable to this point, see, also, Ex parte Frank, 52 Cal. 606; Ex parte Kearny, 55 Cal. 225; Spring Valley Waterworks v. City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046; Mayor, etc., of Baltimore v. Radecke, 49 Md. 217; Tugman v. Chicago, 78 Ill. 405; Dill. Mun. Corp. § 319 et seq., and notes.

It is urged by the defendants that the slip between Clay street wharf and Washington street wharf, in which plaintiff's boats were first assigned a berth, was overcrowded, and for that reason it was absolutely necessary that some of the boats should be removed therefrom to some other wharf. Conceding this, it does not appear that it was necessary to remove plaintiff's boats to another wharf which was unsuitable to its business. On the contrary, it appears that at least two other boats that occupied berths in said slip, to wit, the General McDowell, a government boat, and the steamer Humboldt, might have been removed to other wharves suitable to their business, and without prejudice to their interests. When asked why they determined to remove plaintiff's boats, rather than one of the other lines, Mr. Alexander, a member of the board, answered: "To move the other vessels would not accomplish what we wanted to accomplish particularly. The Humboldt had already been moved once. She had been moved from her place at Clay street to Washington, and, even if it accomplished the object, I don't think the board would be inclined to move her from pillar to post." No reason was given why the General McDowell could not have been removed. What object the board "wanted to accomplish particularly," other than to relieve the crowded condition of Clay street wharf, appears only by the further testimony of Mr. Alexander, who said: "The condition of that part of the city was becoming so crowded, we recognized the fact it was necessary to distribute this line of business [produce business] all over the city. To concentrate it for the next twenty years is out of the question." Yet the policy of the law creating and governing the harbor commission seems to favor the concentration of each kind of business, and it is obvious that the public would be better accommodated by such concentration. One who desires to buy a particular kind of goods, say lumber, coal, fish, or farm produce, must find it very inconvenient to travel two or three miles along the water front to ascertain where he can buy to the best advantage. Therefore I think the court properly found against the plea of necessity.

It is urged that the courts will not declare an order or regulation of the governing board of a municipal corporation void, except in a plain case of abuse of authority. Conceding this, it does not follow that the courts are powerless to give relief in all cases where the evidence is conflicting, though it may be admitted that the appellate court should scrutinize the evidence more closely in cases of this kind than in ordinary cases, and require the record to show a satisfactory preponderance of the evidence in favor of the findings of the trial court. In other words, the findings of fact from which the unreasonableness of the order, regulation, or by-law is deduced should clearly appear to be justified by the evidence, and the facts found should clearly warrant the conclusion of unreasonableness; and such, I think, are the conditions shown by the record in this case. Indeed, there is no substantial conflict of evidence, except upon the issues as to the necessity of the order of removal above considered, and as to the extent of the injury to plaintiff. Speaking of the injurious effect of the order of removal on the business of plaintiff, Mr. Alexander said, "The opinion of the board was—and my individual opinion—that at first it might be something of a hardship upon them to move, but we believed in time they could build up a business." And it was not denied that the effect of the removal might be such as alleged in the complaint and found by the court.

Of the 49 specified errors in law, the only one urged here is that the court erred in admitting certain hearsay evidence. C. M. Keniston, a witness for plaintiff, was permitted to testify to a conversation he had with a Mr. Knapp after the final order of removal was made. The testimony was objected to on the ground that it was irrelevant, immaterial, and mere hearsay. The objectionable testimony was, in substance: That Knapp said to Keniston, who was the secretary of the plaintiff corporation, that he (Knapp) believed it possible that all the factions could be compromised so that plaintiff could be allowed to remain at Clay street wharf; that he knew more about the case, probably, than any one else; that he thought he was in a position to compromise the matter, but, of course, it would require money to do it,—he thought, about $2,000; parties would have to be fixed up, in order to allow plaintiff to remain at Clay street wharf. That Knapp repeated the substance of the above to Mr. Gillis, the president of the plaintiff, and that witness and Mr. Gillis declined to pay any sum for the purpose of effecting a compromise. It appeared that Knapp had acted as the private detective for the California Navigation & Improvement Company about two years immediately preceding this conversation with Keniston, and that he had assisted in procuring the order removing plaintiff from Clay street wharf; but there is nothing in the evidence tending to prove that he was in any wise connected with the defendants, nor that any one of the defendants authorized, or even knew of, his proposals to Keniston or Gillis. That this testimony of Keniston was not only mere hearsay, but irrelevant and immaterial, and for these reasons should have been rejected, admits of no doubt, but that defendants were not injured thereby seems quite as clear. The only possible effect it could have had was to cast a mere suspicion upon the motives and good faith of the defendants; but, as above remarked, the judgment rests firmly on the finding that the order of removal was unreasonable and unjust, independently of the motives or good faith of the commissioners, and must have been the same whether their motives were good or bad. The relief asked and given may be regarded as indivisible, and such as must have been wholly given or entirely denied, and could not have been diminished or affected by proof of good faith of defendants. The following cases were cited to the point that the hearsay evidence was harmless, and that the judgment should not be reversed for the error of admitting it: Norwood v. Kenfield, 30 Cal. 394; Kisling v. Shaw, 33 Cal. 425; Mott v. Reyes, 45 Cal. 380; De La Guerra v. Newhall, 55 Cal. 21; Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136; Jones v. Tallant, 90 Cal. 386, 27 Pac. 305; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493.

The decree enjoins the board from enforcing the order of removal to Mission street, "and from unlawfully requiring plaintiff to dock its boats elsewhere than at said Clay street wharf." Appellants contend that this gives the plaintiff a perpetual vested right to dock at Clay street wharf and enjoins defendants from interfering therewith for any cause. But such is not the meaning of the decree. The board is not enjoined from removing plaintiff's boats from Clay street wharf for any lawful cause, nor from making any reasonable regulation or order. I think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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115 Cal. 160

## PEOPLE v. THOMPSON. (Cr. 121.)

(Supreme Court of California. Nov. 30, 1896.)

TRAIN WRECKING — DENIAL OF NEW TRIAL — APPEAL—ERRONEOUS INSTRUCTIONS.

1. Under Pen. Code, § 1176, which provides that the instructions given or refused, with the indorsements thereon, form a part of the record, and the rulings may be reviewed on appeal as though embodied in a bill of exceptions; and section 1237, which provides for an appeal from the judgment of conviction, and from an order refusing a new trial,—defendant may prosecute both appeals, and can have alleged error in the giving of instructions considered on either of them, but not on both.

2. Under Pen. Code, § 1172, which provides for an exception to an order denying a new trial, such order may be reviewed on an appeal from the judgment on a proper record; and there is no necessity for a separate appeal from the order, though both are provided for by section 1237.

3. Under Pen. Code, § 218 (St. 1891, p. 283), making it a felony to throw a switch, etc., with intent to derail any train, or board any train with intent to rob it, etc., where the indictment charges defendant with throwing a switch with intent to derail a passenger train, "and" boarding a passenger train with intent to rob the same, it charges the single offense of train wrecking; and it is error to charge that the jury must convict defendant if they find that he boarded an express car, and, by putting in fear the messenger in charge, stole anything in the custody of the messenger, where the evidence shows that, if defendant entered the car, it was after it had been derailed.

4. There was no evidence to show that defendant's accomplice boarded the train with intent to rob it, and that, in the perpetration of that offense, the train was ditched; hence it was error to further charge that if an accomplice threw a switch with intent to derail a train, and if he unlawfully boarded the train with intent to rob the same, and defendant aided and abetted, the jury must find defendant guilty, since the instruction assumed the existence of evidence which had not been given, and because it was not applicable to any fact in the case.

McFarland, J., dissenting.

In bank. Appeal from superior court, of Los Angeles county; B. N. Smith, Judge.

W. H. Thompson was convicted of train wrecking, and, from an order denying him a new trial, appeals. Reversed.

For former report, see 43 Pac. 748, 111 Cal. 242.

Ben Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant was convicted upon a charge of derailing a railroad train, and unlawfully boarding a train with intent to rob the same. This appeal is from an order refusing a new trial, and the only points made are that the court erred in giving certain instructions. An appeal from the judgment was separately taken, and, there being no bill of exceptions to be settled,—as the points arose upon the demurrer,—that appeal reached here first, and was long since decided. 111 Cal. 242, 43 Pac. 748. On the former appeal from the judgment no points were made with reference to the instructions, and, as there was no bill of exceptions, such points could not have been presented to the best advantage. Still the defendant might have had a bill of exceptions on the appeal from the judgment, in which so much of the evidence as was necessary to illustrate his points could have been set out. The Code expressly provides (section 1176, Pen. Code) that the instructions given or refused, whether in writing or taken down by the reporter, with the indorsements thereon (showing whether given or not), constituted a part of the record, and the rulings may be reviewed on appeal as though embodied in a bill of exceptions. In criminal cases, if a motion for a new trial is made, it must be denied before judgment is entered against the defendant. Section 1172, Pen. Code, provides for an exception to an order denying a new trial. The order denying a new trial is therefore an order made before judgment, and may be reviewed on an appeal from the judgment. There is therefore no real necessity for an appeal from an order denying a new trial. Still, the Code provides for an appeal from the judgment and from an order denying a new trial. Pen. Code, § 1237. Now, it is suggested that because there has been an appeal from the judgment, upon which the alleged errors in giving the instructions might have been considered, they cannot be considered on this appeal; that is to say, a defendant is at liberty to present such questions either upon an appeal from the judgment or upon an appeal from an order refusing a new trial, but he cannot do both. Furthermore, it is contended an affirmance of the judgment on appeal is final as to questions which were or might have been presented on that appeal. It would therefore follow that if he could have had a record which would have presented his point, and did not, he has lost his right to be heard. Such, as I understand the suggestions, are the reasons urged for refusing to consider the exceptions on this appeal, in reference to which it may be said that both methods are provided by the statute. The motion for a new trial is an independent proceeding in the case, and it often happens in civil cases that a judgment is set aside on a motion for a new trial after it has been affirmed on appeal. It could not be so vacated by the trial court in a criminal case, simply because the judgment cannot be entered until the motion for a new trial has been disposed of. But, as there may be an appeal from the judgment, and afterwards an appeal from the order refusing a new trial, the judgment might be affirmed here on an appeal from the judgment, and afterwards set aside on an appeal from an order denying a new trial as in civil cases. It is entirely a matter of statutory control, and, since both appeals have been provided, I can see no reason why the court should refuse to hear either. It would be going beyond any case within my knowledge to hold that a determination of an appeal is conclusive upon all questions which might have been raised upon any record which, under the rules of practice, might have been made. If conclusive as to the instructions, it would be equally conclusive as to every question which might be made on a motion for a new trial; for, as already stated, every point made on a motion for a new trial could be considered on an appeal from the judgment with a proper record. The true rule, in my opinion, is that defendant may prosecute both appeals, but can have but one decision of the same point.

This precise question has, I think, been decided by this court after most mature consideration in Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 32, 131. That was a civil case, but, so far as affects this question, I see no difference in principle. The reasoning there adopted applies with at least equal force here. The court said: "The law of this state permits two appeals in the same case,—one from the judgment, and the other from the order denying a new trial. Both of these appeals have a direct effect on the judgment, and, if successful, may vacate it entirely or modify it, as the court may determine. These appeals may both be prosecuted and be pending in this court at the same time, as was the case here until the appeal from the judgment was disposed of. The fact that this court has declared a rule of law in deciding the appeal first reached for decision, and upon which no action has or can be taken until the second appeal is also disposed of, cannot, by reason of the rule invoked by the respondent, prevent the court from fully investigating and deciding the second appeal to the extent of modifying or wholly changing its former decision, if it be satisfied that an error has been committed. The case must be regarded as within the control of this court until both appeals are determined."

The questions now raised as to the instructions were not presented on the appeal from the judgment, and as to one instruction, at least, could not have been fully presented without a bill of exceptions. On the appeal from the judgment it was decided that the information, in charging that the defendant willfully, unlawfully, and feloniously threw out a switch with intent to derail a passenger train, and "did then and there willfully, unlawfully, and feloniously board a passenger train, * * * with intent then and there to rob said passenger train," did not charge two offenses. The act under which the prosecution was had was an act adding one section to the Penal Code. It was said by the court on the former appeal that "this act arose from the necessity of the times, and was created for the purpose of stopping train wrecking and punishing train wreckers. The act so declared its purpose in terms, and, aside from one clause thereof, such purpose is patent upon the most casual inspection of its provisions." Again, speaking of this one clause in which the purpose was less manifest, the court said: "The whole tenor and purpose of the act is directed against train wrecking, and this is true as to subdivision 2 equally with all other subdivisions. At first glance that clause would seem to be directed towards the suppression of the crime of robbery; but the offense of robbery is only incidentally involved, and the prevention of the wrecking of the train, and the consequent and natural results following of injury and death to the passengers, is its prime purpose. Whatever else the clause imports, it means acts of violence upon the train. It imports to a more or less degree the subjection of the employés to the robbers, the menace and duress of the employés, a loss of the control of the train by them, fright upon their part, and even death. These things being so, the probabilities of destruction to the train and passengers follow nearly as necessarily as such probabilities would follow from the misplacing of a switch or the removal of a rail. Hence we say that every part and clause of the act is directed towards the suppression of train wrecking." To charge, then, displacing a switch with intent to derail a train, and to board the same with intent to rob the same, is to charge but a single offense, because the probable, or at least the possible, effect of each act, is to wreck the train. The one offense charged is train wrecking. Furthermore, the act is not designed to prevent or punish robbery, save when that is an incident in train wrecking. We also derive from this a definition of the phrase "robbing a train." It is to take from the persons having charge of the train, by violence and intimidation, the control and management thereof, with intent to take from it, or from a person upon it, something of value. Train wrecking must be such a destruction of a train as will endanger human life. It must be of an operative train,—one being used.

Upon the former appeal the court was considering the demurrer alone, and, of course, understood the information to charge that the defendant boarded such a train. The evidence discloses, however, without conflict, that the defendant did not board, or attempt to board, the train until after it had been wrecked. At that time the train was not an operating train, and could not have been wrecked. Therefore, when the defendant boarded the train with the intent to rob it,—if he can be said to have done so,—the act could not by any possibility have contributed towards wrecking the train. This would not necessarily have prevented the conviction of the defendant. He could still have been convicted and punished for throwing out a switch for the purpose of wrecking the train. The evidence was sufficient to sustain a conviction upon that ground; but, unfortunately, the jury was instructed by the court as follows: "If the jury believes from the evidence that the defendant, W. H. Thompson, with Alva Johnson, at the county of Los Angeles, in the state of California, on the 15th day of February, 1894, boarded an express car in a passenger train, on the Southern Pacific

Railroad, at Roscoe Station, in said county, and by force and violence, or by putting in fear of some injury to the person of the messenger in charge of said car, did rob, steal, and carry away any money of any value then in the custody or under the care or in the control of said messenger, then the jury should find the defendant guilty." Under the opinion rendered upon the former appeal, boarding a train under such circumstances as the evidence in this case tends to prove could not constitute the crime of train wrecking. The jury were told that they must convict the defendant of the offense of train wrecking if they found that he boarded an express car, which without conflict the evidence shows was not then, when the evidence tends to show he boarded it, a part of a train which could have been operated or wrecked, and, by putting in fear the messenger in charge of the car,—not of the train,—did rob or steal anything of value in the custody of the messenger; that is to say, although they should find that defendant did not derail the train, and had not interfered with it until after it had been wrecked, still they must find him guilty of this offense if, after the train had been wrecked, he robbed the express messenger while on the car. The so-called "train" was not then in reality a train. It had no engine, and could not have been operated or wrecked. The express car did not then constitute a part of a train. Judged by the opinion rendered on the former appeal, as well as by general rules of law, the above instruction is wrong.

There are additional objections to the third instruction. In it the jury were told that if Alva Johnson threw out a switch with the intent to derail a train, and if he unlawfully boarded the train with intent to rob the same, and, in the perpetration of such offense, one Masters was killed, and defendant aided and abetted, they must find the defendant guilty. Evidence of the killing of Masters was objected to at the trial, and admitted over defendant's objection. By this instruction the attention of the jury is called to it as a material circumstance tending to show the guilt of the defendant. The jury were told that if Johnson boarded the train with the intent to rob it, and the train was thereby ditched, and Masters killed, defendant, if he aided and abetted, was guilty. There was no evidence which tended to show that Johnson boarded the train with intent to rob it, and that, in the perpetration of that offense, the train was ditched. On the contrary, the evidence shows without contradiction that Johnson did not board or attempt to board the train until after it had been ditched. The instruction was therefore erroneous, in that it assumed the existence of evidence which had not been given, and because it was not applicable to any fact in the case.

For these reasons, the judgment is reversed, and a new trial ordered.

I concur: HENSHAW, J.

I dissent: McFARLAND, J.

BEATTY, C. J. I concur in the judgment, and generally in the opinion of Justice TEMPLE, but I think a word should be added with reference to the novel practice pursued in this case, of bringing up the appeals from the judgment and from the order denying a new trial separately and upon different records. This case fully illustrates the proposition that such practice is productive of delay and unnecessary expense, and that it is as inconvenient as it is unusual. For the purpose of preventing such proceedings in the future, I would suggest that this may easily be done by following the directions contained in section 1246 of the Penal Code, which impose upon the county clerk the duty of printing and transmitting the record in criminal cases. The Penal Code (sections 1170-1173) provides for various bills of exceptions to be settled before, during, and after the trial, all or any of which may be used in support of an appeal from the judgment; but "the bill of exceptions" especially referred to in section 1246 is that provided for in section 1171, viz. the bill of the exceptions taken at the trial, and which must be presented for settlement within 10 days after the judgment. If no such bill of exceptions has been settled when the appeal is taken, and the time for its presentation has not elapsed, the clerk should wait till it has been settled, or until the right to have it settled has been lost or waived, before printing the record; and, when he does print it, he should, as the almost universal practice is, and as I think the statute clearly intends, print the entire record, including all bills of exception, in one record for both appeals.

HARRISON, J. (concurring). On the appeal from the judgment against the defendant (111 Cal. 242, 43 Pac. 749), the instructions to the jury were not considered or passed upon by this court. The sufficiency of the information, as tested by the demurrer, was the only matter of law then considered or determined. In the prevailing opinion it was said: "A demurrer to the information was overruled, and the reversal or affirmance of this judgment is dependent upon the legal soundness of the action of the trial court in that behalf." And Mr. Justice Henshaw said, in his dissenting opinion: "This hearing is on demurrer only." It follows that only the propositions of law then determined fall within the rules governing the "law of the case." These rules rest upon the principles of an estoppel, and it is evident that, as the action of the trial court which is now under review was had anterior to the decision of this court upon the appeal from the judgment, none of the elements of an estoppel can be invoked for the purpose of preventing a review of its action. The "law of the case" is properly invoked when, upon a former appeal in the same action, this court has declared the rule of law governing the rights of the litigants in that action. But, as the judgment of this court upon the other appeal was rendered without determining or even considering the directions to the jury, and would not have even the force of a precedent in another case involving the correctness of the same instructions, much less can it be held conclusive in the same case, when their correctness is for the first time directly challenged.

The court erred in giving to the jury the third instruction, but, in my opinion, for a different reason from that assigned by Mr. Justice TEMPLE. This instruction is as follows: "If the jury finds from the evidence that Alva Johnson, at the county of Los Angeles, state of California, on the 15th day of February, 1894, did willfully, unlawfully, and feloniously throw out a switch, at Roscoe Station, on the Southern Pacific Railroad, in said county, with intent then and there to derail a passenger train, and did then and there willfully, unlawfully, and feloniously board said passenger train, with intent then and there to rob the same, and, in the perpetration of said offense, said train was ditched, and one Masters was killed, and that the defendant, W. H. Thompson, was present then and there, aiding, abetting, and counseling said Johnson in the perpetration of said offense, then you will find the defendant guilty, as charged in the information." The instruction follows the language of the information, and, as it was held on the appeal from the judgment that the facts set out in the information charged the defendant with but a single offense, that portion of the instruction which refers to the ditching of the train and the killing of Masters, "in the perpetration of said offense," was authorized by the evidence connecting the defendant with the ditching of the train; and the "offense" referred to in the instruction must have been understood by the jury as including both the throwing out of the switch, as well as boarding the train. The fact that the train had been ditched before the defendant boarded the express car was immaterial, if the two acts were part of a single transaction, and done in pursuance of an original purpose; and, if the defendant threw out the switch for the purpose of enabling him the more readily to board the train for the purpose of robbing it, it was immaterial that the train had been brought to a standstill before he actually got upon the car. Neither would a temporary purpose of abandoning the original plan, after the train had been brought to a stop, change the character of the offense if such original plan was resumed and carried into effect. The instruction assumes that there was evidence that Johnson threw out the switch, and that the defendant was merely present, aiding, abetting, and counseling him in the perpetration of the offense, whereas the only evidence in reference thereto was that of Johnson himself, who testified that the switch was thrown out by the defendant. This portion of the instruction could not, however, have prejudiced the defendant; but the former portion was clearly prejudicial to him, in presenting to the jury the fact that Masters was killed, and thus indirectly charging him with a homicide. No charge of this nature was made in the information, and, although evidence of the killing of Masters was introduced before the jury against the objections of the defendant, there was no issue upon that fact which he was called upon to meet, and the jury should not have been allowed to consider that fact for the purpose of determining his guilt. The order denying a new trial should be reversed, and a new trial granted.

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115 Cal. 132

## PEOPLE v. RATZ. (Cr. 186.)

(Supreme Court of California. Nov. 30, 1896.)

RAPE—AGE OF PROSECUTRIX—EVIDENCE—UNDER AGE OF CONSENT—BELIEF OF GREATER AGE NO DEFENSE.

1. On a trial for rape, where the prosecutrix was under the age of consent, she may testify to her age, though her knowledge of it is derived from statements of the parents or from family reputation.

2. The Family Bible record is admissible in evidence to show a child's age, when it is proved that the book is the Family Bible, and the handwriting or authorship of the entries need not be proved.

3. On a trial for rape, where the prosecutrix was under the age of consent when the crime was committed, defendant cannot, as against the evidence, urge as a defense that he had reason to believe, and did believe, that she was over that age.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Philip Ratz was convicted of rape, and appeals. Affirmed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the State.

HENSHAW, J. The defendant was convicted of the crime of rape, in having had carnal intercourse with a female child under the age of 14 years, and not his wife. The intercourse was admitted. The age of the child was a question in dispute. It was conceded that the intercourse was not had through force or violence, so that if, at the time thereof, the child was over the age of 14 years, the crime of rape was not committed. The child herself testified to her age, as well as to the date of the intercourse. Her evidence went to show that at the time when Ratz carnally knew her she was under the age of 14. The evidence of the child was admissible. A person's age may be proved by his own testimony, and the fact that knowledge of that age is derived from statements of the parents or from family reputation does not render it inadmissible. Hill v. Eldridge, 126 Mass. 234; Cherry v. State, 68 Ala. 29; Bain v. State, 61 Ala. 75; Rosc. Cr. Ev. *272. The testimony of the mother of the child also went to prove the fact that at the date in question she was under the age of 14. The mother, when on the witness stand, was shown a book, and testified that it was hers, and that it was her Family Bible; that it contained the record of her family. This book contained, among other entries, the name of the child, and the date of her birth. The mother testified that it was correct. Objection was made to the introduction of the record by defendant, upon the ground that it appeared that the record was in English; that the mother did not know how to read or write English, and could not tell whether or not the record was correct. The admissibility of the book did not depend upon proof of handwriting or authorship of the entries. It depended upon proof of the fact that it was the Family Bible, which evidence was afforded by the testimony of the mother. As is well said in Hubbard v. Lees, L. R. 1 Exch. 255: "To require evidence of the handwriting or authorship of the entries [in a Family Bible] is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been."

Appellant contends that, even though the child be shown to have been under the age of 14 years, yet that, if the defendant had reason to believe, and did believe, that she was over the age of 14 years, then there was an absence of the necessary intent to constitute a crime, and that he should be acquitted. He asked the court to give an instruction to the jury embodying this as a proposition of law. The proposed instruction was refused. The refusal is assigned as error. The claim here made is not a new one. It has frequently been pressed upon the attention of courts, but in no case, so far as our examination goes, has it met with favor. The object and purpose of the law are too plain to need comment, the crime too infamous to bear discussion. The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime. In People v. Fowler, 88 Cal. 136, 25 Pac. 1110, the defendant was charged with placing a girl under the age of 18 years in a house of prostitution. The same claim here made was there urged, but it was said that one who violates the section acts at his peril, and cannot defend himself on the plea of ignorance as to the age of the child. The same principle was reannounced in People v. Dolan, 96 Cal. 315, 31 Pac. 107, where, under a similar charge, a like claim met with the same response. The whole question is learnedly and elaborately discussed in Reg. v. Prince, L. R. 2 Crown Cas. 154. It was there proved that the defendant did take the girl, and that at the time of her abduction she was under 16 years of age; but it was likewise proved that the defendant bona fide believed, and had reasonable ground for believing, that she was over 16. The bench of 16 judges, with but one dissenting voice, held that neither defendant's honest belief, nor the reasonable grounds afforded him for such belief, relieved him from the consequences of his act. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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(115 Cal. 129)

## DONNELLY v. ADAMS et al. (S. F. 182.)

(Supreme Court of California. Nov. 27, 1896.)

BUILDING CONTRACT — REFERENCE TO PLANS — IDENTIFICATION—PAROL EVIDENCE.

Where a building contract refers for a description of the buildings to be erected to certain plans and specifications of an architect, "which are signed by the parties hereto," such plans are an essential part of the contract, without which it is incomplete, and cannot form the basis of a recovery; and where there are no plans "signed by the parties" the contract cannot be completed by parol evidence to identify others as the ones referred to.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Thomas Donnelly against Frank P. Adams and others. From the judgment both parties appeal. Reversed on defendants' appeal.

Gale & Peery, Chas. S. Peery, and R. Percy Wright, for appellants. Stafford & Stafford, for respondent.

HENSHAW, J. These are cross appeals by plaintiff and defendants. The action was by the assignor of an original contractor to foreclose a lien under a building contract. The court adjudged plaintiff to have a lien, and decreed foreclosure thereof.

Defendants' claim that the contract between the parties is void first invites attention. The contract provided that the contractor should furnish the necessary labor and materials to erect a certain building "and other works shown and described in and by and in conformity with the plans, drawings, and specifications for the same, made by B. E. Henriksen, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto and others concerned in said erection." What purported to be the plans and specifications were admitted in evidence over the objection of defendants. They were not signed by the parties to the contract. In Worden v. Hammond, 37 Cal. 64, the contract was to build a barn "agreeable to the draft, plan, and explanation hereto annexed, marked 'A.'" No plan or specifications were attached, but an unsigned paper was produced, which plaintiffs testified contained the specifications referred to. The paper was admitted, and this court said: "The specifications are an essential part of the contract, and are as material as the price of the work or the terms of payment; for the contract price was not to be paid until the barn was completed according to the specifications. It is not indispensable that the specifications be signed by the party to be charged, but it will be sufficient if they are referred to with certainty. But, where the reference is false, it cannot be helped out by oral evidence. Here the specifications were referred to as annexed to the contract; and when the plaintiffs were permitted to introduce in evidence, as the specifications referred to, a paper which they admitted was never attached to the contract, if they did not thereby contradict the written contract, they added to its terms by oral evidence. The two instruments, taken together, contain all the necessary terms of the contract; and, if the written contract had contained a reference to the specifications in such a manner that their connection would be apparent upon their production, it would be regarded as a sufficient compliance with the statute. But this could not be established by parol evidence without a violation of the statute requiring the contract to be in writing, and signed by the party to be charged thereby. Boydell v. Drummond, 11 East, 157." In Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629, the same question again arose. There the contract provided that the work should be done "conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed." It did not appear in that case whether or not the drawings and specifications were in fact signed, but it did appear that they were not attached; and it is said: "The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment; and until they were 'annexed' to the contract, so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate, and not complete, and could not form the basis of a recovery. Worden v. Hammond, 37 Cal. 63." The only distinction between the contract in the case at bar and those considered in the cases cited lies in the fact that in the present instance the reference is to specifications "signed"; in the other it was to specifications "attached." But the one reference is no less significant and essential than the other. If the specifications be not signed, or if they be not attached, in either case there is a false reference in a written contract which cannot be aided by parol evidence. In both cases the contract was left "inchoate, and not complete, and could not form the basis of a recovery." It follows that the judgment must be reversed upon defendants' appeal. We cannot, therefore, discuss the more interesting point presented by both appeals, namely, the conclusiveness or inconclusiveness of the architect's certificate to the effect that the work had been done according to contract. The contract being void, it is void as to all of its terms and conditions. The architect's certificate, deriving whatever force it may possess from the contract itself, is deprived of all efficacy, and whatever discussion might be had upon the question would be merely obiter, and without binding force. The consideration is thus eliminated from the case, and must be reserved until it is presented upon proper occasion. The modification of the judgment asked for on plaintiff's appeal is denied. Upon defendants' appeal the judgment is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

5 Cal. Unrep. 510

## LASSEROT v. GAMBLE. (S. F. 483.)

(Supreme Court of California. Oct. 15, 1896.)

FORCIBLE DETAINER — WHAT CONSTITUTES — EVIDENCE.

1. A lease provided that on failure of the lessee to perform certain covenants the lessor might recover possession without notice or demand. After the lessee had been in peaceable possession for several months, the lessor, claiming a violation of the lessee's covenants, ordered him to leave the premises, but did not give the written notice required by Code Civ. Proc. §§ 1161, 1162. On the lessee's refusal to leave, the lessor had him arrested on a warrant charging a public offense, and during his absence took possession, without the consent of the employé in charge, and refused to surrender possession to the lessee for more than five days after demand therefor. Code Civ. Proc. § 1160, provides that a person who, during the absence of the occupant, unlawfully enters on real property which for more than five days prior thereto has been in the peaceable possession of such occupant, and refuses to surrender for five days after demand therefor, is guilty of forcible detainer. *Held*, that defendant was liable under said act.

2. In an action against said lessor by the lessee for forcible detainer it was competent to show that plaintiff was arrested at defendant's instance, for the purpose of getting him away from the premises, so that defendant might enter and take possession thereof.

3. In forcible detainer, under Code Civ. Proc. § 1160, evidence of title in defendant is inadmissible.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Peter Lasserot against A. W. Gamble for the forcible detention of certain lands. From a judgment for defendant, and from an order refusing a new trial, plaintiff appeals. Reversed.

Charles B. Younger and Spalsbury & Burke, for appellant. W. D. Storey, for respondent.

BELCHER, C. This is an appeal from a judgment and order refusing a new trial. No brief has been filed on behalf of the respondent. The action is for the forcible detention of certain lands and premises in Santa Cruz county known as the "Gamble Place." The complaint alleges that on the 1st day of December, 1893, the plaintiff was in the actual, peaceable, and undisturbed possession of the said lands and premises, and that, while plaintiff was in such possession, and during his absence from said premises, the defendant, on the day named, unlawfully, and against plaintiff's will, and without his consent, entered upon said premises, and ousted and ejected plaintiff therefrom, and ever since unlawfully, wrongfully, forcibly, and against plaintiff's will has held, and still holds, possession of the same; that on the 30th day of January, 1894, and before the commencement of this action, plaintiff made demand of defendant that he forthwith surrender the said premises and the possession thereof to plaintiff, but defendant, for more than five days after said demand, refused, and still refuses, to surrender the same. The complaint also states that on December 1, 1893, plaintiff was in possession of certain personal property on the said premises, which was then and there and theretofore used by him in the cultivation, farming, and use thereof, and that defendant then and there wrongfully and unlawfully seized and took possession of all of said personal property, and converted the same to his own use, to the plaintiff's damage, etc. The answer denies that on the 1st day of December, 1893, plaintiff was in the peaceable or undisturbed possession of the said real property or of the said personal property, with certain specified exceptions, and alleges that all of said real property and all of said personal property, omitting the excepted articles, was the property of defendant on said day, and that he was then entitled to the possession thereof. The answer further alleges that defendant took possession of all of said property, excepting the said enumerated articles, rightfully and in accordance with the consent and agreement of plaintiff theretofore expressed and entered into by him, and denies that plaintiff has been damaged in any sum whatever by being deprived of said real or personal property. The answer then sets out a lease of the said premises alleged to have been executed by defendant to plaintiff on the 28th day of June, 1893, for the term of three years and four months, commencing on the 1st day of July, 1893, and ending on the 1st day of November, 1896. The lease provides that: "The party of the second part is to stock said ranch with the seven cows and six calves now on said ranch, and the party of the first part is to furnish an equal number of cows, or others of equal value, on or before the 1st day of December next. Each of the parties are to furnish half of the necessary seed and feed and half of the hogs necessary to consume the grain or other products of said ranch, and each is to pay half the cost of repairing the agricultural implements used on said ranch. The party of the first part is to furnish materials for making and keeping the necessary fences in repair. The party of the second part agrees to furnish labor and work said ranch and dairy well, and to make and keep the necessary fences in good repair during the continuance of this lease; to market and dispose of such of the products of the dairy and ranch as both of the parties may from time to time agree to; to keep a full and correct account of such sales, yielding to the party of the first part a correct copy thereof, and paying him one-half of the proceeds thereof on the 1st day of each and every month during the continuance of this lease; and as compensation for the crop now on said ranch the party of the second part agrees to pay to the party of the first part, on or before the 1st day of November next, the sum of four hundred dollars out of the proceeds of the sales of the hogs or other products of said ranch, such amount being in excess of the half due said party of the first part. * * * And the said party of the second part covenants with the said party of the first part that if, at any time during the continuance of this lease, he should fail or refuse to comply with the covenants herein made by him, or in any part thereof, this lease shall at once become void, and the party of the first part may recover possession as if the same was withheld by forcible detainer; the party of the second part hereby waiving the right of any notice or demand for the possession of said premises." After setting out the lease, the answer alleges: "That plaintiff, before December 1, 1893, utterly failed and neglected to perform and comply with the covenants on his part to be performed under said agreement, and willfully and grossly violated said covenants." It then states how plaintiff failed to comply with the conditions of the lease in several respects; that by reason of his said acts of neglect and his violation of said covenants defendant had been damaged in the sum of $1,000; and that, after the violations of plaintiff's covenants, and on or about December 1, 1893, defendant notified plaintiff that said agreement was void, and thereupon took peaceable possession of said farm and the said personal property. The case was tried before a jury, and the verdict and judgment entered thereon were in favor of the defendant.

The statement contains numerous specifications of the particulars in which it is claimed the evidence was insufficient to justify the verdict, and also many specifications of errors in law occurring at the trial, and excepted to by the plaintiff; but most of these specifications need not be considered. It is alleged in the complaint, and not denied by the answer, that plaintiff was in the actual possession of the property when the defendant entered upon the same, and took possession thereof. It is also alleged, and not denied, that plaintiff afterwards demanded of defendant that he forthwith surrender to plaintiff the possession of the said property, and that defendant, for more than five days after said demand, refused, and ever since has refused, and still refuses, to surrender the same.

The circumstances under which defendant took possession of the property were shown to be as follows: Plaintiff testified: "I went there about June 1, 1893, and took possession of the place at that time. I had two men—John Lovely and Richard Lair—working for me. On or about November 29, 1893, I went to Pescadero, and got provisions for the ranch, and returned to the ranch with the provisions. Defendant was at the ranch when I returned. We had supper, and the constable came after supper, and defendant wanted to know if I would leave the place. I said I would not. The constable then arrested me, and required me to go to Justice Craghill's court at Santa Cruz, about twenty miles distant. I gave bond on Saturday evening, but on Sunday one of my bondsmen withdrew from the bond, and I was committed to the county jail in Santa Cruz, and was confined there continuously for fifty-seven days. When I left the premises described in the complaint, I left Lovely in charge of them. I told Lovely, in case I did not come back, to keep possession, and not let anybody have possession of the place. I was in possession of the place. I had peaceable and undisturbed possession of the place up to the time I was arrested by the constable as stated above." And John Lovely testified: "I was at the ranch when defendant came and took possession. Plaintiff was then in jail in Santa Cruz. Defendant came to the ranch after plaintiff was taken to jail, and defendant said to me: 'Frenchie, I want to get in the house to take out some of my things.' I opened the door, and defendant went in. After defendant got in, he said to me: 'You give me possession, and I will give you some money.' Defendant then took down the stovepipe, and asked me to help him move the stove; but I said I would not. I told defendant that I would not give possession to him, or to any other man. Defendant took the dishes and the stove out of plaintiff's room. Defendant then went out, and after a while I thought he was gone, and I went out, and he came back, and fastened the door. I did not give defendant permission to take possession. He took it without my consent. I could not get back in the house. I had nothing to eat. Plaintiff had put me in charge of the place, and told me to take care of it, and not to allow anybody to get possession of it. I had to go away to get something to eat, and defendant would not let me in again. * * * When plaintiff went away, he left me plenty of provisions. After defendant took possession of the place, he threatened to have me arrested if I broke into the house." The plaintiff sought to prove that he was arrested at the instance of the defendant, and to that end he asked defendant, when on the stand as a witness: "Was plaintiff arrested at your instigation?" And again: "Did you not cause plaintiff to be arrested in order to get him off the place?" Both questions were objected to by defendant, though upon what ground does not appear, and the objections were sustained. Afterwards plaintiff offered in evidence the complaint on which the warrant for his arrest was issued, but upon like objection it was also excluded. A copy of the complaint is set out, from which it appears that it charged the plaintiff with a public offense, and was sworn to by defendant on December 1, 1893. The obvious purpose of this offered evidence was to show that the arrest of plaintiff was a means resorted to to get him away from the place in order that defendant might enter upon and take possession of it, and for that purpose it was competent, and should have been admitted. It is clear that defendant had no right to take possession of the premises as he did, and in doing so he was guilty of a forcible detainer. Code Civ. Proc. § 1160, subd. 2.[1] "Under our statute, evidence of title in actions of forcible detainer is inadmissible. 'The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by the defendants; the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise. A forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee-simple title and present right of possession are shown to be in defendant.' McCauley v. Weller, 12 Cal. 524. 'Under the Code, all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of the recovery in this form of action.' Voll v. Hollis, 60 Cal. 575." Giddings v. Water Co., 83 Cal. 100, 23 Pac. 198.

The court properly instructed the jury that it did not require the actual personal presence of plaintiff upon the premises to constitute actual possession in him. If his employé was in possession at the time of defendant's entry, his possession was the possession of plaintiff. The court further instructed the jury that the defendant could not lawfully take possession of the premises described in the complaint against the will or consent of plaintiff, unless he had given plaintiff three days' notice in writing, as provided in sections 1161, 1162, Code Civ. Proc. Under these circumstances the verdict should have been for the plaintiff, and the judgment and order appealed from should be reversed, and the cause remanded.

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[1] Code Civ. Proc. § 1160, declares that: "Every person is guilty of a forcible detainer who * * * during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof for the period of five days, refuses to surrender the same to such former occupant. The occupant * * * is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands."

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregong opinion, the judgment and order appealed from are reversed, and the cause remanded.

(115 Cal. 29)

## HORTON v. JACK. (L. A. 149.)

(Supreme Court of California. Nov. 19, 1896.)

EXECUTORS—VALIDITY OF SALE BY—ACTION FOR CONVERSION—DEFENSE—APPEAL—SETTLEMENT OF BILL OF EXCEPTIONS.

1. A sale of property of a deceased person by his executrix passes no title unless it is confirmed by the probate court (Code Civ. Proc. § 1517), and a subsequent administrator can recover from the purchaser for its conversion.

2. While an executrix may be credited, under Code Civ. Proc. § 1632, with the payment of a debt of the estate which has not been presented and allowed, such credit can only be given by the probate court as therein provided, and it cannot be pleaded by a purchaser of property from an executrix by a sale which was not confirmed, as a defense to an action for conversion by a subsequent administrator, that the proceeds, for which the executrix never asked or received credit, were applied in payment of a debt of the estate which was never presented for allowance.

3. An objection that a bill of exceptions was not served within the required time, where the appellee proposed amendments, but made no objection in the court below, cannot be raised on appeal.

4. Where a proposed bill of exceptions and amendments were delivered to the clerk, and by him to the judge, who thereafter settled the same in open court, when attorneys for both parties were present, without objection being made, the objection that no notice of the time for settlement of the bill was given cannot be thereafter made.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph Horton, administrator with the will annexed of James A. Brown, against R. E. Jack. Judgment for defendant, and plaintiff appeals. Reversed.

M. C. Hester and Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

VAN FLEET, J. This is the second appeal in this case. On the first appeal the cause was remanded for a new trial as between the plaintiff and the defendant, Jack. The opinion on that appeal will be found in 37 Pac. 652, where the facts are fully stated. The second trial resulted in a verdict and judgment for defendant, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

It is contended by appellant (and this is the only question which need be considered) that the facts disclosed on the second trial are substantially the same as on the first trial, and that the decision on the former appeal is, therefore, the law of the case, and requires a reversal of the judgment. Respondent claims that the evidence is now substantially different, in that it shows that the debt to pay which the property in controversy was sold was the debt of the deceased, and not that of Catherine J. Brown; that the executrix had the right to pay that debt from the funds of the estate, although it was not formally presented against the estate, and although such payment was not approved by the probate court; and that the taking of the property to pay that debt did not amount to a conversion.

1. The facts as to the debt in question, as proved on the second trial, did not differ from those disclosed on the first trial. It appeared then, as it does now, that the deceased, in his lifetime, guarantied the payment by Kenney of such sums as should be advanced to him by the bank of which the defendant, Jack, was president; that some such advances were made during the lifetime of the deceased; that after his death his widow, Catherine J., made a new guaranty, in her own name, of the like character; and that all the subsequent advances were made under the latter guaranty. It was not then shown, nor is it shown now, what was the amount of the advances made before Brown's death, further than that it was "between two and three thousand dollars." It was admitted by the answer that the defendant, Jack, received of the proceeds of the sale in question $4,213.10, which he turned over to the bank, and that there still remained unsold a portion of the property of the value of $367.60. Mr. Jack testified on the second trial that upon the death of Mr. Brown, Mrs. Brown "assumed whatever indebtedness there was, and it became her indebtedness," and that after Mr. Brown's death he "treated it as her individual indebtedness." It also appears, as it did before, that no claim against the estate for any portion of this indebtedness was ever presented to the executrix. Under these circumstances the statement of Mr. Jack that the proceeds of this sale were used to wipe out the indebtedness of the deceased, James A. Brown, was merely a statement of the conclusion of the witness, not supported by the facts to which he testified. Moreover, the answer (which was not amended in that respect) expressly alleges that the proceeds of the sale were applied and credited upon an indebtedness of Catherine J. Brown to the bank, and that it was originally agreed that they should be so applied; and no mention is made of any indebtedness of the estate. We are, therefore, unable to perceive that the facts on the second trial differ at all from those on which our former opinion was predicated; and the propositions of law there decided are, therefore, decisive of the case on

this appeal. Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147.

2. No sale of any property of the estate of a deceased person passes any title unless it is confirmed by the probate court (Code Civ. Proc. § 1517); and although, under section 1632, the executrix might be credited with the amount of a debt of the estate paid by her without the affidavit and allowance prescribed by law, that credit could be allowed only by the probate court, and upon the evidence prescribed by that section. It follows that, even if this property had been sold by the executrix to pay a debt of the estate, that sale would not pass the title to the property without confirmation by the probate court; and the appropriation of the proceeds of the property by Jack to the use of the bank would be unlawful. The order of sale, upon which alone the authority of the executrix to sell this property could be based, was made upon the petition of the executrix, which recited that no claims had been presented, and that she knew of no debts or claims against the estate; and the order itself recites that, with the exception of two claims for small amounts, filed subsequent to the petition, there were no debts or claims against the estate except the cost of administration thereof. In her return of sales under this order the executrix reported that she had sold this property to satisfy her individual liability to the bank, and on this showing the court refused to confirm the sale. She also filed an account of the proceedings in the administration, in which she treated this property as still on hand, and did not ask or receive any credit for the payment of any debt of the estate. Whether or not, then, this sale was in fact made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate; and under the decision on the former appeal the administrator was entitled to treat the property as converted by Jack, and to recover its value from him. Whatever equities the defendant may have against Mrs. Brown may be asserted upon distribution or in some other appropriate proceeding, but they constitute no valid defense to this action.

3. Respondent further contends that it now appears that there are no debts outstanding against the estate, and that notice to creditors was duly given, and that there was sufficient money in the hands of the executrix to pay all expenses of administration. It also appears, however, that none of this money has come into the hands of the present administrator, and that he has no funds for the payment of expenses of administration. But, furthermore, it was distinctly decided upon the former appeal that until distribution the administrator is absolutely entitled to the possession of all personal property of the estate, that any interference with that property by any person which has the effect of depriving the administrator of the possession is a conversion, and that he is entitled to recover therefor without proving an indebtedness to satisfy which the property is necessary.

4. Respondent objects to the consideration of the bill of exceptions on the ground that it was served more than 10 days after the service of the notice of intention to move for a new trial, and on the ground that "it was not settled until sixteen days after the amendments had been proposed, and then without any notice and over objection." The former objection was not taken in any way in the court below, though defendant proposed amendments, and, therefore, it cannot be considered here. Hayne, New Trial & App. § 145; Id. § 146, subd. 3; Patrick v. Morse, 64 Cal. 462, 2 Pac. 49. As to the latter objection, it appears that on June 27th defendant served his proposed amendments to plaintiff's bill, and that on the same day the bill and amendments were delivered by plaintiff to the clerk for the judge. They were delivered by the clerk to the judge on the same day. On "law day"—July 13th—the judge, without previous notice, settled the bill, the attorneys for both parties being present, and directed the bill to be engrossed by plaintiff within 10 days. No objection on any ground appears to have been interposed at that time. The engrossed bill was delivered to the judge within the 10 days allowed. On August 31st the judge, at the request of plaintiff, amended the engrossed bill by inserting certain instructions, defendant objecting on the ground that they were "not part of the bill as settled." Thereupon, for the first time, defendant "objected to the settlement of the bill because no notice was given of the settlement." This objection came too late; certainly so as to all of the bill except the three instructions inserted on that day. The settlement of the bill took place on July 13th, and no objection was made at that time. The bill having been delivered to the clerk, no notice of settlement was required from plaintiff. Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685. If the failure of the judge to fix a time for the settlement and give previous notice thereof, under section 650, can ever invalidate the settlement of a bill when the attorneys for both parties are actually present, it certainly cannot have that effect unless at the time objection be made on that ground. As the statute only requires the judge to "designate the time at which he will settle the bill," and the clerk to "immediately notify the parties of such designation," it would seem that the judge, while holding court, and both parties being present, might designate that very time for the settlement of the bill. Such a designation, in the absence of anything showing an abuse of discretion, must be held sufficient. No objection having been taken at the time, it must be presumed that the defendant had an ample opportunity to be heard upon the settlement. We think, therefore, that the objections are not well taken, and that appellant is entitled to have

the bill of exceptions considered upon this appeal. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

115 Cal. 143

## TAYLOR v. HILL, Sheriff, et al. (L. A. 60.)

(Supreme Court of California. Nov. 30, 1896.)

EXECUTION SALE — APPLICATION OF PROCEEDS — PREFERRED CLAIM FOR WAGES—NOTICE TO DEBTOR.

1. In an action under Code Civ. Proc. § 1206, to compel the application of the proceeds of a sale under execution to a claim for wages owed by the execution debtor, as a preferred claim, the complaint must allege that notice of the claim was given to the execution debtor, since, without such notice, there would be a taking of the debtor's property without due process of law; and the requirement is clearly implied in section 1207, which provides that, if the debtor disputes such claim, he must, "within ten days after receiving notice," file a verified statement, etc. 44 Pac. 336, reversed.

2. Under Act April 16, 1880, § 6, which makes the sheriff, as receiver of an insolvent, a mere custodian for safe-keeping of the tangible property pending the appointment of the assignee, he does not represent the insolvent in litigated matters, and notice to the sheriff is not notice to the insolvent.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

For opinion in division, see 44 Pac. 336. Reversed.

V. E. Shaw, for appellants. Collier & Collier and D. L. Murdock, for respondent.

BEATTY, C. J. In the former opinion delivered in this case (44 Pac. 336) it was erroneously held that there was no appeal from the judgment, and accordingly the only questions considered were those presented by the appeal from the order denying a new trial. For this reason alone a rehearing was ordered, and, in disposing of the only question raised by the appeal from the judgment, we readopt the former opinion as to matters therein discussed. The question now to be determined arises upon the demurrer to the complaint which fails to allege that any notice of the claims of plaintiff and his assignors was given to the defendants in the attachment suit of West v. Palmer & Co. The statute (Code Civ. Proc. §§ 1206, 1207) does not expressly require service of notice of claims for wages upon the attachment or execution debtor, but it clearly implies that he is to have notice, for it expressly provides (section 1207) that if he disputes the claim he must, within 10 days after receiving notice, serve upon the claimant and the officer executing the writ a verified statement in writing, setting forth that no part, or not more than a specific portion, of said claim is justly due. The plain intention of the legislature is, therefore, that the debtor as well as the creditor shall have notice of the claim, and an opportunity to dispute it. And this, indeed, is essential to the constitutionality of the act, which would otherwise deprive the debtor of his property without due process of law. Coscia v. Kyle, 15 Nev. 394. It is claimed, however, on behalf of respondent, that, although no notice was given to the execution debtors, it was given to their legal representative. The complaint shows that on March 7, 1894, they were adjudged to be insolvent debtors, and the defendant herein, B. P. Hill, as sheriff, was appointed receiver of their several estates; and that after this date—on March 24, 1894—notice of the claim for wages was served upon him. But the sheriff, as receiver of an insolvent under the insolvent act, does not represent him for the purpose of defending actions, unless invested with a special authority in addition to that conferred by law. The statute makes him a mere custodian for safe-keeping of the tangible property, deeds, vouchers, etc., of the insolvent pending the appointment of the assignee, who alone has authority to represent the insolvent in litigated matters. Act April 16, 1880, § 6. The court erred in overruling the demurrer, and its judgment is for that reason reversed, and the cause remanded, with leave to plaintiff to amend his complaint.

We concur: VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

115 Cal. 158

## PEOPLE v. LARRABEE. (Cr. 158.)

(Supreme Court of California. Nov. 30, 1896.)

HOMICIDE—INSANITY AS A DEFENSE—PROVINCE OF JURY—INSTRUCTIONS.

1. Upon a defense of insanity, where the evidence of the expert witnesses was conflicting, the finding of the jury as to the sanity or insanity of the defendant is conclusive.

2. An instruction that the defense of insanity is often resorted to when other means of escaping punishment is hopeless, and that though, when satisfactorily established, it must commend itself to the justice of the jury, they must examine it with care, lest a mere counterfeit of mental infirmity furnish immunity from guilt, was not improper.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Frank H. Larrabee was convicted of murder, and appeals. Affirmed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant was tried and convicted of murder, the jury fixing the penalty at imprisonment for life. He prosecutes this appeal from the judgment. The killing was admitted. The defense was insanity. Appellant claims that the atrocity of the murder, the lack of motive for the crime, together with the other evidence in the case, established insanity by a clear preponderance. But, if circumstances of inhumanity and barbarity were to be held sufficient to prove the irresponsibility of the perpetrator of a homicide, it would be but an invitation to the evil-minded to increase the number of their victims, and to make their crimes blacker, more horrible, and more infamous. Such circumstances may be evidence of insanity, but they may equally owe their existence to the promptings of a brutal and malignant spirit. In the present case no lack of motive appears. A jealous rage seems to have been the moving cause. Defendant cut the throat of his mistress, who, after tricking and deceiving him, and wheedling him out of his money, carried this and her favors to the arms of another lover. Upon the general question of insanity the evidence of experts was, as usual, conflicting, and the jury must be left as sole arbiters of the question.

The only other point which appellant presses upon our consideration is the alleged error of the trial court in giving the following instruction: "The defense of insanity is one which may be, and sometimes is, resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully, fairly, and justly, and, when satisfactorily established, must commend itself to the sense of humanity and justice of the jury, they must examine it with care lest a mere counterfeit of this mental infirmity shall furnish immunity to guilt." This is, in all essentials, identical with the instruction approved in People v. Pico, 62 Cal. 50. In People v. Dennis, 39 Cal. 625, and in People v. Bumberger, 45 Cal. 650, it was held to be proper for the trial court to instruct the jury to view the evidence upon the defense of insanity with care, lest feigned insanity might shield a defendant from the just consequences of his guilt. We have not observed that the defense of insanity has been employed since the decisions of these cases in a manner to make the caution less needful. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

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115 Cal. 170

## CITY OF SAN DIEGO v. HIGGINS et al.

(L. A. 31.)

(Supreme Court of California. Dec. 1, 1896.)

LIMITATION OF ACTION—TAXES—ACTION TO ENFORCE.

An action to recover a personal judgment for taxes, and to enforce the tax lien on the land, is an action "upon a liability created by statute" (Code Civ. Proc. § 338, subd. 1), and must, therefore, be brought within three years, though Pol. Code, § 3716 et seq., gives taxes the effect of judgments. Temple, J., dissenting.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the city of San Diego against T. J. Higgins and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

William H. Fuller and Clarence L. Barber, for appellant. McDonald & McDonald, for respondents.

HENSHAW, J. The action was for the recovery of $483.46, being the amount of municipal taxes levied by the plaintiff upon the property of defendant Higgins for the year 1887, with interest at the rate of 2 per cent. a month from January 1, 1888. A personal judgment against the defendant Higgins is asked, and it is also sought to subject the property to the lien of the taxes, principal, interest, penalties, and costs. The complaint was filed December 12, 1894. Of the several grounds of demurrer urged against the complaint, that which presents the question whether or not the action is barred by the statute of limitations is the only one which need be considered. On behalf of the demurrant it is claimed that plaintiff's right of action is barred by section 338 of the Code of Civil Procedure. For the complainant it is insisted that sections 3716–3718 of the Political Code, together with section 312 of the Code of Civil Procedure, provide a limitation for the commencement of actions such as this other and different from that contemplated by section 338 of the Code of Civil Procedure. Under the latter section this action, having been commenced more than three years after the right of action accrued, is clearly barred. Under appellant's claim there is no limitation of time fixed for the commencement of such an action, and it may therefore be prosecuted after the lapse of any number of years. This latter contention derives some support from the language of Lewis v. Rothchild, 92 Cal. 625, 28 Pac. 805, where it is said: "We think a different limitation is prescribed by section 3716 of the Political Code, as to liens created by title 9 of that Code, from that prescribed anywhere in title 2 of the Code of Civil Procedure." But this language is to be read in the light of the facts of the case. The action was to recover a deposit made upon the purchase price of a piece of land. The contract of purchase and sale provided for a return of the deposit and a vacation of the contract if a valid lien was found to exist upon the property, and was not removed by the vendor within a designated time. The lien in controversy was one for unpaid taxes, delinquent more than four years before the date of the agreement. This court was only called upon to declare whether or not such a lien was still a valid subsisting lien, and it held that it was, under the terms of section 3716 of the Political Code. The question of the enforcement of such a lien after the lapse of three years was not before the court at all. It might be, as suggested in San Francisco v. Luning, 73 Cal. 610, 15 Pac. 311, that the lien existed "without any provision for its enforcement, in which case it is simply a right without a remedy." In the latter case the action was brought to recover a personal judgment only against defendant, it being pleaded that he "was indebted to plaintiff" in a certain sum for taxes. The opinion, therefore, properly holds that the action is not one upon a judgment, or to enforce a lien, and that, being a suit for the recovery of a personal judgment, the right of action was barred by the statute of limitations. The opinion, however, cites and considers with approval the case of Nevada v. Yellow Jacket Silver Min. Co., 14 Nev. 220, which was an action identical with the one at bar in seeking to foreclose tax liens upon assessed property. The difference between our statutes and those of Nevada lies in the single fact that it is not declared by the Nevada law that a tax has the effect of a judgment. While recognizing this distinction, it is held in San Francisco v. Luning that the difference does not render the principles laid down in the Nevada Case inapplicable under the laws of this state. In Nevada v. Yellow Jacket Silver Min. Co., supra, the court said: "All that can be claimed under the statute is that the lien created continues indefinitely, or until the tax is paid, or the property is sold under tax sale. Does that fact establish what is claimed,—that the remedy to enforce collection by suit is barred?" After elaborate consideration, the conclusion arrived at is thus succinctly stated: "This, then, is our case upon the question under discussion: A statutory lien is created, which still exists, but which cannot be enforced, nor can judgment be obtained against either of the defendants without this or a similar action, which is barred by the statute." The case of City and County of San Francisco v. Jones, 20 Fed. 188, was an action to recover a personal judgment for taxes, but the language of Sawyer, J., in discussing the question of a lien, is of value in this consideration. After citing the provisions of our Political Code, the court says: "Under these and other provisions of the Political Code no action is necessary to collect a valid tax. But it is claimed that these provisions take the case of an action under the statute to recover a tax out of the statute of limitations. In the case already cited the supreme court of Nevada, on a similar statute, decided otherwise, and we think correctly. * * * The lien is but an incident to the tax,—the money due,—and, like the case of a mortgage, when an action to recover the debt is barred, the suit to enforce the lien is also barred. This has long been the settled doctrine in this state in relation to a mortgage. Neither the debt nor the lien is extinguished in the case of a mortgage in any other sense than in the case of a tax, and the statutory lien incident to it. The remedy by action is barred, whatever the case may be as to other remedies. * * * We see no good reason, at this day, and under our laws for the levy and collection of taxes, for allowing the state to vex parties with suits for taxes after the lapse of many years, that is not equally applicable to private parties. The state has officers specially appointed to attend to these particular duties, and no others, and if they neglect their duties the state, which appoints them, if any one, should be the party to suffer. To permit the state, after a lapse of many years, to recover by suit taxes allowed to run uncollected, with five per cent. penalty, and, in the language of Mr. Justice Swayne, the 'most devouring rate' of two per cent. per month interest, would be to inflict unendurable oppression." County of Los Angeles v. Ballerino, 99 Cal. 593, 32 Pac. 581, and 34 Pac. 329, was an action identical in nature with the one at bar. It was sought to recover from defendant taxes levied and assessed upon his property, and to enforce a lien upon that property for their payment. The action was brought more than two years, but less than three years, after the right of action had accrued. Defendant urged that it was barred by subdivision 1 of section 339 of the Code of Civil Procedure. The court said: "This, however, is not such an action, but is one which arises upon a liability created by statute, other than a penalty or forfeiture, within the meaning of section 338 of the same Code;" citing San Francisco v. Luning, City and County of San Francisco v. Jones, Lewis v. Rothchild, and Nevada v. Yellow Jacket Silver Min. Co.

It is true that in none of these cases, saving that from Nevada, has the question under consideration been the subject of direct adjudication, but it is none the less clear that this court has repeatedly expressed its approval of the reasoning and conclusion reached in Nevada v. Yellow Jacket Silver Min. Co., and City and County of San Francisco v. Jones. But in People v. Hulbert, 71 Cal. 72, 12 Pac. 43, a question identical in principle, though not in form, was decided by this court in accordance with the foregoing views, and upon the authority of the above-named cases. The action was to foreclose a lien upon defendant's land under an assessment by a district for the reclamation of swamp and overflowed lands. The defendant demurred upon the ground that the cause of action was barred by subdivision 1 of section 338, Code Civ. Proc. The reclamation act provided (Pol. Code, § 3463), that from and after the filing of the list, or certified copy thereof, the charges assessed upon any tract of land within the county constitute a lien thereon. There is, however, no vital distinction between this language and that employed in section 3716 of the Political Code, which declares that the lien is not removed until payment of the tax; for, as is said in Nevada v. Yellow Jacket Silver Min. Co.: "Had the statute created the lien without providing for its continuance until the tax should be paid, the result would be the same,—the lien would have continued, when once created, until payment, or until the repeal of the statute creating it." This would be true in the absence of a statute to the contrary. Civ. Code, § 2911. In sustaining the demurrer this court declared that the cause of action was barred by section 338, subd. 1, of the Code of Civil Procedure. As to the single feature in which our code provisions differ from the Nevada law, namely, in providing that every tax has the effect of a judgment against the person, which shall not be satisfied until the tax is paid, it may be said that this action does not purport to be one upon a judgment. Conceding (though not deciding) that an action under section 3716 of the Political Code might be commenced as upon a judgment, and that this complaint is a sufficient pleading of such a cause of action, still this proceeding could not be maintained, for it was commenced more than five years after the right accrued. Code Civ. Proc. § 336, subd. 1. In the case of every judgment where no action is commenced upon it within five years, the judgment is not thereby satisfied, but the right to enforce its satisfaction by suit is barred.

It has been assumed throughout this discussion that the provisions of the Political Code relating to the lien of taxes (Pol. Code, §§ 3716–3718), are applicable to those levied for municipal purposes. Whether or not this be so is not here decided. The point is not presented by counsel, and it is unnecessary to this decision. For clearly, if those provisions be not applicable to municipal taxes, appellant's cause of action is barred. It follows, therefore, that the cause of action sought to be prosecuted is barred by section 338, subd. 1, of the Code of Civil Procedure, and that the demurrer thereto was properly sustained. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

TEMPLE, J. (dissenting). I do not agree with the conclusion reached by the court in this case. The action is for the recovery of a municipal tax. It is sought to recover a personal judgment, and to subject the property of the defendant to a lien for the recovery of the tax. It seems to be admitted that the action is well brought unless the right of action is barred by section 338 of the Code of Civil Procedure. The court holds that such right is barred because the action was not commenced within three years. Section 3716, Pol. Code, reads as follows: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; and the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." It is decided that, not only has the statute run against the right to maintain a personal action, but against the right to foreclose the lien as well. At the same time the code provision is construed to mean that the lien continues until the taxes are paid, or the property has been sold for the payment thereof. It is held that the statutory lien continues, and will never become barred, but that there is now no mode in which the tax can be collected, or the lien foreclosed. The lien is said to constitute a right without a remedy. It is not that the law has not provided a mode for the foreclosure of the lien, but that by reason of the bar of the statute the tax cannot be collected at all, through a sale of the property upon which it constitutes a lien or otherwise. What is meant, under such circumstances, by saying that the lien continues after the right to collect the tax from the property in any mode has ceased, I am unable to comprehend. A lien is necessarily an incident to an obligation, and the purpose is to secure performance. When it ceases to be security for such performance, it has ceased to exist. If it could continue, it would not be a right without a remedy, but a remedy without a right,—redress when there was nothing to redress. Of course, as it is always an incident, it must fall with the principal, although the converse does not follow.

As an example of a right without a remedy, reference has been made to cases in which the right to a personal action is barred while there is still a right to foreclose a lien given to secure it. An unfortunate reference for the point in all such cases is that the obligation may be enforced by foreclosing the lien. It is also said that the bar of the statute does not extinguish the debt, but only bars the remedy. This, too, is error. As a legal obligation, a debt is extinguished by the bar of the statute. It continues to exist only as a moral obligation, which is sufficient consideration for a new contract. In the cases above alluded to in which it was held that a suit would lie to foreclose a mortgage, although the note was barred, the note and mortgage were regarded as distinct obligations or agreements to pay the same debt. The doctrine was sometimes based upon the fact that the mortgage was under seal and the note was not, and different periods of limitation were prescribed, and sometimes on the claim that the limitation did not apply to courts of equity. Sometimes, too, it may be, because title passed by the mortgage to the mortgage, and courts would not enforce a right to redeem until the debt was paid, on the principle that he who seeks equity must do equity. On the same principle this court has refused to compel the satisfaction of a mortgage by a mortgagee after the mortgage had become barred,—not that there is a subsisting lien, but because the court will not grant affirmative relief in violation of the maxim above alluded to. At common law a lien was simply a right to retain possession until an obligation was performed. In equity a lien might be a right to sell certain property for the payment of a debt, or an amount falling due upon the nonperformance of an obligation. The lien could exist without possession, and be enforced by foreclosure and sale. A lien may arise in various ways. It is always a charge upon property, and when there ceases to be a charge there can be no lien. See section 1180, Code Civ. Proc. It is security for the performance of an obligation, and, when the obligation ceases to be, it is a contradiction in terms to say that the lien exists. Therefore, if it be conceded, as it is in the leading opinion, that the effect of the section of the Code above recited is that the lien is never barred, it must follow that the obligation to pay the tax is not barred. What is the lien of a tax? It is the right to collect the amount of the tax from the property. This right does not merely result from the lien; it is the lien. To say that the lien continues, but cannot be enforced in any mode, is to say that the right to collect the tax from the property continues, and is not barred, yet the right to collect the tax from the property is wholly barred. It is a contradiction in terms. What I have said is upon the theory that section 3716 is correctly construed as providing that the lien shall never be barred by the statute. That section makes the lien a judgment lien, and, I think, plainly the judgment and lien go together. If the section is to be understood as providing that the lien continues without regard to limitation until the tax is paid, it must also be understood as providing that the judgment continues. It as emphatically declares that the judgment is not satisfied as it does that the lien is not removed. Perhaps it was merely intended to say that no change in the property or its ownership should affect the lien, and no officer or board could satisfy the judgment or remove the lien. It might mean all this, and have no reference to any limitation. If it be material to hold that the action is based upon the judgment, I think it should be held this action is an action upon the judgment. When facts are averred which show the existence of a tax, it also shows a judgment, for that is the judgment.

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(115 Cal. 196)

## IVEY v. KERN COUNTY LAND CO. (L. A. 171.)

(Supreme Court of California. Dec. 3, 1896.)

VENUE — ACTION AGAINST CORPORATION — PLACE WHERE CONTRACT MADE AND BREACH OCCURS.

1. In an action against a corporation for breach of contract it appeared that defendant's principal place of business was in S. county, but that it had an office in K. county, where the contract was prepared, and was signed in duplicate by plaintiff, and forwarded by defendant's agent to the main office for approval and signature; and that, after it was signed by defendant, said contract was returned to the agent in K. county, and by him delivered to plaintiff. *Held*, that the contract was made in K. county, within Const. art. 12, § 16, allowing a corporation to be sued in the county where the contract is made.

2. In an action against a corporation for breach of contract to convey land on full payment of the price, it appeared that defendant's principal place of business was in S. county, but that it had an office in K. county, and that payments were to be made at the latter place. *Held*, that the breach occurred in K. county, within Const. art. 12, § 16, allowing a corporation to be sued in the county where the breach occurs.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by James M. Ivey against the Kern County Land Company to recover for breach of a contract to convey land. From an order granting a motion to change the place of trial, plaintiff appeals. Reversed.

C. E. Arnold and J. W. Wiley, for appellant. E. J. McCutchen, for respondent.

HAYNES, C. Plaintiff brought this action in the county of Kern for damages for breach of a certain contract whereby the defendant agreed to sell and convey to the plaintiff certain lands situate in said county of Kern. The defendant filed a demurrer to the complaint, and also a notice of motion, and a demand for a change of the place of trial from said county to the superior court of the city and county of San Francisco. Said motion was granted, and the plaintiff appeals from the order granting said motion.

The grounds upon which said motion was based are as follows: "(1) That the contract sued upon in this action was made in said city and county of San Francisco, and was to be performed therein. (2) That the obligation or liability of defendant, if any, arose in said city and county of San Francisco, and the breach thereof, if any, by defendant, occurred therein. (3) That the principal office and place of business of defendant is in the said city and county of San Francisco." The agreement, for the breach of which the action was brought, was executed in duplicate. It recites that said corporation has its principal place of business in the city and county of San Francisco. It describes the land which is the subject of the agreement as being situated in the county of Kern. It provided that all money to be paid to the party of the first part should be paid at its office in the city and county of San Francisco, or at such other place as the party of the first part should, on reasonable notice to the party of the second part, direct; and, upon receiving all such payments, to execute and deliver to the second party a good and sufficient deed of said premises. An affidavit filed on the part of the defendant in support of its motion was made by the secretary of the corporation. It states, in substance, that the principal office and place of business of the defendant is in the city and county of San Francisco; that he, as secretary, signed the said contract at said city and county; that, so far as said contract imposes any obligation upon the defendant, it was to be performed in said city and county; that no agreement had been made upon the part of the defendant to perform said contract in any other place; that the obligation or liability of said corporation, if any there be, arose from said contract, and therefore arose in said city and county of San Francisco; that the breach of said obligation alleged in the complaint was its failure to execute a deed for said premises, and that there was no agreement to execute the deed at any place but in the said city and county. The affidavit of the plaintiff in opposition to said motion shows that he is a resident of said county of Kern; that at the time of the making of said contract, and ever since, the defendant has had a place of business, and now maintains its principal office for the transaction of business, at Bakersfield, in said county of Kern; that all negotiations prior to and up to the time of the execution and delivery of said contract in relation thereto were had with the defendant at its said office in Bakersfield; that said contract was there drafted in duplicate by the defendant, and the same was presented to the plaintiff at Bakersfield for his approval, acceptance, and signature; that he there signed in duplicate the said contract, and that after it had been executed by the defendant it was delivered to him at defendant's said office in Bakersfield; that he was instructed in writing by the defendant to make, and did make, all payments at its office in said county of Kern; and also averred that the obligations imposed upon the defendant by the contract were to be performed at said county of Kern, and that the breach of said contract on the part of defendant occurred there.

The constitution of this state provides as follows: "A corporation or association may be sued (1) in the county where the contract is made (2) or is to be performed, (3) or where the obligation or liability arises, (4) or the breach occurs, (5) or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Article 12, § 16. If the foregoing provisions of the constitution did not authorize the transfer of the cause for trial from the county of Kern to the city and county of San Francisco, the order must be reversed; if it did, the order must be affirmed. If either one of the said several provisions of said section authorized the plaintiff to bring and have his action tried in the county of Kern, it is immaterial whether either of the other provisions required it to be brought in San Francisco. Most of the cases upon the subject of the place where the contract is made arose in cases where the contract was made in one state, and was to be performed in another, and where the law affecting the contract was different in each of the states; but the principles there involved apply here. The defendant's principal place of business is the city and county of San Francisco, where it had an office, and where its principal executive officers, the president and secretary, reside. It also has an office, or agency, in Bakersfield, in Kern county, where the contract set out in the complaint was prepared and was signed in duplicate by the plaintiff, and forwarded by defendant's agent to its office in San Francisco for approval and signature, respondent contending that said agent did not have authority to bind the corporation by contract. If we regard the draft of the contract when signed by the plaintiff as an offer or proposal to purchase upon the terms and conditions therein stated, it would seem to be precisely analogous to a proposed contract transmitted by mail, and governed by the law controlling such contracts so far as the place of making it is concerned, and as to such contracts it seems to be well settled that when the proposal is unconditionally accepted by a letter deposited in the mail, properly addressed to the proposer, the contract is complete. Clark v. Dales, 20 Barb. 42; Vassar v. Camp, 14 Barb. 354; Mactier's Adm'rs v. Frith, 6 Wend. 103; Minnesota Linseed Oil Co. v. Collier White-Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635. See, also, note to Ford v. Insurance Co., 99 Am. Dec. 668, and text and notes, 3 Am. & Eng. Enc. Law, p. 856. In the first of the cases above cited it was held that, as soon as the acceptance had gone beyond the control of the party accepting, the contract thus formed became mutually obligatory upon the parties. A deposit of such acceptance in the post-office, addressed to the other party, places it beyond his control; and in some cases it has been held that such contract is deemed to have been made at the place where the acceptance was mailed; but whether that is true as a general proposition, or only in exceptional cases, need not be considered. In the case before us the proposed contract, after it was signed by the defendant, was not sent by mail to the plaintiff, but was sent to defendant's agent in charge of their branch office or agency at Bakersfield, and was by its agency delivered to the plaintiff at that place; so that until its actual delivery to the plaintiff it was in the power and under the control of the defendant, and the acceptance and execution of the proposed contract was not complete until such delivery; and the place of delivery, being the place where the last act is performed which is necessary to render the contract obligatory, is the place where the contract is made. Ford v. Insurance Co., 6 Bush, 133; Milliken v. Pratt, 125 Mass. 375; Ames v. McCamber, 124 Mass. 85; Insurance Co. v. Tuttle, 40 N. J. Law, 476; Shuenfeldt v. Junkermann, 20 Fed. 357; Whiston v. Stodder, 8 Mart. (La.) 95, 13 Am. Dec. 281; Scudder v. Bank, 91 U. S. 406. An instrument executed in duplicate is, in effect, one instrument. Kennedy v. Gloster, 98 Cal. 143, 32 Pac. 941. The delivery of the duplicate to the plaintiff at Bakersfield was, therefore, the delivery of the contract, and the execution of a written instrument includes its delivery. Clark v. Child, 66 Cal. 87, 4 Pac. 1058. "A contract in writing takes effect upon its delivery to the party in whose favor it was made, or to his agent." Civ. Code, § 1626. The contract involved in this action was, therefore, made in

Kern county, and the action was properly brought in said county, and is triable therein.

The case of Shuenfeldt v. Junkermann, 20 Fed. 357, cited and relied upon by respondent, supports our conclusion. The difference between that case and this lies in the fact that in that case the contract was not in writing, and the plaintiff's assent to the proposed contract, which was the last act in its completion, was made in Chicago; while here the last act, and the one necessary to the completion of the contract, was its delivery to the plaintiff, and that act was performed at Bakersfield. If our conclusion as to the place where the contract was made were doubtful, we think it clear that the place where the breach of the contract by the defendant was committed was also at Kern county. Th plaintiff was directed to make his payments at that place. The full payment of the purchase money and the delivery of the deed were concurrent acts, and, upon full payment being made by the plaintiff at Bakersfield, he was entitled to have delivered to him, at that place, and at the time of payment, a deed conveying the land to him. Suppose the plaintiff had failed to make his payments, and the defendant had desired to put him in default; it would have been necessary to tender the deed and demand payment at the place where payment was required to be made. The defendant could not put the plaintiff in default by demanding payment at Bakersfield, and saying to him, "When you have paid your money, come to our principal place of business in San Francisco, and get your deed." The order appealed from should be reversed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

115 Cal. 239

## VON SCHMIDT v. VON SCHMIDT. (Sac. 117.)

(Supreme Court of California. Dec. 8, 1896.)

PARTNERSHIP—CONTRACT—CONSTRUCTION.

A partnership agreement between a father and son for the purchase and cultivation and improvement of land for which the father paid the purchase price, and to which each took title to a moiety, provided that the father was to be reimbursed for the price; that the son was to superintend the cultivation and improvement, for the expenses of which the father was to advance the money; that the services of the son were to be set off against the money advanced by the father. *Held*, that the agreement required the proceeds and profits of the lands to be applied to the expenses of cultivation and improvement, and the father to advance money for that purpose only if the profits and proceeds proved insufficient therefor.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Edward A. Von Schmidt against Alfred W. Von Schmidt. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. D. Edwards, for appellant. Frank H. Short, for respondent.

PER CURIAM. This action is for an accounting of the affairs and business of an alleged partnership. The court found that upon the accounting defendant was indebted to plaintiff, on account of said partnership, in the sum of $3,200, and also interest for a certain period upon the sum of $1,600, making in all $4,616. Defendant appeals from the judgment. There is also in the transcript a notice of an appeal from an order denying a motion for a new trial; but there is no bill of exceptions or statement, and this latter appeal has been abandoned. The appeal from the judgment rests entirely upon the judgment roll, which includes findings of the court below, where the case was tried without a jury. Appellant does not make any point upon the pleadings, but he contends that under the findings there should have been a balance decreed to him of something over $5,000 against plaintiff, instead of a balance of $4,616 in favor of plaintiff. The judgment is so clearly favorable to the appellant that it should not be reversed, unless for some material error which is quite clear and palpable. The court finds that in 1881 one Alexey W. Von Schmidt, the father of appellant, and the appellant entered into a partnership for the purchase, improvement, development, and cultivation of certain described land; that the land was purchased by the said father, and the deed taken in the name of the son, appellant herein, who afterwards redeeded one undivided half thereof to his father; that the father was to be reimbursed for the amount expended by him in the said purchase; that the appellant was to superintend and assist in the development and improvement of said property, and that the father should advance the expenses therefor, and that the services of the appellant should be a set-off against the money that should be advanced by the father; that the father from time to time advanced, over and above what was received by him upon the sale of some of the property, the net sum of $63,938.33; that the appellant advanced the sum of $93.50, and no more; that the appellant devoted his time, skill, and labor personally to the development, etc., of said lands, and planting and improving the same, since about the 27th of February, 1881; and that, with the exception of about $2,400 diverted by appellant to other uses, and "a reasonable amount for the support and maintenance of the defendant and his family upon said premises," the appellant has devoted the proceeds and product of said property towards the expenses and improvement thereof, which proceeds aggregate the sum of $20,838. (The father afterwards assigned the interest to plaintiff.) Now, the whole contention of appellant is that, as he used this latter sum of money, which was derived from the proceeds and profits of the property, to the expenses of its improvement, cultivation, etc., he should be credited with one-half of that amount, and that under this view he would be entitled to a judgment of about $5,000 against plaintiff, and that the judgment should be so amended. The court does not find what the amount of the support and maintenance of defendant and his family was, although, as this complaint was not filed until February, 1895, more than 13 years after the appellant commenced living on the land, it is quite evident that such amount would greatly exceed the claim made by appellant here as to half of said proceeds of the land; and, as there is no pretense that under the agreement the appellant was entitled to any support for himself and family, it is clear that, if the court had found the amount of said expenses, it should have been added to the charges against appellant. But as the amount of such expenses was not found, they cannot be considered on this appeal; and the only question is whether, upon the findings, the court clearly erred in not crediting appellant with one-half of the value of the products and proceeds of the land which were used in its improvement, development, etc. We do not think that the court so erred. The findings were, no doubt, somewhat carelessly and loosely drawn; but we think that, under a fair construction, they mean merely that the father was to advance from his individual resources all the outside, independent capital and money that should be necessary to the development and cultivation of the land, and not that the proceeds of the land itself should not be used in its future development and cultivation. Under this view the judgment is in all respects sustained by the findings. The judgment and order appealed from are affirmed.

115 Cal. 1

## SAN JOAQUIN LUMBER CO. v. WELTON et al. (Sac. 104.)

(Supreme Court of California. Dec. 7, 1896.)

SUPREME COURT—COSTS—JURISDICTION.

Code Civ. Proc. § 1195, requiring the superior court in actions to enforce liens to allow, as part of the costs, reasonable attorney's fees in the superior and supreme courts, places the allowance of attorney's fees as part of the costs in such actions, in the first instance, in the superior court, so as to preclude the supreme court, on appeal from judgments in such actions, from making any order directing the superior court as to allowance of attorney's fees incurred on the appeal as part of the costs.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Petition by San Joaquin Lumber Company in action by it against S. L. Welton and others, a judgment in their favor having been affirmed on appeal (46 Pac. 735), for a modification of the judgment of affirmance. Denied.

Fred H. Hood, for appellants. Davis & Allen, for respondent.

PER CURIAM. A decision was rendered in this cause by this department on November 7, 1896, affirming the judgment of the superior court. 46 Pac. 735. The action was for the enforcement of a mechanic's lien; and, since the decision, the respondent has filed here a petition that this court amend its judgment of affirmance by directing the court below to add to the amount of the original judgment an attorney's fee for defending the cause in this court on the appeal, under section 1195 of the Code of Civil Procedure. But it was held in Lumber Co. v. Neal, 94 Cal. 192, 29 Pac. 622, that "section 1195 of the Code places that matter in the hands of the superior court," and that an order made here upon the subject would not be binding upon the trial court. An application for the attorney's fee must therefore be made to the superior court. The petition is denied.

115 Cal. 203

## In re JACK'S ESTATE. (Sac. 205.)

(Supreme Court of California. Dec. 7, 1896.)

GUARDIAN'S SALE—WHEN SET ASIDE—EVIDENCE.

1. On request of a guardian to set aside a sale by him of 78.41 acres of land for $1,450, unless a higher offer be made by the purchaser, the latter offered to increase her bid $3 per acre. Witnesses estimated it to be worth from $20 to $50 per acre. *Held*, that the court did not err in setting aside the sale, notwithstanding the additional bid, under Code Civ. Proc. § 1789, providing that all proceedings for the sale of property by guardians must be the same as those for the sale of property of decedents, and sections 1517, 1552, and 1554, providing that sales by executors shall be reported to the court, and giving the court discretion to order a new sale.

2. Where real-estate dealers testified to the value of land, it was not error to permit them to be cross-examined as to the ground on which they based their estimates as to such value.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Proceeding in the matter of the estate and guardianship of Edward Roy Jack, a minor, for the sale of real estate, in which there was a return of the sale to the court. From an order setting aside the sale, and directing a new sale, Margaret McCormick, the purchaser, appeals. Affirmed.

Jas. A. Louttit and Paul C. Morf, for appellant. Minor & Ashley, for respondent.

BELCHER, C. Edward Roy Jack, a minor, was the owner of a tract of land in San Joaquin county, containing 78.41 acres, and Ada H. Jack was the guardian of his person and estate. On December 6, 1895, the said guardian, pursuant to due and legal proceedings theretofore had in the superior court of said county, offered for sale, and sold, the said tract of land to Margaret McCormick for the sum of $1,450, subject to confirmation by the court. The guardian duly made to the court a return of the sale, and stated that the same was legally made and fairly conducted, but that the sum bid was disproportionate to the value of the property sold; wherefore she asked that, after a hearing upon the return, the court make an order rejecting said sale, unless a higher offer be made at the time of such hearing. Notice of the hearing was duly given by the clerk of the court, and the matter came on regularly for consideration and decision by the court on January 3, 1896. At that time, Mrs. McCormick, being present in court, filed, in writing, an offer increasing her bid in the sum of three dollars per acre, and thereupon asked that the said sale be confirmed. Witnesses were called and examined on both sides in relation to the value of the property, and, after due consideration, the court found that the sum originally bid and the increased bid were disproportionate to the value of the property sold, and that it would be for the best interests of the minor and his estate to vacate said sale, and to refuse to accept said offer. Thereupon it was ordered that the sale to Mrs. McCormick be vacated and set aside, and that her offer increasing her bid in the sum of three dollars per acre be declined, and that a new sale of said premises be made by said guardian. From this order, Mrs. McCormick has appealed.

The Code provides that all the proceedings for the sale of property by guardians must be the same as those prescribed for the sale of the property of decedents by executors or administrators. Code Civ. Proc. § 1789. And, as to the sale of property by executors or administrators, the same Code contains the following provisions:

"Sec. 1517. All sales must be under oath reported to and confirmed by the court before the title to the property passes."

"Sec. 1552. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court. * * * Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent. more in amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale."

"Sec. 1554. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be made."

In view of these provisions of the Code, the question is: Did the court err in determining that Mrs. McCormick's bid, including her increased bid, was disproportionate to the value of the property, and in refusing to confirm the sale? In our opinion, the evidence was sufficient to justify the decision, and the court properly exercised its discretion in vacating and setting aside the said sale, and ordering a new sale to be made. It is true that two witnesses, M. D. Eaton and Fred Arnold, called on behalf of Mrs. McCormick, testified, in effect, that they resided in Stockton, San Joaquin county, and had been engaged in the real-estate business for a number of years; that they knew the land in question, and its value, and considered the sum of $20 to $21.50 per acre a fair price for it at that time. And, on cross-examination, each witness testified that his estimate of the value was based upon a forced sale, and that there was no demand for such property then; that, if he owned the property, he would not sell it for any such price. And the witness Eaton further testified that a portion of the land was "China land," which rented to Chinamen for from eight to ten dollars per acre, and that a simiiar piece of land in that neighborhood, but better shaped, had been sold within a year for $30 per acre. On the other hand, J. D. McDougald was called as a witness on behalf of the guardian, and testified that he lived in San Joaquin county, and had known the land in question intimately for many years; that he owned adjoining lands, and knew their value. He was then asked, "What do you consider the fair market value of this land per acre?" and answered: "It is from forty to fifty dollars per acre, even in these times. I based my estimate upon what it would bring and what it will rent for or produce."

It is objected for appellant that the testimony of McDougald was incredible, and not sufficient to raise a substantial conflict as against that given by Eaton and Arnold. This objection, cannot be sustained. It was for the court below to determine what were the facts, and its conclusions cannot be disturbed on appeal.

It is also objected for appellant that the court erred in permitting the witnesses Eaton and Arnold to be cross-examined as to the ground upon which they based their estimates of the value of the land. We see no error in the rulings complained of. The question to be determined was, what was the real value of the land sold? And, in ascertaining that value, it was proper for the court to be informed upon what grounds the estimates of value were based. Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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(115 Cal. 233)

## PEOPLE v. ROSS. (Cr. 139.)

(Supreme Court of California. Dec. 8, 1896.)

CRIMINAL LAW—REVIEW ON APPEAL—ARGUMENT OF COUNSEL—EXAMINATION OF WITNESS—CREDIBILITY—INSTRUCTIONS—REASONABLE DOUBT.

1. An assignment that the evidence does not sustain the verdict in a criminal case will not be sustained, unless it is plain that the verdict could only have been rendered through passion or prejudice.

2. Error in sustaining an objection by the prosecuting attorney to questions put to a witness is cured if the witness thereafter testifies in regard to the matter without objection.

3. Where a witness for the state testifies on the trial differently from his testimony on preliminary examination, a portion of such testimony may be read to him, and he may be required to explain it.

4. On trial for robbery committed on a prostitute, where she testified for the state, a charge that there was no evidence directly assailing her reputation for truth is not objectionable, as ignoring the testimony as to her occupation, and evidence of contradictory statements, made out of court, where there was a further charge that "the common experience of mankind is that there is rarely found united in the character of persons as degraded as she is any regard for truth. It does not, however, follow that, because she is the degraded woman that she is admitted to be, she is for that reason alone not to be believed, and her testimony entirely disregarded."

5. The prosecuting attorney may properly remark that defendant's flight might be considered in determining his guilt.

6. The use of the words "wholly satisfied," in defining reasonable doubt, is not ground for reversal, where they could not mislead the jury, when taken with the rest of the charge.

7. A charge on reasonable doubt, stating that "the doubt must be supported by reason, and not by mere conjecture and idle supposition, irrespective of evidence," is not objectionable, as directing the jury to disregard their own judgments, founded upon their experience.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Walter Horace Ross was convicted of robbery, and appeals. Affirmed.

Carroll Cook, for appellant. Atty. Gen. Fitzgerald, for the State.

TEMPLE, J. Having been convicted of the crime of robbery, and sentenced to the penitentiary for the term of 25 years, the defendant appeals from the judgment and from an order refusing a new trial. He was accused of robbery, committed upon the person of one Grace Walls, in a house of prostitution in San Francisco.

1. The first point made is that the evidence does not sustain the verdict. It is not claimed that there was not some proof of every essential fact, but the contention is that the story told by the prosecuting witness is grossly improbable; that she made contradictory statements, both in her testimony and out of court; and that she was contradicted by other witnesses. There is some plausibility in all these claims, but they are matters peculiarly in the province of the jury. We should not interpose unless the matter is so plain that one can see that the verdict could only have been rendered through passion or prejudice. This is not such a case.

2. If there was error in sustaining an objection made by the prosecuting attorney to the questions asked the witness Wynn, that error was cured, for the witness was recalled, and without objection testified fully in regard to the matter.

3. The prosecution read to its own witness a portion of his testimony, given at the preliminary examination, in which he testified to a different state of facts to that stated upon the trial. This was objected to, and the court, somewhat impatiently perhaps, overruled the objection, and asked the witness if his former testimony refreshed his memory as to the fact, and whether his former statement was correct. I see no objection to this course. It is not the case of refreshing the memory of a witness at all, and no doubt the accidental use of the word "refresh" by the judge suggested the point. It is the ordinary case in which a witness has disappointed the party calling him, and is confronted with his former statements, and asked to explain them.

4. Many exceptions are taken to the charge of the court:

(1) In the course of its charge the court said: "There has been no evidence brought here that I have heard that directly assails her reputation or character as being a truthful person." It is said that this ignores the testimony as to her degrading occupation, and the evidence of contradictory statements made out of court. This criticism is hardly fair. It ignores the qualifying word "directly," and also the balance of the same sentence from which the quotation was made, which is: "The common experience of mankind is that there is rarely found united in the character of persons as degraded as she is any regard for truth. It does not, however, follow that, because she is the degraded woman that she is admitted to be, she is for that reason alone not to be believed, and her testimony entirely disregarded." Much more to the same effect was said by the judge. There was no error here to the prejudice of the defendant.

(2) Several expressions are quoted from the charge in which the defendant is mentioned as leading a dissolute life. In the instructions these sentiments are mentioned as admissions or statements made by counsel for the defense in his address to the jury. If the propositions were admitted by counsel, and the case submitted on that basis, there was nothing wrong about it. I have no doubt such was

the case. At all events the contrary does not appear. The evidence would fully justify the jury in so concluding, but would not authorize the positive statement by the judge. I do not think error is shown here.

(3) I fail to see anything erroneous or which could prejudice the defendant in the remarks in regard to flight as a circumstance from which the jury could infer guilt.

(4) In the definition of what constitutes a reasonable doubt, the court told the jury that they need not be "wholly satisfied." I do not think the new phrase inserted in the stereotyped definition an improvement, but in the context it could not mislead.

(5) Nor do I think the defendant was injured by the statement that "the doubt must be supported by reason, and not by mere conjecture and idle supposition, irrespective of evidence in the case." This could not have been understood as directing them to disregard their own judgments, founded upon their experience in life, but quite the contrary.

5. The two points founded upon the assumption that there was no verdict upon the issue as to prior conviction are not borne out by the record as corrected on a suggestion of a diminution. It shows that the prior conviction was admitted. The record does not show that the clerk read to the jury that part of the information relating to the former conviction. The minutes merely show that the information was read. No exception was taken to this on the arraignment, and we must presume it was properly read. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

115 Cal. 211

## PETERSON v. SHERIFF OF CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 457.)

(Supreme Court of California. Dec. 7, 1896.)

PATENT RIGHT NOT SUBJECT TO EXECUTION — ASSIGNMENT—EQUITY JURISDICTION.

1. A patent right cannot be sold under a common execution, since it is neither "personal property capable of manual delivery," within Code Civ. Proc. § 542, subd. 3, providing that such property may be attached by taking it into custody, nor "debts and credits, and other personal property not capable of manual delivery," which can be attached by leaving notice with a third person owing such debts, or having such credits or personal property in his possession.

2. The provision of the act of congress that a patent right may be transferred by assignment is exclusive, so that a creditor of the patentee can have such right subjected to the satisfaction of his judgment only by an application to a court of equity to compel the patentee to make an assignment.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Petition by Lewis Peterson for a writ of mandamus to compel the sheriff of the city and county of San Francisco to sell a patent right under execution. From a judgment denying the writ, plaintiff appeals. Affirmed.

John L. Boone, for appellant. Reddy, Campbell & Metson, for respondent.

McFARLAND, J. The appellant filed a petition in the superior court for a writ of mandate. He averred in his petition (briefly) that he had obtained a judgment in a justice's court against the Eureka Electric Company, a corporation, for $233.50; that he had taken out an execution upon said judgment, which had been returned nulla bona; that, upon an examination of the secretary of said company, he discovered that it was the owner of two certain United States letters patents, and the inventions covered thereby; that thereupon he procured an alias execution, which he delivered to the sheriff, with instructions "to levy upon, advertise, and sell all the right, title, and interest of said defendant, the Eureka Electric Company, in and to said letters patent, and the inventions covered and protected thereby"; and that the said sheriff refused to advertise and sell said rights, etc., of said company to said patent rights. Wherefore he prayed for a writ of mandamus requiring the sheriff "to advertise and sell all the right, title, and interest" of said company in and to said patent rights. A general demurrer to the petition was sustained by the superior court, and judgment was entered for the respondent. From this judgment the petitioner appealed.

The demurrer was properly sustained. There is no method by which the sheriff could levy upon said property. It was neither "personal property, capable of manual delivery," which, under subdivision 3 of section 542 of the Code of Civil Procedure, must be attached by taking it into custody; nor does it come under the category of "debts and credits, and other personal property not capable of manual delivery," which must be attached by leaving notice with a third person owing such debts, or having such credits or personal property in his possession. A patent right is a thing created entirely by federal legislation. It is a personal favor or monopoly, granted to a particular person by the United States government. It could not be transferred to another person at all, if the government had provided no method of transferring it; but the government has provided that it may be transferred by assignment, and that is the only method by which it can be transferred. And if a creditor of the patentee can have the patent right subjected to the satisfaction of his judgment at all, it can be done only by a court of equity, acting in personam, and compelling the patentee to make an assignment. It cannot be advertised and sold under a common execution. As before said, there is no way in which it can be levied upon, and the mere advertising and selling of it upon notice would convey nothing to the purchaser. Carver v. Peck, 131 Mass. 291, and cases there cited; Bank v. Robinson, 57 Cal. 520. In Carver v. Peck, supra, the court says: "The incorporeal and intangible right of an inventor or an author in a patent or a copyright cannot be taken on execution at law." In Bank v. Robinson, supra, the court says: "But a patent right is not tangible property. It is an incorporeal thing, subsisting in grant from the government of the United States. Yet it is subjected to some of the legal incidents of ownership of tangible property, such as succession and transfer. But, as a creation of legislation, it is transferable only according to the provisions of the statutes which created it; and the only question is, has a court of equity power to compel its assignment and sale for the benefit of judgment creditors?" The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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115 Cal. 242

## PEOPLE v. WORTHINGTON. (Cr. 181.)

(Supreme Court of California. Dec. 8, 1896.)

HOMICIDE—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. A charge stating that the question of self-defense is not in the case, being supported, without contradiction, by the record, is not ground for reversal, the case being one where, under Pen. Code, § 1105, the burden of proving self-defense is on defendant.

2. Admission of evidence as to deceased's whereabouts for some time before he was killed, even if immaterial, is harmless.

3. Evidence that witness received from deceased certain papers and letters after he was shot, and before he died, is harmless, though they are not identified or connected in any way with the case.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Louisa Worthington appeals from a conviction of murder. Affirmed.

Burnette G. Haskell and J. J. Guilfoyle, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The appellant was convicted of murder in the second degree, and now appeals from the judgment and order denying her motion for a new trial.

It is insisted that the trial court committed error in giving the jury the following instruction: "It is, however, supposed to be unnecessary to elaborate the law of self-defense for the purpose of this case, inasmuch as it is understood to be conceded that the deceased was not, at the moment he was shot, endeavoring to do any injury to the accused woman, or to any other person, but was standing quietly at the wharf when she took his life by shooting him with a loaded pistol." It is unfortunate that the statements of the judge found in this instruction as to the facts of the case should have gone to the jury. It is said in People v. Gordon, 88 Cal. 426, 26 Pac. 504: "That judges must not charge juries with respect to matters of fact is a constitutional prohibition, which has been jealously guarded and rigidly upheld from the earliest judicial history of the state." In People v. Phillips, 70 Cal. 68, 11 Pac. 496, the trial court detailed to the jury certain facts of the case as having been proven, and this court there said: "Of course, this mode of charging a jury should be carefully avoided; but it has been held here that an instruction assuming a fact does not demand a reversal, if the fact is admitted, or there is no shadow of conflict of evidence with respect to it." In the present case, if there was any bona fide claim that the killing was done in self-defense, this instruction of the judge would demand a new trial of the case; but we examine the record in vain for any such claim by counsel, and look in vain in that record for a word of evidence tending to show that the killing was done in self-defense. The statement of defendant's counsel to the jury in outlining the facts which were to constitute his client's defense did not even hint at self-defense. The defendant herself testified: "I have no recollection of having fired a shot at him." Defendant's counsel rested the case upon the theory that, if the defendant killed the deceased, she was insane at the time, and not legally responsible for the act. That she did kill the deceased must be taken as a conceded fact, and upon such concession appellant is then left to justify upon the sole plea of nonaccountability. Of course, evidence at the trial offered by a defendant may take a wider range than his opening statement, and may establish defenses not there adverted to. Yet here such is not the fact. The most injurious construction to defendant which could be given the charge is that, in effect, the jury were told by it that the question of self-defense was not in the case. The record discloses that fact without contradiction, and as matter of law; and there is nothing in the giving of this instruction to demand a new trial. There are many trials upon charges of murder where self-defense is not an element, and no harm could possibly result to a defendant in such a case if the jury were so instructed by the judge.

Section 1105 of the Penal Code provides: "Upon the trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Under the evidence placed before the jury by the prosecution, this was essentially a case covered by the foregoing section of the Penal Code. The homicide by the defendant was proven. No evidence of the prosecution tended to show that the crime committed only amounted to manslaughter, or that it was justifiable or excusable. Under the evidence, these conditions cannot be gainsaid for a moment; and, such being the fact, the burden of proof shifted to the defendant, and, if self-defense was relied upon by her, it was for her to produce the evidence. This she did not even attempt to do. In no possible way was defendant's case prejudiced by the giving of this instruction. There is nothing in the case of People v. Webster (Cal.) 43 Pac. 1114, opposed to the foregoing views.

There was no material error committed in admitting evidence as to the whereabouts of the deceased, Baddeley, between March 10th and April 25th. If the evidence was immaterial, the error committed was harmless. But the objection would seem to point more to the weight of the evidence than to its materiality.

Neither could any sound objection be made to the evidence of Mahoney, given to the effect that he received certain papers and letters from the deceased immediately after he was shot. As to papers and letters unidentified, and not connected in some way with the case, no possible harm to defendant could have resulted from the admission of this evidence; and, as to one letter upon which evidence was offered tending to show that it had been written by defendant, the evidence was clearly admissible. If the letter had been found upon the body of the deceased after death, that fact would have been admissible; and the circumstance that it was given to the witness by deceased immediately after he was wounded, and shortly prior to his death, demands the application of no different principle of law. This letter, which was introduced in evidence, was signed "Louise," and addressed "Dear Harry." The defendant admitted after the killing, upon an inspection and reading of the letter, that it was "hers." The fact that the defendant's name was "Louisa," and the deceased's name "Harry," taken in connection with the admission, furnished a foundation of identification amply sufficient to justify its admission in evidence as her letter.

The court committed no error in refusing to give the various instructions asked by defendant's counsel.

For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

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114 Cal. 593

## BRADBURY v. DAVENPORT et al. (L. A. 161.)

(Supreme Court of California. Oct. 24, 1896.)

MORTGAGE—ABSOLUTE DEED—EQUITY OF REDEMPTION—PLEADING.

1. A conveyance of the mortgaged premises by the mortgagor to the mortgagee, by delivery of deed in escrow, to be delivered in case of the nonpayment of the mortgage deed within a certain time, will be set aside where the property is of double the value of the indebtedness.

2. In a suit to have an absolute deed by a mortgagor to a mortgagee, in consideration of the mortgage debt, decreed a mortgage, a complaint alleging that the mortgagor's "equity of redemption," at the time of the conveyance, was of a certain value, though not technically correct, sufficiently alleges, in the case of a special demurrer, that the interest of the mortgagor was of such value.

3. In a suit by the administrator of a mortgagor to have a conveyance of the mortgaged premises to the mortgagee, in consideration of the mortgage debt, decreed a mortgage, a tender of the amount of the mortgage debt is not necessary, where the estate is embarrassed, and unable to raise the money, except by a sale of the mortgagor's interest.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by William N. Bradbury, administrator, against Joseph N. Davenport and others. From a judgment for defendants plaintiff appeals. Reversed.

Withington & Carter, for appellant. Haines & Ward and D. N. Hanmack, for respondents.

HAYNES, C. This appeal is from a judgment rendered against the plaintiff upon demurrer to the complaint. The complaint, after alleging the appointment of the plaintiff as administrator of Daniel Keniston, deceased, and describing the property involved in the controversy herein, alleged, in substance, as follows: That on January 1, 1891, Keniston executed a mortgage to the defendant Davenport upon certain of the real estate described in the complaint, to secure the sum of $4,000, with interest at 10½ per cent. per annum, payable in two years from said last-mentioned date, which mortgage was duly recorded; and defendant Davenport claimed that there was due thereon, of principal and interest, to March 1, 1895, the sum of $3,933.87. The remainder of the complaint (except paragraph 4, which need not be noticed) is as follows: "That on or about said 1st day of March, 1895, the said Daniel Keniston, being then sick in body, and embarrassed financially, and being persuaded thereto by the representations of said defendant Davenport, was induced to sign, and did sign, a certain agreement with said Davenport, and to execute a deed to lots 4 and 5 of the premises above described to said J. N. Davenport, which he (the said Keniston) handed, together with said agreement, to the defendant J. H. Anderson, cashier of the Bank of Escondido; that by the terms of said agreement, upon the payment to said cashier of a sum of money, not expressed in said agreement, before July 1, 1895, the said cashier was to discharge said mortgage, and return the note secured thereby to said Keniston; and that in case said Keniston should not pay said sum of $3,933.87, and interest to July 1st, before said July 1, 1895, the said cashier should deliver said deed to said Davenport, and the note to said Keniston, and the delivery of said deed should be in full cancellation and satisfaction of said note. (3) That the said Daniel Keniston, from the time of the execution of said agreement, continued sick and unable properly to attend to his business, and from and after the 29th day of June until the 9th day of July, 1895, the said date of his death, was unconscious; and that subsequent to the death of said Daniel Keniston, and after plaintiff had applied for administration in behalf of himself and the heirs of said Keniston, he notified the defendant Anderson not to deliver said deed to said Davenport; but that he (the said Anderson), in violation of the trust reposed in him, and well knowing that said Keniston was dead, and after said notice, upon the demand of said Davenport, upon the 24th day of July, 1895, delivered said deed to said Davenport, and the said Davenport caused the same to be recorded, and claims to be the owner of said property. That no demand had been made by said Davenport before said last date for said deed." (5) "That said deed constitutes a cloud upon the title of plaintiff, and his right to subject said property to administration; that the equity in said property is of great value, namely, the sum of $4,000; and that the estate of said Daniel Keniston is largely indebted; and that it is necessary to sell the interest of the estate in said premises in order to pay said indebtedness." The prayer of the complaint is that said deed from Daniel Keniston to the defendant Davenport be decreed to be void and of no effect; or that the same is a mortgage to secure any sum, which may be found due from said intestate to said defendant Davenport; and that said property be further decreed to be assets of the estate, and subject to administration. The demurrer to the complaint is as follows: "That said complaint does not state facts sufficient to constitute a cause of action, in this, to wit: First. That it shows on its face that this defendant is the owner of lots four (4) and five (5) in section four (4), township twelve (12) south, range two (2) west, S. B. M. Two. That the complaint contains no offer or tender, or any allegation of offer or tender, to pay the overdue mortgage indebtedness to this defendant therein alleged to be subsisting." This demurrer was sustained, and, the plaintiff declining to amend his complaint, judgment was rendered "that the complaint herein be, and the same is hereby, dismissed on the merits," and for costs.

Appellant insists that said contract or agreement deposited with Anderson with the deed is void, because it is an agreement for forfeiture of the property subject to the lien in case the debtor does not pay before July 1st; and, in support of this proposition, he cites section 2889 of the Civil Code, which is as follows: "All contracts for the forfeiture of property subject to lien in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void." Aside from the provision of said section of the Civil Code, it is well settled that the mortgagor is not allowed to renounce beforehand his privilege of redemption; that, while generally any one may renounce any privilege or surrender any right he had, an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions; that, when one borrows money upon the security of his property, he is not allowed by any form of words to preclude himself from redeeming (Jones, Mortg. §§ 251, 1045), though the doctrine, "once a mortgage, always a mortgage," does not apply to subsequent contracts. Watson v. Edwards, 105 Cal. 70, 75, 38 Pac. 527, 528. In Peugh v. Davis, 96 U. S. 332, it was held that an equity of redemption is so inseparably connected with a mortgage that it cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage, though a subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. As to such release, the court, by Field, J., said: "It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding." In relation to such subsequent agreement, Jones, in his valuable work on Mortgages (section 251), says: "A subsequent agreement that what was originally a mortgage shall be regarded as an absolute conveyance is open to the same objection [that is, the objection to such agreement in the mortgage itself], and will not be sustained unless fairly made, and no undue advantage is taken by the creditor. The burden is therefore upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration." In support of this proposition, the author cites, among many other cases, Villa v. Rodriguez, 12 Wall. 323, from which we quote the following passage: "The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes. He must exercise no undue influence. He must take no advantage of the fears and poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instrument employed is immaterial. That the mortgagor knowingly surrendered, and never intended to redeem, is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

Respondent contends, however, that this case is conclusively settled by this court in McDonald v. Huff, 77 Cal. 279, 19 Pac. 499. But that case is clearly distinguishable from this. In that case an unsecured debt, as well as a debt secured by a mortgage, was to be satisfied by the deed deposited in escrow, if such debts were not otherwise paid within the time limited by the agreement, so that a price in addition to the amount of the mortgage lien was paid for the property, and there is no indication, either in the statement of facts or in the opinion of the court, but that the price thus paid was the full value of the property conveyed; while in the case at bar the plaintiff, while not disputing respondent's right to a lien as security for the amount of the mortgage debt and interest, alleges that the equity of the estate in said premises is of the value of $4,000. In the absence of a special demurrer, we must hold this to be an allegation that, at the commencement of this action, said premises were worth $4,000 more than the amount secured by the mortgage, with interest to that date.

Respondent also contends that the deed to him took effect when delivered, as of the date of the escrow, and that the agreement was therefore fully executed before this action was begun. But that does not conclude the plaintiff. In Russell v. Southard, 12 How. 139, it was held that, though a mortgagee in possession may take a release from the mortgagor, the transaction is to be carefully scrutinized, and, if any unconscientious advantage was taken, the release will be set aside. Conceding that the depositary may, upon the happening of the condition, deliver the deed held by him in escrow, notwithstanding the death of one of the parties to the escrow agreement, the transaction is not placed beyond the control of a court of equity if the circumstances of the case require its interposition. It is said, however, by respondent, that the term "equity," when applied to mortgages in this state, describes nothing, and he quotes Pom. Eq. Jur. § 1188, to the effect that it is an entire misuse of language to apply the name "equity of redemption" to the legal estate of the mortgagor. Sichler v. Look, 93 Cal. 600, 29 Pac. 220, is also cited, where it is said, in substance, that the clause usually inserted in decrees of foreclosure, "that the defendant be forever barred and foreclosed of and from all equity of redemption," etc., does not add to the effect of a sale under the decree beyond what it would have had if the provision had been omitted. But the learned justice who wrote the opinion refers to the matter as one of common practice, and says: "Its insertion is due to the conservatism of the profession, which hesitates to adopt a reform in procedure, and prefers to adhere to the forms which were used under a different system."

If the allegation contained in said fifth paragraph had been specially demurred to upon the ground of uncertainty or ambiguity, such demurrer should have been sustained; but we think, when tested by a general demurrer, that the allegation is a sufficient statement that the interest of the estate in the property described in the deed is of the value of $4,000 over and above the indebtedness of the estate to the defendant. It is alleged that the said deed constitutes a cloud upon the title of plaintiff and his right to subject said property to administration. The "equity," therefore, must refer to the interest which the estate would have had in the land subject to the mortgage; and, as the demurrer concedes the truth of this allegation, a cause of action was stated entitling the plaintiff to relief upon that ground, if no other.

Respondent contends, however, that the complaint is fatally defective, because it contains no offer or tender, or any allegation of offer or tender, to pay the overdue mortgage indebtedness. They treat this as an action to quiet title, or as an action to redeem. Strictly speaking, it is neither. It alleges that a mortgage was given; that, at the date of the deed and agreement, a subsisting debt, secured by the mortgage, was due, unpaid, and enforceable under the mortgage, which was then, and still would have been, a valid lien upon the premises; alleges facts which show the invalidity of the deed; and prays that the said deed be canceled, or that it be declared a mortgage to secure any sum that may be found due from the intestate to defendant Davenport. Plaintiff treats the lien as still subsisting. A bill in equity to redeem from a subsisting and enforceable mortgage lien would not lie, as the lien could be discharged by payment; but the defendant claims to have an absolute title to the land, and that the mortgage, which formerly subsisted, has been paid and discharged by the conveyance of March 1, 1895. If the decree prayed for in a given case would leave the defendant without remedy for the recovery of the money which would have been secured by the mortgage if a deed had not been subsequently given, it is clear that a court of equity would not grant it, unless the plaintiff had tendered or offered to pay the money which he alleged the deed was given to secure, whether the debt was barred by the statute of limitations or not. But the decree here sought can have no such effect. The suit is brought, not to deprive the defendant of any of his just rights, but to determine the validity of the transaction by which the defendant claims what amounts to a forfeiture of the mortgaged property, and not to deprive him of a remedy whereby he may collect his debt. To impose upon the plaintiff the condition that he shall first tender payment would give the defendant a benefit or advantage of great value from what is, upon the facts alleged, a transaction from which he should not be permitted to derive any benefit or advantage; that is, he could stand upon the apparent title conveyed by the deed without foreclosure, for all time, knowing that his debtor cannot quiet his title against him without payment of the debt and interest, though barred by the statute, with the power of alienation at any time to an innocent purchaser,—advantages which he did not and could not have had under the mortgage.

Nor is it true that the debtor who has given a deed absolute in form, as security for the payment of his debt, must, under all circumstances, tender payment before he can litigate the character of the instrument; as, for example, where the debt is not due, and the grantee asserts an absolute title, or is attempting to sell and convey to a stranger. A court of equity will not tie its hands by an unbending rule, which would require it to impose inequitable terms, or do any injustice in a given case falling within a general class, though having peculiar or distinguishing features. There are sufficient facts appearing in the complaint, though not clearly stated, to show that the imposition of the condition of plaintiff's right to maintain this action, namely, that he must tender payment of the mortgage debt to the defendant, would result in a denial of justice. Keniston died July 9th, plaintiff was appointed administrator July 23d; and this action was commenced July 30th, the deed to defendant Davenport having been delivered on the 24th. It is alleged that the estate is largely indebted, and that a sale of the interest of the estate in the premises described in the deed is necessary in order to pay said indebtedness. Under such circumstances, it would be inequitable to require a tender of the amount due as a condition upon the performance of which alone the action could be maintained; and a compliance with such condition would appear, from the facts stated, to be impossible. Certainly, the money could not be raised upon the premises embraced in the deed, whatever its value, until it should be determined that the deed was itself only a mortgage. We think the court erred in sustaining the demurrer, and that the judgment should be reversed, with leave to the plaintiff to amend his complaint if so advised.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with leave to the plaintiff to amend his complaint if so advised.

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115 Cal. 214

## McNEIL v. HANSEN. (S. F. 486.)

(Supreme Court of California. Dec. 7, 1896.)

TRANSFER BY INSOLVENT — ACTION BY ASSIGNEE IN INSOLVENCY—RIGHTS OF CREDITORS—PRO RATA DISTRIBUTION.

A suit by an assignee in insolvency to set aside conveyances made by the insolvent, by deeds absolute, under oral agreements with the transferee that he would sell all the insolvent's property, and distribute the proceeds pro rata among the creditors, cannot be maintained where the transferee had not yet disposed of part of the real estate transferred, and all sales which had been made were for a fair price, and it does not appear that such transferee had agreed to distribute pro rata the proceeds of each sale as it was made, or that any of the unpaid creditors had complained of his actions, or were not willing to wait until the rest of the property had been sold.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by J. W. McNeil, as assignee in insolvency of C. G. White, against E. H. Hansen, to set aside conveyances on the ground of fraud. From a judgment of nonsuit, plaintiff appeals. Affirmed.

John J. Coffey, for appellant. Wm. H. Jordan, for respondent.

McFARLAND, J. After plaintiff had introduced his evidence and rested, the court granted a nonsuit, and rendered judgment for defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

We see no reason for disturbing the judgment. C. G. White filed his petition in insolvency on October 3, 1891, and, in December following, appellant was appointed his assignee. This action was commenced in February, 1893, to cancel and set aside certain sales of personal property and certain conveyances of real property made by said White to respondent on February 17, 1891,—nearly eight months before the filing of the said petition in insolvency, and two years before the commencement of this action,—and to account for and pay to appellant all moneys which he had received from sales of part of the property which he had received from White, which moneys he had paid to White's creditors. Respondent contends that the complaint does not state facts sufficient to constitute a cause of action, and the contention is, no doubt, difficult to answer. There are uncertainties and inconsistencies in the complaint. There is no showing in it that any of the creditors of White are complaining of the transfers and conveyances by him to respondent. It does not show with certainty what part of the described property was actually transferred to respondent, and what was retained by White, and its averments as to the consideration of the transfers are inconsistent. Respondent also contends that, under section 55 of the insolvent law, an action like the one at bar cannot be maintained by an assignee unless the alleged transfer was made within one month before the filing of the petition in insolvency. We mention these points because they are raised by respondent, and are important; but we do not deem it necessary to pass upon the sufficiency of the complaint. We will assume that the complaint states with sufficient certainty that on February 17, 1891, White was actually insolvent, and that Hansen knew it; that on said day he, by written instruments, transferred and conveyed to respondent, Hansen, certain described personal and real property, which included all his property; that these instruments were, in form, absolute, and in no way purported to be assignments for the benefit of creditors; that they were made, however, upon the consideration and with an oral understanding that respondent was to make sales of the property on as favorable terms as practicable, and from the proceeds of such sales pay White's creditors, pro rata, in equal proportionate amounts to each; that respondent did sell some of said property, and paid the proceeds to White's creditors; that he did not pay the same ratably, but paid to some of the creditors more, proportionally, than to others, and that a few of the creditors had not yet received anything; and that some of the property transferred to respondent is still in the latter's hands, unsold. The gist of the cause of action alleged, conceding that any cause of action is alleged, is that respondent wrongfully violated the alleged agreement with White, by paying more to some of the creditors than to others, thus making the former preferred creditors.

The only witness introduced at the trial by appellant was White, and the court below was entirely right in holding that his testimony failed to establish any of the material facts relied on for a recovery. His testimony showed that, at the time of said transfers and conveyances, he did not consider himself insolvent, and that Hansen did not know that he was insolvent. It shows that the transfers and conveyances were not made with intent to hinder, delay, defraud, or prefer creditors. It appears from his testimony that, although he considered his assets greater than his liabilities (and that fact appeared from the statements which he then made), still he owed some debts which he could not then readily pay, and, being desirous of engaging in a certain business, he wanted to be free from the pressure of said debts. Under these circumstances, he had interviews with his creditors,—or at least with nearly all of them,—who consented to relieve him if he would transfer his property to the respondent, Hansen, whom they selected for that purpose, who was to sell the property and apply the proceeds to the debts. This was done, and Hansen sold a considerable part of the property at fair prices, to which White consented, and paid the proceeds to creditors. There is no contention that Hansen did not make good sales. Indeed, the sales were negotiated by White himself. As to the only objection now urged to the transaction, viz. that Hansen did not pay the moneys received from the different sales ratably among all the creditors, the evidence does not show that Hansen agreed to pay all the debts, pro rata, or to distribute the proceeds of each sale, as it should be made, equally among all the creditors, in proportion to the amounts owing them. Indeed, it appears incidentally that some of the creditors had liens on certain property, and were thus legally preferred creditors; and we have not been able to discover from the testimony that any one of the few creditors who have not yet received anything from the sales has complained, or is not willing to wait until the remaining part of the property shall have been sold. We see no material error committed by the court in any ruling made at the trial.

As appellant has put his contentions under three headings, namely, (1) that the court should have granted his motion for a judgment on the pleadings, (2) that the motion for a nonsuit should have been denied, and (3) that a new trial should have been granted, it is sufficient to say that, in our opinion, each of said contentions is without substantial merit. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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115 Cal. 222

## GOODSELL v. ASHWORTH et al. (S. F. 291.)

(Supreme Court of California. Dec. 7, 1896.)

SUPERINTENDENT OF STREETS — ACTION ON BOND —DAMAGES.

In an action by a lot owner on the bond of the superintendent of streets, under section 22 of the street law (St. 1885, p. 160), for the neglect of such official to see that a sewer built under his supervision was properly constructed, evidence that the sewer was not covered with earth, as required by the specifications, and was cracked at places, but that sewage passed through without apparent leakage, and that it could be put in good condition for $952, one-third of which sum would be plaintiff's proportion if he could be required to contribute to the cost of reconstruction, did not warrant a finding that the sewer was valueless, and that plaintiff's damage was $755, the full amount which he had paid under the original assessment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by D. C. M. Goodsell against Thomas Ashworth and others on the official bond of defendant Ashworth, as superintendent of streets, and others. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed.

John T. Humphreys, W. C. Burnett, L. G. Burnett, and J. F. Tevlin, for appellants. Edward R. Taylor, for respondent.

BELCHER, C. On the 6th day of February, 1890, the board of supervisors of the city and county of San Francisco, after the necessary preliminary proceedings had been taken therefor, awarded to one Thomas Philbin a contract to construct a brick sewer of certain dimensions, and according to certain specifications, on Susquehanna street, from the northeasterly line of Corea street to the northeasterly line of Trinidad street, in said city. On the 19th of the same month the defendant, Thomas Ashworth, as superintendent of streets, and said Philbin, entered into a contract whereby the latter was to construct the said sewer according to the attached specifications, and at a stipulated price. Shortly thereafter Philbin commenced the construction of the sewer, and completed the same before May 28, 1890. On the last-named day Ashworth, as such superintendent of streets, having accepted the work as done to his satisfaction, made an assessment to cover the sum due therefor under the contract, with incidental expenses. To the assessment he attached a diagram and warrant, as required by the statute, and the same were recorded in his office. The whole amount for which the assessment was made was $2,291.43, and the amount assessed against the plaintiff's property was $780.65, the balance being assessed to other persons and against other property than that owned by plaintiff. On June 16, 1890, plaintiff paid, to satisfy his assessment, the sum of $755.65, the balance of $25 being thrown off by the contractor. On December 29, 1890, the plaintiff notified Ashworth in writing that the specifications under which the work of constructing the sewer was done were not complied with in several particulars. To this notice Ashworth paid no attention, as his term of office expired four or five days—one of which was Sunday—thereafter, and he had no time. On January 24, 1891, the plaintiff commenced this action against Ashworth and the sureties on his official bond as superintendent of streets, and, after setting out the facts as to the office held by Ashworth, the making of the contract with Philbin, the construction of the sewer, and the making and filing of an assessment for the cost thereof, the complaint alleged "that by reason of the premises it became the duty of the defendant Ashworth, as said superintendent, to see that said Philbin followed said contract and the specifications thereto attached in the matter of constructing said sewer; but that said Ashworth, wholly neglecting his duty in that regard, permitted said Philbin to violate said contract and specifications in the following particulars"; then setting out various particulars in which the contract and specifications were violated. It was then alleged "that by reason of the aforesaid violation of said contract and specifications said sewer is valueless for the purpose for which it was intended, and is in constant danger of injury." It was further alleged that plaintiff's lands were assessed for the sum of $780.65, and the amount so assessed became a lien on said lands, to discharge which plaintiff was compelled to pay, and did pay, on July 16, 1890, the whole of said sum; and that by reason of the premises plaintiff had been damaged in the sum of $780.65, for which he prayed judgment, with interest from the date of payment. To that complaint a general demurrer was interposed and sustained, and, plaintiff declining to amend, judgment was entered that he take nothing by his action. From that judgment an appeal was taken to this court, where it was reversed. Goodsell v. Ashworth, 96 Cal. 397, 31 Pac. 261. When the case went back to the court below, the plaintiff amended his complaint by striking out the averments as to the particulars wherein the contract and specifications were not complied with in the construction of the sewer, and by inserting in lieu thereof more specific averments, and alleging "that by reason of the said violation of said contract and specifications said sewer has become badly cracked in several places, and valueless for the purposes for which it was intended, and is in constant danger of injury." The defendants answered the complaint, and denied, among other things, that the contract and specifications were violated in the construction of the said sewer, or that the plaintiff had been damaged by reason of any alleged violations thereof in the sum named, or in any sum whatever. After a trial of the case without a jury, the court below found "that all and singular the matters and things set out and alleged in the complaint are true, except that plaintiff paid to discharge the assessment lien mentioned in the complaint the sum of seven hundred and fifty-five dollars and sixty-five cents, instead of the sum of seven hundred and eighty dollars and sixty-five cents as alleged." And as a conclusion of law the court found "that plaintiff was entitled to judgment against the defendants for the sum of seven hundred and fifty-five dollars and sixty-five cents, with interest thereon at the rate of seven per centum per annum from the 16th day of June, 1890, together with costs of suit." Judgment was accordingly entered against defendants on July 5, 1894, for the sum of $970, besides costs. From that judgment, and an order denying their motion for a new trial, defendants have appealed.

In our opinion, the court clearly erred in finding that the sewer was valueless for the purposes for which it was intended, and that by reason of the premises plaintiff had been damaged in the sum of $755.65, there being no evidence to justify such findings.

1. It is true that Thomas McMann, a witness for plaintiff, testified that he lived in the neighborhood at the time the sewer was constructed, and considered that it was not properly built. "It gives no drainage to the gutter. It is only six feet down. It is four feet too shallow. They started to build it up instead of sinking it down. That sewer is no use to the property there,—no use at all, even if it didn't crack. It ought to be down in the ground ten feet below the grade." But it was not claimed that the sewer was not placed upon the grade established for it, and it was afterwards admitted by counsel for both sides "that the work was done according to the official grade of the street." As the opinion of the witness that the sewer was of no use to the property was based upon the theory that it was constructed on the wrong grade, it is of no weight and is entitled to no consideration. The sewer contracted for and construct-

ed was 560 feet long, and was oval shaped, 2 feet 3 inches by 3 feet 4 inches in size. It was constructed partly below, partly on, and partly above the surface of the street as it was then found. And according to the specifications its sides were to be covered and protected by embankments of earth which were to extend up and be at least two feet deep on the top of it. It is alleged that a large part of the sewer was not, and never had been, protected by an embankment or earth filling of any kind, and that it remains throughout a considerable portion of its length in an exposed condition. There was a conflict in the evidence as to whether the sewer was properly covered with earth by the contractor, and as to whether the embankments had since been washed down by rains and flowing streams of water, and trod down by animals. It was proved, however, by witnesses for the plaintiff, that the embankments could now be restored and made good at an expense of $300. It was also proved by witnesses for the plaintiff that the sewer was in good condition, except where it was cracked, and that so much of it as was cracked could be reconstructed at a cost of $4 per foot. One of the witnesses referred to—John E. Shepard—testified that he made a careful examination of the sewer, outside and inside, the day before the trial, and that he found it cracked at various places on the sides and top for a distance of 163 feet, and he said: "With the sewer in that condition, such as I found it, in order to make that a good sewer, I consider that one hundred and sixty-three feet of that sewer would have to be reconstructed." Another of the witnesses referred to—C. B. Williams—testified that he had examined the sewer in its present condition, and saw cracks in it on the sides and on top. "The cracks I saw were sixty-two or sixty-three feet, and it would cost, as I say, to repair those cracks [about $4 a foot]. If a new sewer were put in there, the whole extent of those cracks, the entire sewer would then be good. So far as the sewer itself, it seemed to be very good work. That is all the defects that I saw, and that it was not covered. It seemed to be of good workmanship, but the trouble seems to have been that the filling on the side did not protect it. That is where the trouble was. I do not know anything about whether that was filled, and the earth washed away." It was also proved, without conflict, that water and sewage were passing through the sewer without any apparent leakage. Assuming, then, in view of the evidence introduced by the plaintiff, that, in order to put the sewer into good condition, it was necessary to reconstruct 163 feet of it, still there can be found no warrant for saying that it was valueless for the purposes for which it was intended.

2. As to the question of damages. By section 22 of the street law (St. 1885, p. 160) it is provided that the superintendent of streets shall, before entering upon the duties of his office, give bonds to the municipality with sureties; "and should he fail to see the laws, ordinances, orders and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect." The whole sewer was 560 feet long, and the part of it requiring reconstruction was at most 163 feet long. That part could be reconstructed, so as to make the whole sewer a good one, for about $652, and the sewer could be embanked and covered with earth so as to meet the requirements of the specifications for about $300, aggregating $952. The plaintiff's assessment was about one-third of the whole assessment, and if he could be required to pay his proportion of the cost of reconstructing and covering the sewer the amount would be only about $317. Under these circumstances, how can it be said that the plaintiff was damaged in the full amount he paid to discharge the assessment against him? We fail to see any valid ground for the conclusion reached by the court below.

The attorney for respondent has devoted a large part of his brief to the proposition that "the decision on the former appeal is decisive on this appeal." It is said: "The case now before the court is precisely the same case as on the former appeal. * * * It is, therefore, plain that the only questions in the case are as to whether or not the sewer was built in accordance with contract and specifications, and whether, by reason of its not having been so built, it was defective. If these questions are answered in the affirmative, then the judgment and order must necessarily be affirmed." The case now before the court is not the same as on the former appeal. That appeal was from a judgment on demurrer, and the question was whether, under the street law, one claiming to have been injured in his person or property in consequence of the official neglect of the superintendent of streets had a remedy by action against the superintendent and the sureties on his bond, or was limited to an appeal to the board of supervisors. The court said: "The contention of respondent's counsel is that the remedy by appeal to the board of supervisors is exclusive, and that by failing to avail himself of that remedy appellant is without any remedy. The law does not say so. On the other hand, the same act that provides for an appeal to the board of supervisors gives the appellant a remedy by action upon the bond of the superintendent and his sureties." The judgment was accordingly reversed, with directions to the court below to overrule the demurrer, and allow the defendants to answer. When the case went back to the court below, the defendants did answer the complaint, denying most of its material averments. One of the issues tried was as to whether the sewer was valueless for the purposes for which it was intended, and another was as to the damages sustained by the plaintiff. These were not matters involved in the former appeal, and it seems idle to claim that they are res judicata. The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

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115 Cal. 208

## SHAIN v. MAXWELL et al. (S. F. 400.)

(Supreme Court of California. Dec. 7, 1896.)

Record on Appeal—Bill of Exceptions—Sufficiency—Action for Goods Sold—Sufficiency of Verdict.

1. An order denying a motion to require plaintiff to furnish a more specific bill of particulars will not be disturbed where the bill of exceptions does not show upon what evidence the court made the order.

2. A verdict for plaintiff, in a suit for goods sold, will not be disturbed on the ground that the bill of items furnished by plaintiff shows that the larger part of the account was for liquors, bringing the case within Act March 20, 1874 (St. 1873–74, p. 509), providing that no recovery could be had on retail liquor accounts exceeding five dollars, on a computation that the payments acknowledged in the bill were more than sufficient to extinguish the whole debt, except items within such statute, if there is nothing in the record showing what evidence was produced at the trial.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Joseph E. Shain against George H. Maxwell, as executor of the estate of R. S. Mesick, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Eugene R. Garber, for appellant. Vincent Neale, for respondent.

BRITT, C. Action to recover a balance of $2,382.50 on an account for goods furnished and cash advanced to defendant's testator. Plaintiff had a verdict and judgment for $750. In the judgment roll appears a bill of exceptions, the sum and substance of which is that the court heard defendant's motion for an order requiring plaintiff to furnish a "further and other" bill of particulars, more specific than one he had previously, on December 5, 1893, served on defendant and filed with the clerk; that defendant's notice of such motion and the said bill of particulars "are hereby referred to and made a part of this bill of exceptions, as fully as though incorporated herein"; that, after argument on the motion, the court denied the same, and defendant excepted.

A paper, entitled in the cause, indorsed as filed by the clerk December 5, 1893, and purporting to be a bill of particulars, is printed in the transcript near said bill of exceptions. Respondent insists that this is not identified as the document of that date mentioned in the bill of exceptions, and cannot be considered on the appeal. We think, however, that no decision on this matter is necessary. For, conceding the identification of the document as part of the record to be sufficient, there is yet nothing in the bill of exceptions to show upon what evidence the court made its order. The reference to the paper of December 5, 1893, is to it merely as the subject concerning which defendant desired action by the court. It is not shown that the same was introduced in evidence to support the motion, or that it was before the court in any manner prior to the settlement of the bill of exceptions. For anything appearing, the motion may have been denied for the reason that the nature and contents of the bill previously rendered by the plaintiff were not exhibited to the court. There is, therefore, no foundation for argument that the order should have been different.

It appears from the said bill of items in the transcript that the larger part of the account in question was for wines and liquors furnished to said testator. Appellant contends that this was a retail liquor account, and that, under the statute of March 20, 1874 (St. 1873–74, p. 509), no recovery could be had thereon exceeding five dollars; and he presents sundry computations to show that payments acknowledged in the bill were more than sufficient to extinguish the whole thereof, except items within said statute. Hence he claims that the verdict should have been in his favor. But, obviously, the propriety of the verdict cannot be impeached by a method so indirect. There is nothing in the record to show what evidence was produced at the trial. It may have been proved that the parties to the account agreed that payments should be applied to the several charges in the order of their date, in which case—so far as any possible effect of the act of 1874 is concerned—the verdict might have been much larger. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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115 Cal. 218

## SNELL v. PAYNE. (S. F. 403.)

(Supreme Court of California. Dec. 7, 1896.)

Appeal and Error—Specifications of Error—Mechanics' Liens — Sufficiency — Clerical Error — Conditions of Contract — Overcharges.

1. A bill of exceptions need not contain specifications of error, except as to the ground that a finding or decision is not supported by the evidence.

2. A mechanic's lien is not invalidated by a clerical error therein as to the amount due on the building.

3. A lien which shows that the materials were to be delivered in such quantities as might be directed during the progress of construction, and that the claimant "was to be paid thereafter therefor, on demand of payment as to each delivery of any quantity on said property by him, the reasonable market value thereof," is not objectionable as not stating the terms and conditions of the contract.

4. Where lime was furnished for the construction of a building, the lien may include a charge for barrels in which the lime was sent, but which were not returned after it was used.

5. In the absence of fraud, a lien is not invalidated by the fact that it claims an amount which is greater than the value of the materials furnished.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by E. W. Snell against Elizabeth Payne to foreclose a mechanic's lien. From a judgment of nonsuit, plaintiff appeals. Reversed.

J. J. Burt, for appellant. E. H. Wakeman, for respondent.

McFARLAND, J. This action was brought by the plaintiff, Snell, to foreclose a lien for materials furnished for and used in the construction of certain buildings on the land of defendant, Payne. After plaintiff had introduced his evidence the defendant moved for a nonsuit. The nonsuit was granted, and judgment entered for defendant. The plaintiff appeals from the judgment upon the judgment roll and a bill of exceptions.

Respondent contends that the merits of the appeal cannot be considered because the bill of exceptions does not contain any specification of errors; but this contention cannot be maintained, because it has been frequently held by this court that a bill of exceptions, except as to the ground that a finding or decision is not supported by the evidence, need not contain specifications of error. Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111.

The grounds upon which the motion for a nonsuit was made do not appear, except so far as they may be gathered from findings which the court filed at the time the motion was granted; but these so-called findings cannot be considered where the case was decided upon a motion for nonsuit. It appears, however, from the bill of exceptions, that the court sustained an objection to the introduction of appellant's lien, and the views of the court upon the case are to a considerable extent developed by that ruling. We see no objection to the said claim of lien which appellant offered. The grounds of the objection to the offered document were as follows: (1) That the lien, in designating the amounts due on each of the three buildings which were erected, stated the amount upon each to be $87.88⅓, instead of $66.88⅓, which latter sum was, in fact, the true amount; (2) that the lien did not state the terms, time given, and conditions of the contract; and (3) that the appellant charged for 18 barrels, in which the lime which he furnished was packed, at 25 cents each. As to this last-named ground it appears that the lime furnished by appellant was packed in barrels; that most of the barrels were returned to appellant after the lime had been used, and a credit given by appellant of the value of the barrels; but that 18 of such barrels were not returned, and no deduction was made for the value of the barrels, which were rated at 25 cents each.

With respect to the first objection, it is sufficient to say that the amount designated for each of the three buildings was upon its face a mere clerical error, and that, at most, the only penalty for such error would be a postponement of the liens to the claims of other lienholders, and such error would not invalidate the lien.

As to the second objection, the only point which seems to be made is that the lien did not designate with sufficient accuracy the time of payment for the lime; but the recorded lien showed that it was to be delivered in such quantities as might be directed during the progress of the construction of the building, and that appellant "was to be paid thereafter therefor, on demand of payment as to each delivery of any quantity on said property by him, the reasonable market value thereof"; and we think that this was a sufficient statement upon this subject.

As to the third ground, we think that, where material is usually delivered in certain packages, it is proper to charge for it as packed, although the small material constituting the package does not literally go into the construction of the building; but, at best, the matter under consideration would merely be an overcharge, and it is quite clear that a recorded lien, good in other respects, cannot be rejected because the amount claimed is somewhat larger than can be sustained by the proofs, unless it be so willfully false as to amount to a fraud, and nothing of that kind appears here. Barber v. Reynolds, 44 Cal. 519; Harmon v. Railroad Co., 86 Cal. 617, 25 Pac. 124; Malone v. Mining Co., 76 Cal. 578, 18 Pac. 772.

The court, therefore, erred in sustaining the objections to appellant's offered claim of lien, and for this reason the judgment must be reversed. Of course, the action of a trial court in granting a nonsuit would be sustained, no matter whether the proper grounds were stated by the moving party or not, where we could see any valid ground for sustaining such action; but in the case at bar we can see no ground upon which the motion for a nonsuit can be sustained. The judgment is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 534

## LAVER et al. v. HOTALING. (S. F. 502.)

(Supreme Court of California. Dec. 7, 1896.)

CONTRACTS—SERVICES OF ARCHITECTS—EVIDENCE OF VALUE.

1. In an action by architects to recover for services, evidence of a rule of compensation of architects established by architects' institutes and associations is not admissible when not accompanied by any proof that the rule was known to defendant at the time of the alleged contract, or that it was so generally accepted by the public as to give it the standing of a custom, knowledge of which was to be imputed to him.

2. Where plaintiff testified on the direct examination as to an alleged custom, defendant did not waive his objections to such evidence by cross-examining plaintiff thereon, or calling witnesses to disprove it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Augustus Laver and another against A. P. Hotaling to recover for services rendered by plaintiffs as architects. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Robert Harrison and Michael Mullany, for appellant. A. P. Van Duzer and Walter H. Levy, for respondents.

BRITT, C. Plaintiffs are co-partners in the practice of their profession of architects. They sued in this action to recover the alleged reasonable value of services performed, it is claimed, at defendant's request in the preparation of drawings, plans, and specifications for a building defendant had in mind to erect. After verdict and judgment in plaintiffs' favor, the court granted a new trial on the sole ground specified in its order that it erred at the trial "in permitting the introduction of evidence of a rule of compensation of architects established by architects' institutes or associations." Plaintiffs appeal, and contend, firstly, that the court mistook in assuming that it had allowed evidence of the character mentioned in the order granting a new trial. While it hardly appears that plaintiffs directly offered the conventional rates of compensation fixed by any society of architects for professional services, yet there was an undertone of reliance thereon in a great part of the evidence for plaintiffs as the basis on which estimates of the value of their services were founded; and it sufficiently appears that defendant ineffectually endeavored, by motion to strike out and otherwise, to exclude testimony of such value having those rates as its data. Thus, Mr. Laver, one of the plaintiffs, testified that there is a uniform rule governing the compensation of architects. On cross-examination he was asked, "Is that rule established by the Architects' Association here?" He replied, "That is established by every civilized country in the world,"—a certain percentage on the cost of the structure, payable when the specifications are finished. Another one of the plaintiffs testified that the value of their services was 2½ per cent. of the estimated cost of the building; that he based this statement upon "the custom." Mr. O'Connor, a witness for plaintiffs, stated that the estimate he gave upon the subject of value was arrived at by reference to a custom prevalent in various cities, and "published in the rules and regulations of the American Institute of Architecture." There was other testimony of similar tendency. All of it received color beyond what it possessed intrinsically from the following instruction of the court to the jury: "In order to prove the value of those services, plaintiffs have called witnesses to show that under a rule of the Architects' Association of New York the builder or owner must pay for the architect's plans, profiles, and specifications compensation on the basis of a percentage upon the contemplated cost of the building. They say that is an arbitrary, fixed rule of those architects. If you should be satisfied that such a rule as that exists, and that plaintiffs are otherwise entitled to recover, you may award a verdict on the basis of that compensation." In this condition of the case we think the statement of the court in its order that evidence had been received "of a rule of compensation of architects established by architects' institutes or associations" was not materially inaccurate. The jury must have retired with the conviction that such evidence was before them for consideration. This evidence, standing alone, was incompetent. It was not accompanied by any proof that the rule or usage of architects was known to the defendant at the time of the alleged contract with plaintiffs, nor that it was so generally accepted and acted upon by the public as to give it the standing of a custom, reasonable, uniform, and notorious, knowledge of which was to be imputed to him. In the absence of such complementary proof, the law, as we understand it, does not allow that a rule for professional guidance, adopted by organizations or societies of the members of any profession, is competent evidence in their favor in controversies with lay employers regarding the quantum of their compensation. See 27 Am. & Eng. Enc. Law, 739; Mechem, Ag. § 963, note 1; Blake v. Stump, 73 Md. 171, 20 Atl. 791; Taliaferro v. Bank, 71 Md. 200, 17 Atl. 1036; McMasters v. Railroad Co., 69 Pa. St. 374. We do not deny the principle illustrated by Sewell v. Corp, 1 Car. & P. 392; Thomas v. Brandt (Md.) 26 Atl. 524, and other cases, that, if there is a general usage, applicable to the charges of a particular profession, it may be looked to in order to determine the compensation to be paid by one who employs an individual of that profession; but we hold that such a usage cannot be proved for that purpose against laymen by showing a rule adopted within the profession only.

It is urged that the existence of the rule or custom of architects was developed on cross-examination of plaintiffs' witnesses; also that testimony concerning the same matter was given by a witness called by defendant, and hence that the latter cannot complain of the error. But the evidence of plaintiffs related to an alleged customary rule of charges, and we think defendant might, without waiving his objections, produce evidence either by cross-examination or from his own witnesses to exhibit the source of the alleged custom, and to show more clearly the incompetence of the plaintiffs' evidence in that behalf. As nearly as we can make out, this was the purpose of the course of interrogation pursued by defendant. In our opinion, none of the objections advanced by plaintiffs to the order appealed from are maintainable, and it should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

115 Cal. 230

## In re MARSH. (Sac. 193.)

(Supreme Court of California. Dec. 8, 1896.)

INSOLVENCY — EFFECT OF PRIOR PROCEEDINGS — DISCHARGE.

One whose petition for a discharge under the insolvent act of 1880 has been denied, on the ground that his debts did not exceed the sum of $300, as required by the act (section 2) before a debtor could claim its benefits, is not within section 49, providing that no discharge shall be granted if the debtor has received "the benefits of any act of insolvency" within three years next preceding his application for discharge.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Application by S. N. Marsh for a discharge in bankruptcy. The application was contested by J. A. Bell, a creditor of the insolvent. From an order denying the discharge, applicant appeals. Reversed.

M. K. Harris and A. M. Drew, for appellant. Frank H. Short and J. W. Taggart, for respondent.

BRITT, C. April 22, 1893, Marsh filed in the superior court a petition in insolvency under the insolvent act of 1880. In the accompanying schedules his debts were estimated at $2,318, including the sum of $2,200 on a promissory note to one J. A. Bell, for which note, it was stated, there was no consideration. A formal adjudication of insolvency was entered, and, after the expiration of three months following, Marsh applied for a discharge from his debts. Said Bell contested the application, and on July 14, 1894, after trial of the contest, the court rendered judgment declaring that on said April 22, 1893, Marsh did not owe debts amounting to $300, and was not entitled to be discharged or to receive the benefits of the act. Afterwards, on October 9, 1894, Marsh began the present proceeding by filing a new petition in insolvency, showing liabilities amounting to $3,104. Thereupon he was adjudged insolvent, and on January 11, 1895, he again made application to be discharged from his debts. Bell again contested his right to the same, this time on the ground that in the proceeding first instituted Marsh had had the benefit of the insolvent act, within the meaning of the provision of section 49 thereof, that no discharge shall be granted if the debtor has received the benefits of any act of insolvency within three years next preceding his application for discharge. The court made findings sustaining this view and gave judgment denying the discharge, and subsequently denied a motion for new trial.

At first blush it seems odd that, if a debtor's discharge in insolvency is denied, on the ground that he was not, when he filed his petition, entitled to receive the benefits of the act, yet, in a subsequent proceeding, his discharge may be again defeated because, in the first, he had enjoyed such benefits. And this impression is not effaced on fuller consideration of the facts here. Under the act of 1880 (section 2) no one whose debts did not exceed the sum of $300 could invoke the action of the court for his relief. Marsh's first petition was, therefore, self-destructive. See Friedlander v. Loucks, 34 Cal. 24; In re Fowler, 1 Low. 162, Fed. Cas. No. 4,998. To say that there was no consideration for his promissory note to Bell was to say that it was no valid contract, and hence no debt. The court had no jurisdiction to entertain his petition, and he, of course, could receive no legal benefits from proceedings based thereon. In this the case differs wholly from In re Smith, 68 Cal. 203, 8 Pac. 881, relied on by respondent. No question existed there as to any jurisdictional infirmity in the prior proceedings taken by the insolvent. The judgment and order appealed from should be reversed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

115 Cal. 252

## MORRISON v. RODGERS. (S. F. 474.)

(Supreme Court of California. Dec. 9, 1896.)

MARRIAGE BROKERAGE.

An agreement by one engaged to be married to pay a person, if he induces the other person to the engagement to carry it into effect, cannot be enforced.

Department 1. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Morrison against Rodgers. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Allen, Jr., W. W. Allen, Sr., and Aylett R. Cotton, for appellant. Van R. Paterson, for respondent.

HARRISON, J. This action was brought to recover certain moneys, which it is alleged the defendant promised to pay to the plaintiff if she would use her influence in endeavoring to induce a certain person to marry the defendant, and should be instrumental in bringing about such marriage. It is alleged that, in consideration of said promise by the defendant, the plaintiff did endeavor to persuade said person to marry the defendant, and was instrumental in bringing said marriage about, and that the defendant has failed to keep her promise, and has not paid the money agreed by her to be paid. The rule that a marriage brokerage contract is invalid. as being contrary to public policy, and that the services rendered under such contract are without legal consideration, and are incapable of forming the foundation of an action for their recovery, is so elementary that but very few cases involving the question have found their way into the reported decisions; but, whenever the question has been presented, courts have invariably declared that the action could not be maintained. Story, Eq. Jur. § 261; 2 Pars. Cont. *74; Greenh. Pub. Pol. 478; Williamson v. Gihon, 2 Schoales & L. 357; Crawford v. Russell, 62 Barb. 92; Duval v. Wellman, 124 N. Y. 159, 26 N. E. 343; Johnson v. Hunt, 81 Ky. 321.

It is sought to distinguish the present case from those in which the rule has been laid down by the fact that here there was an existing agreement for marriage between the parties, and that the agreement with the defendant was only for the purpose of promoting the carrying out of that agreement. We are of the opinion, however, that this fact does not take the case out of the above rule. The same reasons by which the rule is upheld control here. The freedom of choice essential to a happy marriage, and the voluntary selection by each spouse of the person who is to be his or her companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to an agreement for marriage to carry it into effect, if he or she has once been disposed to abandon it, as by an endeavor to bring about such an agreement between parties who do not sustain any relation to each other. The basis of the agreement with the plaintiff in the present case is alleged to be the fact that the defendant became apprehensive that the person who had agreed to marry her would not keep his agreement, and it was for the purpose of inducing him to forego whatever purpose he had to abandon such contemplated marriage that the plaintiff rendered the services for which the action is brought. There can be no difference, in principle, between services rendered under such an employment and those rendered for the purpose of inducing one to marry another whom he did not previously know. The court properly sustained the demurrer to the complaint, and the judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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115 Cal. 255

## PEOPLE v. McCARTHY. (Cr. 168.)

(Supreme Court of California. Dec. 9, 1896.)

Homicide—Insanity as a Defense—Witnesses—Competency—Instructions.

1. On a trial for a murder, on the issue of defendant's sanity, where the testimony of witnesses is introduced by the prosecution in rebuttal, the trial court's ruling that such witnesses are "intimate acquaintances" of defendant, so as to render them competent, under Code Civ. Proc. § 1870, subd. 10, will not be disturbed, except where there is no just room for question that his discretion has been improperly exercised.

2. Whether the facts developed upon his examination show that the witness is an "intimate acquaintance" is a question for the judge, and not for the witness.

3. The question of the mere manner or appearance of a person at a particular time does not fall within the requirement that the witness must be an "intimate acquaintance" in order to be a competent witness on the issue of the person's sanity.

4. A jailer who had an excellent opportunity to study defendant's manner and mental condition for several months, during which he had charge of defendant, may testify, on the question of insanity, to defendant's manner or appearance at the time he was committed.

5. A jailer may testify to the conduct of defendant while in jail, and to the apparent condition of his mind during that time, in rebuttal of a showing of a general and permanent state of dementia and diseased condition of mind in defendant.

6. On a trial for murder, where the defense is insanity, and no issue is made or suggested as to defendant's sanity at the time of his trial, it is proper to instruct the jury: "You are not to consider whether or not defendant is insane at the present time, but you are to consider him as now sane. * * * The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time rests upon him, because the law presumes he was then sane."

7. Error must be shown, and, where the record is silent as to a fact which it is claimed is essential to sustain a given instruction, the instruction will not be held erroneous, unless it would be so held under any conceivable state of the case.

8. Whatever is proper as a matter of argument to the jury is not erroneous when submitted as a statement of law by the judge.

9. It is the duty of the judge, in his charge, to protect the jury against being misled by improper or misleading statements or claims, made in the argument, as to the law which should govern them.

10. On a trial for murder, where the defense is insanity, it is not error to instruct: "A due regard for the ends of justice, and the peace and welfare of society, no less than mercy to the accused, require that [the defense] should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense, when satisfactorily established, it yet should be satisfactorily examined into, with great care, lest an ingenious counterfeit of the malady furnish protection to guilt."

In bank. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Dennis McCarthy was convicted of murder, and from the judgment, and from an order denying him a new trial, appeals. Affirmed.

Farquar & Hall, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The defendant was convicted of murder of the first degree, committed in the killing of one George Fox, and was sentenced to be hanged. He appeals from the judgment and from an order denying him a new trial. The defense was insanity, the homicide being admitted, and the exceptions urged are based upon certain rulings made on the admissibility of evidence, and directions in law to the jury, bearing upon that defense, which it is claimed were erroneous.

1. Of the objections to rulings upon evidence, the point most relied upon involves several exceptions of the same character arising on the admission by the trial judge of the testimony of a number of witnesses introduced by the prosecution to rebut the showing made by defendant on the subject of his sanity. The objection in each instance was that the testimony was incompetent because the witness was not an "intimate acquaintance" of defendant, under subdivision 10, § 1870, Code Civ. Proc. Each of these witnesses was examined preliminarily as to the extent and character of his previous acquaintance with the defendant, before any questions were put touching the subject of defendant's mental soundness, and, in overruling the objection made, the trial judge necessarily passed in each instance upon the sufficiency of the evidence to show that degree of intimacy which would render the witness competent. In the determination of this question, as in that of any other fact from oral evidence, he, of necessity, must be conceded to be the best judge of what the evidence shows, since he has before him many elements of fact which cannot be transmitted to paper, but which enable him to more correctly weigh the evidence, and exercise a wiser discrimination as to what it shows, than one who reads but a naked statement of the evidence, without the presence of the witness. And so it has been held, and wisely, that the trial judge is to be accorded wide discretion and latitude in this respect, and his ruling will not be disturbed, except where the evidence is so lacking as to leave no just room for question that the discretion has been improperly exercised. People v. Pico, 62 Cal. 53; Estate of Carpenter, 94 Cal. 414, 29 Pac. 1101; People v. Lane, 101 Cal. 516, 36 Pac. 16; People v. Schmitt, 106 Cal. 52, 39 Pac. 204. The appellant does not undertake to point out with any particularity the deficiencies of the evidence in any instance, but contents himself with the general statement that it is insufficient to show intimate acquaintance, within the rule laid down by this court in Estate of Carpenter, supra. But while that case discusses and defines what the words "intimate acquaintance," as used in the statute, mean, it does not undertake to prescribe any measure of proof by which that relationship is to be determined. And, in the nature of things, it would be difficult to do so. After a discussion of the meaning of the statute, it is there said: "Now, when we take into consideration the rule as it exists in most jurisdictions where the common law prevails, we must conclude that our Code has attempted, what has been said to be impracticable, to establish a rule as to what opportunities of observation shall entitle a witness to speak. A nonexpert may testify, but only if he has had these advantages which I have attempted briefly to specify, notwithstanding the statutory attempt. Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is, and must remain, more or less indefinite. A very large discretion must be conceded to the trial court. If the conclusion reached is one which can be reasonably entertained, consistently with the above idea of intimacy, this court cannot review the ruling." So it will be seen that that case leaves the question of competency practically where it found it,—a question of large discretion in the trial judge to determine whether the evidence in any instance brings the witness within the rule of the statute.

With this principle in view, we have carefully examined the testimony of each witness objected to, and, without stating it in detail, we think there was a showing in every instance which would preclude us from saying that the ruling of the learned judge of the court below was unwarranted. In each instance there was shown an acquaintance between the witness and the defendant, of a greater or less degree of intimacy, extending over a period of several weeks,—a period more than sufficient, so far as time is concerned, to afford one the opportunity of forming an intelligent judgment of the condition and bent of defendant's mind; and, as suggested in People v. Schmitt, supra, "something must be conceded to the intelligence of the witness, and his habits of observation, and of these qualifications the trial court can better judge." It is true that one of the witnesses (Thurston) stated that he did not regard himself as intimately acquainted with defendant; but that was a question for the judge, and not the witness; and the facts developed upon his examination justified, we think, the admission of his evidence.

The witness Weise, the jailer who received defendant at the county jail, was permitted to testify that defendant appeared "rational" at that time. The witness had had no previous acquaintance with the defendant, and it it contended that the evidence was incompetent. But under the rule declared in People v. Lavelle, 71 Cal. 351, 12 Pac. 226, and Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, and 37 Pac. 231, the evidence was unobjectionable. It is there held that the question of the mere manner or appearance of a person at a particular time does not fall within the rule which requires the witness to be an "intimate acquaintance" in order to be competent to testify. Moreover, we think the opinion of the witness is to be regarded as having been formed more upon his subsequent acquaintance with and knowledge of defendant, acquired during the months that the latter remained under his charge in the county jail, than upon the mere appearance of defendant when first brought to the jail. The evidence shows that the witness had a very excellent opportunity, of which he availed himself, to acquire an intimate knowledge, and form an intelligent judgment, of defendant's manner and mental condition; and we think, upon this ground, that the evidence was admissible. The further evidence of this witness and that of Dougherty, another jailer, as to the conduct of defendant while in the jail, and the apparent condition of his mind during that time, was clearly admissible in rebuttal of the showing of a general and permanent state of dementia and diseased condition of mind in the defendant, which the evidence in behalf of the latter had tended to establish, and was relevant and material to the issue before the jury. People v. Lee Fook, 85 Cal. 300, 24 Pac. 654. The objection to the question asked witness Pool was properly overruled, within the doctrine of People v. Lavelle, supra, above adverted to.

There are some other exceptions under this head, noted in a very general way in appellant's brief, but which counsel has not argued, either in the brief or orally. We have carefully examined them, however, more by reason of the gravity of the offense, and the extreme consequences to defendant of this appeal, than in the expectation of finding them possessed of merit. They do not demand separate notice, but it is sufficient to say that they involve no error.

2. The court correctly instructed the jury as to the character of insanity which would constitute a defense to the charge, and, in connection therewith, gave this instruction: "You are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time rests upon him, because the law presumes he was then sane." A precisely similar instruction, from which the present one was evidently taken, was given in People v. Schmitt, supra; and it was contended there, as it is here, that it was erroneous, as an invasion of the province of the jury, in virtually withdrawing from them the right to consider the question of defendant's sanity at the time of the trial as a factor in determining whether he was sane at the time of the homicide. But it was held that the instruction could not be regarded as having that effect; that no question having been made, or issue submitted, as to the defendant's sanity at the time of the trial, "for the purposes of the trial he was to be considered sane, the issue being whether he was sane at the time he committed the homicide"; and, further, that the court having properly charged the jury that, in determining whether defendant was sane at the time of the homicide, they should consider all his acts and conduct, both before, at the time of, and since the act, the instruction could not have been understood by the jury as interfering with that right. The same reasoning applies here. No issue was made or suggested as to the defendant's sanity at the time of his trial, and, as in the above case, the jury were properly charged as to their right to consider all the evidence bearing upon the question of insanity. In fact, taken in connection with the whole charge, we regard the instruction as doing no more than informing the jury that the issue submitted to them was that of defendant's sanity at the date of the homicide, and that, for the purposes of the trial, he was to be considered sane, since only a sane man can be competently put upon trial for an offense. It is further suggested in People v. Schmitt that the instruction was evidently given to correct an erroneous suggestion made in the argument of counsel, and for that purpose was proper. It does not appear whether any such fact occurred in this case, but, the record being silent, we should presume, if necessary to sustain the action of the court, that a like necessity existed. Error must be shown, and, where the record is silent as to the fact, an instruction will not be held erroneous unless it would be so held under any conceivable state of the case.

Defendant also objects to instructions 13 and 14, and 18 and 19, which were as follows: (13) "I instruct you 'that the doctrine that in some forms of insanity the patient or sufferer knows the nature of his act fully, but at the same time cannot prevent it, through paralysis of the will power, and which is sometimes known as uncontrollable or irresistible impulse, has no legal standing in this state, and is not a legal defense to crime.'" (14) "In our courts of law there is no such doctrine established or recognized as moral insanity distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts, as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a criminal act, and wrong in itself, and deserves punishment, having the ability to correctly reason on the subject, and yet be held guiltless, and not punishable, on the ground solely of a perversion of the moral sense." (18) "In prosecutions for crimes the defense of insanity is often interposed, and thereby becomes a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice, and the peace and welfare of society, no less than mercy to the accused, require that it should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense, when satisfactorily established, it yet should be satisfactorily examined into with great care, lest an ingenious counterfeit of the malady furnish protection to guilt." (19) "It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any reason for the perpetration of the offense, he must have been acting under what is called a 'powerful and irresistible influence, or homicidal tendency.' But I must remark as to that, the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief." Appellant, in his brief, says that while the suggestions contained in instructions 13, 14, and 19 might be proper as matters of argument to the jury, they were not proper as statements of law from the judge. The basis upon which counsel draws this distinction, he does not disclose; but we apprehend that, aside from a discussion of the evidence, whatever may be correctly stated by counsel in argument to the jury as a legal guide to facilitate their deliberations must necessarily be held proper matter for instruction by the judge, since the latter is the source from which the jury are to receive their guidance in the law. But, moreover, the principles embodied in these instructions have been expressly approved of as correct statements of the law of insanity as a shield for crime. People v. Hoin, 62 Cal. 120. At the oral argument, appellant made the further objection to these instructions that they had no application to the circumstances or facts of this case, or the character of the defense, and hence were a mere statement of negative matter, which was misleading, and improper to lay before the jury, and calculated to prejudice defendant's case. But the statement by the judge in instruction 19 of what had been urged before the jury shows that matters of exactly the nature referred to in the instructions had been argued to them. It is as much the duty of the judge, in his charge, to protect the jury against being misled by improper or misleading statements or claims made in the argument as to the law which should govern them, as it is to correctly state the affirmative propositions of law arising upon the evidence. Instruction 18 is substantially the same as one which has received the repeated approval of this court. See People v. Dennis, 39 Cal. 625; People v. Bumberger, 45 Cal. 650; People v. Pico, supra; and People v. Larrabee (just decided) 46 Pac. 922. Appellant claims that it goes beyond the one given in those cases, but in what respect he does not point out, and we are unable to perceive wherein it transgresses the rule as there declared. While couched in language slightly different, it nevertheless expresses the same idea and means the same thing. We would suggest, however, that, where it is deemed essential by the trial judge to give an instruction upon this point, it would be the part of wisdom to follow approved language. We think, in fact, it would be better in most cases if the instruction were omitted altogether; and, indeed, if its propriety were an open question, we should be much inclined to doubt it. While the general principles which it states are no doubt those which should control the jury in passing upon such defense, the case must be a rare one where their suggestion is really demanded. Juries are, as a rule, ready and intelligent in distinguishing between the genuine and the simulated in any defense presented for their consideration, while the danger in making such suggestions, however general in their terms, is that they may possibly be seized upon as intended by the judge to intimate and characterize his opinion of the case on trial,—a result almost necessarily prejudicial to defendant, and, in effect, a trespass upon the constitutional right of the jury to pass upon the facts free from the influence of the judge. In the present case, however, we are relieved of any anxiety as to the effect of this instruction, since we are unable to conceive, in view of the circumstances of the case, how defendant could possibly have been prejudiced thereby. The killing was an exceptionally cold-blooded and wanton one, inflicted upon a defenseless man from no other cause, so far as manifest, than a feeling of petty spite and jealousy, having no just foundation, while the evidence relied upon to establish the defense of insanity was so entirely lacking in material substance as that no unbiased jury, themselves enjoying the blessing of sane and reasoning minds, could have justly reached a different conclusion. From a review of the whole record, we are satisfied that no error exists which should operate to set the verdict aside, and the judgment and order must therefore be affirmed. It is so ordered.

We concur: HARRISON, J.; McFARLAND, J.; HENSHAW, J.; GAROUTTE, J.

I dissent: TEMPLE, J.

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## MILES v. WOODWARD. (S. F. 367.)

(Supreme Court of California. Dec. 14, 1896.)

MINING CORPORATIONS—STATUTORY REGULATIONS—FILING STATEMENTS—CONSTITUTIONALITY OF ACT—SPECIAL LEGISLATION—EVIDENCE—BURDEN OF PROOF—PLEADING.

1. Act April 23, 1880 (St. 1880, p. 134), requiring directors of mining corporations to make, or cause to be made and posted, the weekly reports of the superintendent, does not, by restricting the action of domestic corporations, violate Const. art. 12, § 15, providing that no foreign corporation shall be allowed to transact business within the state on more favorable terms than are prescribed by law to similar corporations organized under the laws of the state.

2. Such act is not a special law, though some of its provisions apply only to mining corporations which produce bullion from gold and silver bearing ores, since the greater part of its provisions apply to all mining corporations generally.

3. A complaint in an action to recover the liquidated damages provided in Act April 23, 1880 (St. 1880, p. 134), for failure of directors of a mining corporation to make or post the weekly reports of the superintendent, need not allege that such failure or refusal was willful, but it is

matter of defense for the directors to state that their failure was not willful.

4. In a suit against a director of a mining corporation to recover the statutory liquidated damages provided by Act April 23, 1880 (St. 1880, p. 134), for failure to make and post the weekly reports of the superintendent, certain papers, appearing to be reports made by the superintendent of the mine to its secretary, but not shown in fact to have been the superintendent's reports, or to have been the only reports which the directors caused to be posted, are inadmissible.

5. Where directors of a mining company, in the statutory action against them for failure to make out and post the weekly reports of the superintendent (Act April 23, 1880), put in an answer containing a denial of a violation of the statute, and also matter in extenuation and excuse, admissions in the latter portion of the answer will not relieve plaintiff from the burden of proving such violation, since, under Code Civ. Proc. § 441, providing that defendant may set up as many defenses and counterclaims as he may have, he may plead all his defenses, though they are inconsistent with each other.

6. After the original answer has been superseded by an amended pleading, portions of the original answer containing admissions are not admissible.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by William E. Miles against B. B. Woodward. Judgment for plaintiff, and defendant appeals. Reversed.

E. S. Pillsbury and F. D. Madison, for appellant. C. H. Wilson, for respondent.

HENSHAW, J. Appeals from the judgment, and from the order denying a new trial. Plaintiff, a stockholder of the Bodie Consolidated Mining Company, a corporation organized and existing under the laws of the state of California, brought this action against defendant, a director of said corporation, to recover $1,000 liquidated damages for a violation of the provisions of the act of April 23, 1880 (St. 1880, p. 134). The violation complained of was the alleged failure, refusal, and neglect of the directors of the corporation to make, or cause to be made and posted and filed, the weekly reports of the superintendent, as required by the act.

1. It is first claimed that the act in question is unconstitutional for the reason that it operates only upon domestic corporations, and thereby allows foreign corporations to transact business within this state upon more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state, in violation of article 12, § 15, of the constitution. But the act, as its title declares, is an act designed for the "better protection of the stockholders in corporations formed under the laws of the state of California, for the purpose of carrying on and conducting the business of mining." The statute is, in its nature, both penal and remedial. It is directed to the internal affairs of the corporation, and not to its outside dealings, or to the conduct of its business. The constitution was not designed to limit the powers of the legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. Over the organization and internal government of foreign corporations, however, it has no such powers. The laws of the state do not have extraterritorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations, and it has not attempted to do so. This law is designed to protect stockholders of domestic corporations, and, to that end, has declared that the directors of those corporations, the conduct of whose internal affairs is subject to the control of the legislature, shall do specific acts, under a prescribed penalty for their failure and refusal. It does not, therefore, relate to the business of the corporation, nor impose burdens or restrictions upon domestic corporations, in the conduct of their business, from which foreign corporations are relieved, but pertains as exclusively to corporate management as do the Code provisions relating to the organization and conduct of savings and loan corporations, street-railroad corporations, and all corporations whose internal affairs are more or less carefully regulated by the laws of the state.

2. It is next contended that the act in question is unconstitutional as being a special law. Herein the argument is that a reading of the act discloses that it is made to apply—First, only to mining corporations which produce bullion, or corporations organized for the purpose of gold or silver mining; second, that it applies only to such of those corporations as produce bullion from gold or silver bearing ores or quartz; that it is, therefore, special, in that it does not apply to domestic corporations engaged in the mining of copper, lead, quicksilver, or of gold obtained by drift or hydraulic mining. Against this objection, respondent urges the authority of the case of Hewlett v. Epstein, 63 Cal. 184. But in that case the sole argument pressed upon the attention of the court was that the act in question was unconstitutional because it applied to mining corporations alone, and not to all corporations. The language of the opinion, in briefly disposing of this contention in a single sentence, cannot justly be considered as conclusive of the question upon this new and distinct attack. Of the numerous cases in which judgments have been obtained under this act, and appeals taken to this court, Hewlett v. Epstein is the only one in which the constitutionality of the act was raised. The consideration of the question thus presented is therefore not foreclosed by any of the adjudicated cases. If the construction which appellant puts upon the act, viz. that it applies only to those mining corporations which extract gold or silver from ores and quartz, were to be accepted as the true one, his attack upon the constitutionality of this law, as being arbitrary, special legislation, would certainly be powerful, if not irresistible.

But we cannot agree to that interpretation. The act provides for the doing of many things by the officers and agents of all mining corporations. Some of the things required to be done, such as keeping a complete set of books, showing all receipts and expenditures of the corporation, the source of such receipts and objects of such expenditures, and all transfers of stock, are acts which may be performed by, and the doing of which is therefore properly imposed upon, all mining corporations. The provision requiring the superintendent to report weekly the number of men employed by him, and the rate of wages paid to each, likewise applies to all mining corporations. The superintendent is also required to report the amount of ore extracted, and from what part of the mine taken, the amount sent to the mill for reduction, and its assay value. These requirements, from their nature, apply only to those mining corporations which extract the precious metal from ores; but they apply to all such corporations, and are as general as, from the varying character of mining corporations and of their operations, they could be made. The requirement that the superintendent shall certify to the amount of bullion shipped to the office of the company, or retained by him, applies, not only to corporations which extract gold or silver from ores, but equally to those which extract it by the methods of placer or hydraulic mining. In short, in the general scheme contemplated by the statute there are found many provisions applicable in their terms to all mining corporations, and others applicable only to such mining corporations as extract the precious metals from ores. But the law does not lose its general characteristic, nor fail of uniformity of operation, because it requires all corporations to report all the ores mined by them, so long as it requires all of those which mine precious ores to make such report. The very fact that gold is obtained sometimes by hydraulic mining, as free gold, and at other times by crushing quartz, shows the reason for the added provisions requiring the superintendent to report the nature and extent of new ore discoveries.

3. Appellant further contends that the trial court erred in overruling his demurrer to the complaint. The complaint averred, in precise terms, that the defendant directors, "disregarding their duty and obligation, and the rights of the plaintiff in the premises, on and at all the times and during all the weeks and periods herein mentioned, did entirely fail, refuse, and neglect to make, or cause to be made and posted or filed, the weekly reports of the superintendent required to be made," etc. It is alleged that this complaint is defective in not averring that the failure of the directors was willful and intentional, and in this regard the case of Eyre v. Harmon, 92 Cal. 580, 28 Pac. 779, is relied upon. In that case it is said: "In order to justify a recovery, it must appear that there has been an intentional disregard of the law,—a willful neglect to comply with its requirements." And it is argued that as a party must allege every material fact which he is required to prove, and will be precluded from proving any fact not alleged (Spring Valley Waterworks v. City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046), the complaint is, in this particular, defective. In Eyre v. Harmon the court was not considering the sufficiency or insufficiency of a pleading. When it used the language quoted and relied upon, it was considering the question whether, upon proof of the directors' failure, they could be exculpated and relieved from the penalty by any showing whatsoever; and it was said, as a matter of common right and justice, that the law did not mean to exact impossibilities of them, nor to punish them under a penal statute for an act beyond their power to perform; that, therefore, they were liable only for a willful and intentional failure. "Impossibilities," it is further said, "are not required of them, but only that they shall in good faith direct this officer, who is at all times subject to their control, to obey the positive requirements of the law in the matter of these reports." The statute says: "In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided, they shall be liable." The averment here made goes further than the language of the statute, for it is alleged that the directors did entirely fail, refuse, and neglect to make, or cause to be made and posted, the report. Upon proof following this averment of their failure or of their refusal, a prima facie case against the directors is established. It is not incumbent upon the plaintiff, under this statute, to show that their failure was willful. It is a matter of defense for the directors to prove that it was not. The opinion in Eyre v. Harmon is to be read in connection with that of Schenck v. Bandmann, 81 Cal. 231, 22 Pac. 654, where, discussing the same question, it is said: "It may be that, under possible circumstances, the directors of a corporation, when they have failed to comply strictly with the law, should be held excused. For example, the president or secretary, or both of them, might be taken sick and die, rendering it impossible for the account to be made, verified, and posted in time. But, if so, the facts must be within the knowledge of the directors who are sued, and should be set forth and proved." It is here made plainly apparent that, the failure being shown, circumstances of exculpation are matters of defense.

4. Plaintiff, over the objection and exception of defendants, introduced in evidence certain papers, appearing to be reports made by the superintendent of the mine to its secretary. No evidence preceded, accompanied, or followed the admission of these papers, to

show that they were in fact the superintendent's reports, or that they were the only reports which the directors caused to be posted. Upon all these matters no light is shed, and, so far as the record speaks, they are but fugitive sheets, of no meaning or import. Respondent contends, however, that, by reason of matters not appearing in the statement, they were offered as being the reports, and the only reports, received and posted by the directors. This claim cannot, of course, be considered. He further contends that the admissions of the answer relieve from the force of appellant's objection. The answer, however, contained two separate and distinct defenses. By the one, defendant rested upon a denial of a violation of the statute. By the other, defendant averred matters of extenuation, excuse, and defense, and ended by setting forth certain reports of the superintendent, which it was alleged the directors caused to be posted, and which are identical in form with those admitted in evidence. But under our system a defendant may plead any and all his defenses, and they may be inconsistent the one with the other. Code Civ. Proc. § 441; Buhne v. Corbett, 43 Cal. 264. And the effect of a denial in one defense is not waived by the setting up of affirmative matter in another defense. Billings v. Drew, 52 Cal. 565. It was therefore incumbent upon plaintiff to prove defendant's violation of the statute, and this his evidence, as disclosed by the record, unquestionably fails to do. For the reports which were offered were not generally admissible against defendant to overcome the effect of his denial of plaintiff's charges. Miller v. Chandler, 59 Cal. 540; Dillon v. Center, 68 Cal. 561, 10 Pac. 176.

5. Defendant's original answer had been superseded by an amended pleading. Over defendant's objections, portions of his original answer, containing admissions, were admitted. This was error. Mecham v. McKay, 37 Cal. 154; Ralphs v. Hensler (Cal.) 45 Pac. 1062. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; McFARLAND, J.

## MEMORANDUM DECISIONS.

In re DAILEY. (Cr. 74.) (Supreme Court of California. July 23, 1896.) In bank. Petition by W. R. Dailey, committed to custody by the superior court of San Francisco county, for a discharge on habeas corpus. Prisoner discharged. Carroll Cook, for petitioner. John M. Dickinson, for respondent.

McFARLAND, J. It is stipulated by the attorneys for petitioner and respondent that petitioner shall be ordered discharged from custody, and pursuant to said stipulation it will be so ordered. It seems to have been assumed by counsel that the discharge of the petitioner should legally follow the decision of this court in Dailey v. Superior Court (S. F. 209) 44 Pac. 458, but such is not necessarily the consequence of that decision. In that case it was held that the superior court could not enjoin or prohibit beforehand the future production of a certain play in a theater, but it did not follow from that decision that the court could not afterwards have punished the petitioner for having produced said play. If, therefore, the imprisonment out of which the present proceeding in habeas corpus arose was for a contempt in actually producing said play, and not for merely violating the order prohibiting its production, then the former decision would not be in point. But as counsel for both parties seem to agree that the imprisonment was for contempt in violating said order, and stipulate for the petitioner's discharge, we do not feel called upon to give the matter any further consideration. The petitioner is discharged. We concur: GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.; HARRISON, J.

FARNSWORTH v. HINTON. (S. F. 701.) BROWN v. SAME. (S. F. 702.) (Supreme Court of California. Oct. 9, 1896.) In bank. Petitions by Farnsworth and Brown for writ of mandamus to Hinton, registrar. Denied. A. Ruet, for petitioners. Garret W. McEnerney, for respondent.

PER CURIAM. Upon the authority of McDonald v. Hinton (S. F. 684; this day decided) 46 Pac. 870, the applications for writs of mandamus in above cases are denied and the proceedings dismissed; the cases being substantially alike, and having all been considered together.

GROEZINGER, Appellant, v. SUTRO et al., Respondents. (S. F. 590.)[1] (Supreme Court of California. Sept. 16, 1896.) In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge. Action by one Groezinger against Adolph Sutro and others to enjoin the calling of an election in the city and county of San Francisco. From a judgment in favor of defendants, plaintiff appeals. Affirmed. Rodgers & Paterson, for appellant. Garrett W. McEnerney, for respondents.

PER CURIAM. The questions presented on this appeal have been considered in the case of Kahn v. Sutro (just decided) 46 Pac. 87, and upon the authority of that case the judgment appealed from is affirmed.

LOFTUS et al., Appellants, v. FISCHER et al., Respondents. (Sac. 123.) (Supreme Court of California. June 18, 1896.) Department 2. Action by Mariam V. Loftus and others against Jacob A. Fischer and others. Judgment for defendants, and plaintiffs appeal. Motion by appellants to tax the costs of the clerk's certificate against respondents. Decision reserved.

PER CURIAM. For the reasons given in Loftus v. Fischer (Sac. 34; filed June 17, 1896) 45 Pac. 328, this motion to tax the costs of the clerk's certificate against respondents cannot be determined independently of the appeal. It is therefore continued over, to be considered and decided with the appeal in Loftus v. Fischer (Sac. 6) Id. 1058.

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McCULLY, Appellant, v. O'CONNOR, Respondent. (L. A. 145.)[1] (Supreme Court of California. Sept. 16, 1896.) Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge. Action by Jane Mason McCully, administratrix of the estate of James L. Mason, deceased, against Andrew J. O'Connor, receiver of the Consolidated National Bank of San Diego. From a judgment denying plaintiff judgment on part of her claim, she appeals. Reversed. Trippet & Neale, for appellant. James E. Wadham and Frederic W. Stearns, for respondent.

PER CURIAM. This action was brought February 9, 1895, to recover from the defendant, receiver of the Consolidated National Bank of San Diego, upon certificate of deposit No. 17,896, dated April 2, 1892, for $8,000, payable to the order of James L. Mason, upon which certain payments had been made, leaving a balance of $6,168.90 as principal and interest; also, to recover the sum of $1,841.24 due said Mason on an open account. The court below gave judgment in favor of the plaintiff, as administratrix, upon the open account, to be paid out of the assets of the bank as therein specified, and gave judgment against the plaintiff upon the amount due upon the certificate of deposit, for the reason that plaintiff had not said certificate of deposit in her possession, and is not entitled to such possession, and is not able to surrender the same for cancellation, and for the reason that plaintiff did not present said certificate of deposit to the defendant receiver at the time of presenting her claim for the sum due thereon against the assets of the bank. Plaintiff appeals from so much of the judgment as denied her recovery on the certificate of deposit. The pleadings and findings of the court show fully the amount due upon the certificate of deposit, which certificate, at the date of the filing of the claim by plaintiff, and thence continually until after the bringing of this action, was in the possession and custody of the defendant herein, with whom it had been filed, as evidence of the sum due thereon, by George H. Cooper, a foreign administrator of the estate of James L. Mason, upon whose estate the plaintiff herein is and was the administratrix of the assets and property in this state. It follows that, if plaintiff was entitled to recover upon the certificate, no bond, security, or indemnity was necessary from her to the defendant, who held the certificate. The certificate is the same involved in the action L. A. 144, in which this plaintiff, as administratrix, is plaintiff, and George H. Cooper, as administrator, is defendant and respondent, and this day decided upon appeal to this court. 46 Pac. 82. For the reasons given in the opinion in that case, the portion of the judgment appealed from here should be reversed and the court below directed to enter judgment in favor of appellant for the sum found due upon the certificate of deposit, with interest, to be enforced in like manner, and payable upon like terms, with the judgment rendered in favor of appellant for the residue of her demand, and it is so adjudged.

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[1] Rehearing denied.

[1] Rehearing denied.

Ex parte PAULSELL. (Cr. 227.) (Supreme Court of California. Nov. 24, 1896.) In bank. Appeal from superior court, Placer county; J. E. Prewitt, Judge. Application by W. E. Paulsell to be admitted to bail. Petition granted. F. P. Tuttle and W. B. Lardner, for appellant. Jo Hamilton and G. W. Hamilton, for respondent.

PER CURIAM. Upon the hearing of the return to the writ of habeas corpus issued herein, it is ordered that the petitioner be admitted to bail, upon the charge of robbery now pending against him in the superior court of the city and county of San Francisco, in the sum of $15,000; the undertaking and bail to be approved by the superior court of the city and county of San Francisco in the department where said cause is pending; or by the judge thereof.

PEOPLE, Respondent, v. CUMMINGS, Appellant. (Cr. 118.) (Supreme Court of California. May 30, 1896.) In bank. Cæsar Cummings was convicted of murder, and appeals. Affirmed.

PER CURIAM. The questions involved in this appeal are identical with those involved in the appeal of People v. Cummings (No. 117; this day decided) 45 Pac. 184, and for the reasons there given the judgment herein is affirmed.

114 Cal. 432

PEOPLE, Respondent, v. TALLMADGE, Appellant. (Cr. 143.) (Supreme Court of California. Oct. 3, 1896.) Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge. Walter Tallmadge was convicted of the larceny of hogs, and appeals from the judgment, and from an order denying a new trial. Affirmed. Power & Alford and Forrest L. Alford, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. This case so far as the point involved in the appeal is concerned, is similar to the case of People v. Tallmadge (No. 138; this day decided) 46 Pac. 282. In the present case the appellant was charged with the larceny of certain hogs belonging to one Allen, and, as in case No. 138, one Lynde was the principal witness against the appellant, and an accomplice. The point for reversal is that the court below should have granted a new trial upon the ground of newly-discovered evidence, upon the affidavit of said Lynde that he had committed perjury at the trial; and, in this regard, the case is substantially the same as that in said case No. 138. Therefore, upon the authority of said case No. 138, the judgment and order denying a new trial are affirmed.

SWAIN, Respondent, v. GAVIN et al., Appellants (two cases. S. F. 65, 66.) (Supreme Court of California. July 16, 1896.) Department 2. Action by Charles J. Gavin, administrator of Ellen Gavin, and others, against Frank Swain, executor of Mary J. Holmes. Judgment for defendant, and plaintiffs appeal. Affirmed.

PER CURIAM. The single question presented by appellants for decision in each of the above causes is the same as that which was this day decided in the case of Gavin v. Swain (S. F. 64) 45 Pac. 677, and it is so stipulated by counsel for the respective parties. Therefore, for the reasons stated in the opinion of the commissioners in the last-mentioned case (S. F. 64), the judgment in each of the above-entitled causes, numbered, respectively, S. F. 65 and S. F. 66, is affirmed.

WOOLRIDGE, Respondent, v. BOARDMAN et al., Appellants. (Sac. 201.) (Supreme Court of California. Nov. 24, 1896.) Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge. Action by E. Woolridge, assignee of A. F. Boardman & Co., against A. F. Boardman, Mary Boardman, and others to set aside a transfer of stock as in fraud of creditors. From a judgment for plaintiff, and an order denying new trial, defendants appeal. Affirmed. F. P. Tuttle and W. B. Lardner, for appellants. Jo Hamilton and G. W. Hamilton, for respondent.

BRITT, C. In this case the court below set aside, because of fraud as to creditors of A. F. Boardman, a voluntary conveyance by him made on September 3, 1894, to his wife, Mary Boardman, of certain stock in the Auburn Orange Company, a corporation. The legal questions are substantially the same as those in Sac. 202 (45 Pac. 868), and on the grounds stated in the opinion there we recommend that the order denying the motion of defendants Boardman and wife for a new trial be affirmed. We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying the motion of defendants Boardman and wife for a new trial is affirmed.

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### MURRAY v. MURRAY et al. (Sac. 43.)

(Supreme Court of California. Dec. 11, 1896.)

HUSBAND AND WIFE—MAINTENANCE WITHOUT DIVORCE—FRAUDULENT CONVEYANCES—CONSTRUCTIVE SERVICE—RECEIVER—PLEADING—HARMLESS ERROR—PERSONAL JUDGMENT—RIGHTS OF GRANTEES.

**1. Where judgment is rendered on default, the findings, if made, do not constitute a part of the judgment roll (Code Civ. Proc. § 670), and the facts are to be looked for in the complaint and judgment. Such allegations of the complaint, however, as are necessary to support the judgment are deemed to have had confirmation in the evidence.**

2. Under Civ. Code, § 137, which authorizes a deserted wife to sue the husband for the maintenance of herself and of her children, if any, the wife is so far his creditor as to be within Civ. Code, § 3439, which avoids conveyances made in fraud of creditors, and it avoids a conveyance made by the husband with the design to defeat the wife's right of maintenance.

3. It is immaterial that the transfer was made before marriage, where there had been a previous agreement of marriage, followed by cohabitation and pregnancy, which left the wife no alternative but to carry out the agreement.

4. In the wife's action for maintenance without divorce, under Civ. Code, § 137, where the purely legal remedies are inadequate, the action carries with it the right to have a receiver appointed, under the general provision for such an officer (Code Civ. Proc. § 564), in all cases "where receivers have been heretofore appointed by the usages of courts of equity."

5. The wife's claim for maintenance is within the general powers of a court of equity to grant, and is not dependent on the statute; and, since plaintiff's demand may be charged specifically upon the defendant's property, described in the complaint and sought to be subjected, the court has power to appoint a receiver at the beginning of the action.

6. In such case, where defendant is a nonresident, by means of the receiver's possession of the property, and the due publication of the summons, etc., the court acquires jurisdiction to subject the property seized to the satisfaction of its lawful judgment.

7. Where a complaint contains but one cause of action, that a detail of matters tending to show the extent, form, and nature of the relief to which the plaintiff is entitled is erroneously designated "a separate cause of action," does not affect the substantial rights of the parties; and, under Code Civ. Proc. § 475, the error must be disregarded.

8. In an action for maintenance without divorce, where the wife seeks to have set aside certain transfers of property alleged to be in fraud of her right of maintenance, the judgment cannot extend to a deed not mentioned in the complaint, or affect the rights of transferees who have not been made parties.

9. In such case, where defendant is a nonresident, and served constructively, the award to plaintiff is limited to the property within the court's control, and no obligation can be imposed on defendant personally.

10. In such case the court should declare precisely what part of the property is to continue in the hands of a receiver or otherwise subject to the satisfaction of the judgment, and the remainder, if any, should be wholly exempted from the effect of the judgment.

11. In an action for maintenance without divorce, a physician's bill, incurred by plaintiff during her illness, may be included in an award for plaintiff's maintenance.

Harrison and Temple, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Agnes Murray against Owen Murray and James Murray for maintenance without divorce, and to set aside certain transfers of property. From a judgment in favor of plaintiff, defendants appeal. Modified and amended.

J. H. Daly and Sayle & Coldwell, for appellants. J. P. Meux and H. M. Johnston, for respondent.

BRITT, C. Plaintiff having been deserted by her husband, the defendant Owen Murray, she instituted this action against him for maintenance without divorce, and to set aside certain transfers of property made by him to his brother, the defendant James Murray, which obstruct the enforcement of her right. Both defendants being absent from the state, —said James residing in Canada,—summons was served on them by publication and mailing, as prescribed by statute. They failed to appear, and plaintiff obtained judgment, from which defendants appeal.

In the printed transcript appears a paper entitled "Findings," and it is recited in the judgment that the court, after hearing the evidence, "made and filed its findings of fact and conclusions of law herein"; but, as there was no necessity for findings, and as in such a case findings, if made, do not constitute part of the judgment roll (Code Civ. Proc. § 670), we can look for the facts of the controversy only to the complaint and judgment. Such allegations of the complaint, however, as are necessary to support the judgment are deemed to have had confirmation in the evidence. It appears from the complaint that plaintiff and defendant Owen, residents of Fresno county, in this state, about August 1, 1893, agreed to intermarry, and at once assumed the relations of husband and wife, and she was got with child by him. On November 7th following they were lawfully married, and in March, 1894, he brought her to the city of San Francisco, where he abandoned her among strangers, and himself departed the state, leaving her in circumstances of miserable destitution. In October, 1893, after the said meretricious cohabitation had begun, said Owen was the owner of divers promissory notes, secured by mortgages of real estate, amounting in face value to near $6,000, among which was a note and mortgage executed in his favor by one Briscoe for the sum of $2,000, and another executed by one Crow for the sum of $1,500. He also owned a sheriff's certificate of sale of certain land in the town of Fresno, and then had possession of such land. Without the knowledge of plaintiff, and with intent to defraud her of the right to subject said property to her claims for maintenance and support, about October 4, 1893, he assigned and transferred said notes and mortgages and said certificate of sale to his brother, said James Murray, who rendered no consideration for such assignment, but was "cognizant of said intent and purpose, and conspired with defendant Owen to get rid of his property in the manner aforesaid, in order to defraud the plaintiff out of the enjoyment and benefit of any portion thereof." At the same time said Owen received back from his brother a power of attorney authorizing him to manage said property for the latter. Acting thereunder, on February 7, 1894, he collected the money due on the note and mortgage of Crow, and released the mortgage, but kept the money for himself. A deed was made, subsequently to said assignments, conveying the land described in said certificate of sale to said James Murray, and about March, 1894, said Owen leased such land, which had been occupied as the home of himself and plaintiff, to one Smith, who went into possession of the same. The said notes and mortgages, other than that released on February 7, 1894, are within the jurisdiction of the court, and said Owen has no other property within the state to the knowledge of plaintiff. It was further averred in the complaint that, unless a receiver be appointed to take charge of said securities and said land, the defendants would convey the land and remove the securities beyond the control of the court. The prayer was for maintenance and alimony, pendente lite and permanent; that the said transfers and conveyance be canceled and the said property adjudged to belong to defendant Owen; that a receiver be appointed to take charge of the same, etc. By its judgment, rendered November 22, 1894, the court in terms set aside the transfers and assignments described in the complaint (except that of the Crow mortgage), and declared the property which was the subject thereof to be the property of said Owen, and chargeable with the maintenance of plaintiff and their infant child. In like manner it declared to be fraudulent and void the said lease to Smith, and also a certain deed of real estate made by one Evans and one Mancourt to James Murray on February 14, 1894, and declared the land described therein to be the property of said Owen. It was further adjudged that plaintiff be permitted to occupy and use the premises in the town of Fresno formerly occupied by herself and her said husband, and that she be allowed, in addition, the sum of $25 per month from December 1, 1894, the payment of the same to be a charge upon said premises, and also secured by a bond in the sum of $1,500, which said Owen was required to execute with sureties; that, in default of such bond, the receiver previously appointed by the court (who by the admission of counsel and the recitals in the judgment appears, on the commencement of the action, to have taken possession of all the property involved) deposit the note and mortgage of said Briscoe in the hands of a person designated to receive the same "as security for the payment to plaintiff of said alimony"; that the receiver pay the sum of $25 to certain physicians named for professional services rendered to plaintiff during illness; "that, when said several sums of money have been paid, and the further payment of alimony, * * * properly secured as provided herein, the receiver is directed to deliver all of said property and effects remaining after said payment into the custody" whence he had taken it, which being done, the receiver shall be finally discharged.

**1. It may be, as contended by appellants, that in virtue of our statute (Civ. Code, § 157), declaring that neither husband nor wife has any interest in the property of the other, the wife in this state, merely because of her conjugal relation, has no standing to attack a voluntary disposition of her husband's separate property, made either before or aft-**

er marriage, and this for the apparently simple reason that the fact of marriage gives her no interest (Smith v. Smith, 12 Cal. 216; Chandler v. Hollingsworth, 3 Del. Ch. 99; Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602; Butler v. Butler, 21 Kan. 525 et seq.); but that is not the question here. Admitting such to be the rule, the plaintiff is not affected by it. She is the deserted wife of defendant Owen, and by reason of his act of desertion is authorized to maintain the action. Civ. Code, § 137. To defeat its purpose he made the transfers of property to his brother. Every transfer of property made with intent to delay or defraud any creditor or other person of his demands is by the statute of Elizabeth, re-enacted in Civ. Code, § 3439, declared void as against all creditors of the debtor, etc. The wife, though not in strictness a creditor of the husband, is yet, as concerns her right to maintenance, so far within the protection of this statute that it avoids his transfers made with the design to defeat such right. Green v. Adams, 59 Vt. 609, 10 Atl. 742; Tyler v. Tyler, 126 Ill. 525, 537, 21 N. E. 616, and cases cited; Stuart v. Stuart, 123 Mass. 370; Stew. Mar. & Div. § 381. See Lord v. Hough, 43 Cal. 581. And, the circumstances of this case considered, in our judgment the fact that the marriage had not been solemnized at the time of the transfers to James Murray cannot prevent the application of the rule here. The plaintiff was in that condition that even knowledge of the fraudulent assignments would not have enabled her to exercise a fair option whether she would fulfill her engagement with Owen Murray. To her the alternative was marriage or the continued stain of concubinage and the bastardy of her offspring. In Taylor v. Pugh, 1 Hare, 608, the woman, before marriage, and without the knowledge of her intended husband, who had seduced her, executed a settlement of her property for her own benefit. After the marriage the husband filed a bill to set aside the settlement as in fraud of his marital rights. The court denied the relief, the vice chancellor, Sir James Wigram, saying: "The husband, by bringing the intended wife to his house, and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court with any effect that his wife has committed a fraud upon him because she has taken the precaution to have her property secured for herself and her children." Conversely, in this instance, the husband has no equity to say that the assignments, which would have been undeniably a fraud against the plaintiff if made after marriage, shall be treated as innocent because made before that event, when by his conduct marriage had become to her inevitable.

2. By section 140, Civ. Code, the court in an action such as this, or for divorce, may require the husband to give reasonable security for providing maintenance, and may enforce the same by appointing a receiver. This court has said recently that the only authority for the appointment of a receiver in a divorce suit is to be found in that section. Petaluma Sav. Bank v. Superior Court of City and County of San Francisco, 44 Pac. 179. If this be true, also, of an action for maintenance without divorce, it would seem that the language of the section is yet sufficient to justify the appointment of the receiver made in this case at the commencement of the suit. Carey v. Carey, 2 Daly, 424. But, assuming that the statute does not reach so far, still, in our opinion, the action is, by reason of the inadequacy of purely legal remedies, so much a subject of equitable cognizance that it carries with it the right to have a receiver appointed, under the general provision for such an officer in all cases "where receivers have been heretofore appointed by the usages of courts of equity." Code Civ. Proc. § 564. That the relief sought is within the general powers of a court of equity to grant, and is not dependent upon statute, has been decided by this court, and the principle has found quite general acceptance. Galland v. Galland, 38 Cal. 265; Story, Eq. Jur. 1423a; Hanscom v. Hanscom (Colo. App.) 39 Pac. 885, and cases cited; Tolman v. Tolman, 1 App. Cas. D. C. 299. "The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack for fraud any transfers of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony." Hinds v. Hinds, 80 Ala. 225. The wife having such a demand, and her position being assimilated to that of a creditor of her husband (Feigley v. Feigley, 7 Md. 537; Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616; Livermore v. Boutelle, 11 Gray, 217; Green v. Adams, 59 Vt. 609, 10 Atl. 742), it would appear that a receiver in aid of the enforcement of the demand should be appointed, when the occasion arises, for reasons like to those on which a creditor seeking to avoid fraudulent conveyances of a debtor is permitted to employ the same instrumentality. The rule in equity is that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss. Bloodgood v. Clark, 4 Paige, 574; High, Rec. § 105, and cases cited. As shown, the plaintiff here has a demand enforceable in equity, and it may be charged specifically upon the property described in the complaint. Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095; Civ. Code, 137, 140, 141; Plumb v. Bateman, 2 App. Cas. D. C. 170, 171; Hanscom v. Hanscom (Colo. App.) 39 Pac. 885. It seems necessarily to follow that the court had power to appoint the receiver at the beginning of the action. Of course, such a power should be very cautiously exercised,

but there is nothing in the present record to show that the court was indiscreet in that behalf.

3. We have dwelt somewhat upon the matter of the receivership because of the influence of that proceeding on the question of the jurisdiction of the court to render any judgment at all. Service of summons by publication, or other form of substituted service of process for notifying an absentee or nonresident defendant of an action against him, is allowed to be effectual "where, in connection with process against the person for commencing the action, property within the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein." Pennoyer v. Neff, 95 U. S. 733; Brown v. Campbell, 100 Cal. 641, 35 Pac. 433. Perhaps the jurisdiction in this case is maintainable on the ground that the judgment is sought as a means of affecting an interest in the property described in the complaint. However that may be, we have no doubt that, by means of the receiver's possession of the property, and the due publication, etc., of the summons, the court acquired jurisdiction to subject the property seized to the satisfaction of its lawful judgment. According to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. To accomplish this object, the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment; and it is common practice to apply property which has been attached in the course of an action in personam against a nonresident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding in rem. Several recent cases illustrate our conclusion. Most of them relate to the effect of legislation, such as sections 412, 749, Code Civ. Proc.; Hanscom v. Hanscom (Colo. App.) 39 Pac. 885; Thurston v. Thurston, 58 Minn. 279, 287, 59 N. W. 1017, 1019; Corson v. Shoemaker, 55 Minn. 396, 57 N. W. 134; Bennett v. Fenton, 41 Fed. 283; Single v. Manufacturing Co., 55 Fed. 553; Miller v. Jones, 67 Hun, 281, 22 N. Y. Supp. 86; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557; Plumb v. Bateman, 2 App. Cas. D. C. 156, 171; Bragg v. Gaynor, 85 Wis. 470, 55 N. W. 919. The case last cited was a creditors' bill to reach certain debts evidenced by notes and mortgages executed by residents of the state to Gaynor and by him assigned in fraud of Bragg, a judgment creditor. Both Gaynor and the fraudulent assignee were nonresidents, were served with process out of the state, and failed to appear. The court held that such debts were "property within the state," within the meaning of a statute like, in this particular, to section 412 of our Code of Civil Procedure, as amended in 1893, and that the service of an injunction on the mortgagors, who were made defendants, restraining them from paying to the nonresident creditor, brought the debts under the control of the court, so that its judgment avoiding the assignment, and appointing a receiver to collect the debts and apply the proceeds to the payment of Bragg's demand against Gaynor, was valid. We see no essential difference, as concerns the question of jurisdiction, between that case and the present.

4. It is contended that a portion of the complaint, introduced with the words, "For a separate and second cause of action, plaintiff avers," etc., and which contains virtually all the allegations of the pleading relating to the fraudulent transfers from Owen to James Murray, is insufficient as a statement of a cause of action, in that it fails to allege the husband's failure to provide for the wife's support. The complaint is loosely drawn, but we think it apparent that it contains but one cause of action, and that the portion thereof to which appellants point this objection is not a real attempt to state a second transaction, intended as an independent ground for plaintiff's suit, but is only a detail of matters tending to show the extent, form, and nature of the relief to which she is entitled upon her single cause of action, viz. her husband's desertion and his failure to maintain her, and that the words designating it "a separate cause of action" should be disregarded, as an error which does not affect the substantial right of the parties. Code Civ. Proc. § 475.

5. It was error to cancel the deed made by Evans and Mancourt to James Murray. It is not mentioned in the complaint, and, for anything appearing, Owen Murray had no interest in it. So the lease to Smith should not have been canceled. Smith was not made a party to the action. He had a right to an opportunity for a hearing, however fraudulent may have been the contract of lease. We think, also, that the court had no power to require said Owen to execute a bond in favor of plaintiff conditioned for the payment of the alimony allowed to her. No obligation upon him personally can be imposed by the judgment (De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345), and the power of the court to secure the award to plaintiff is limited to the property within its control. The court should not have disturbed the transfers to James Murray any further than the exigencies of the decree in favor of plaintiff required. Any property not needed for securing the maintenance allowed to her, and which can be restored to the person from whom the receiver took it, as provided in the judgment, is that much which, as between defendants, belongs to James Murray. The court should have declared precisely what part

of the property was to continue in the hands of a receiver, or otherwise subjected to the satisfaction of the judgment, and the remainder, if any, should have been wholly exempted from the effect of the judgment.

So far as the facts are disclosed by the record, we see no error in the direction that the receiver pay a physician's bill incurred by plaintiff. It must be assumed that this was found to be part of the necessary maintenance of plaintiff, which was the very purpose for which the funds were in the hands of the receiver. See Fox v. Mining Co., 108 Cal. 475, 41 Pac. 328; Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095. If this were an action for divorce as well as maintenance, we should say that the difficulties attending a continuing allowance under the circumstances are such that it would be better to award the plaintiff absolutely a gross sum, or part of the property in question, as in Robinson v. Robinson, just cited; but as, possibly, the cohabitation of the parties may be resumed, we think the cause should be remanded, with instructions to the court below to modify and amend the judgment in the particulars wherein we have shown it to be erroneous, and, as so modified and amended, it should stand affirmed.

We concur: SEARLS, C.; HAYNES, C.

BEATTY, C. J., and GAROUTTE, VAN FLEET, and McFARLAND, JJ. For the reasons given in the foregoing opinion, the cause is remanded, and the court below is instructed to modify and amend its judgment in the particulars wherein it is shown by said opinion to be erroneous, and, as so modified and amended, it will stand affirmed.

We dissent: HARRISON, J.; TEMPLE, J.

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114 Cal. 554

## PEOPLE v. BARNEY. (Cr. 135.)

(Supreme Court of California. Oct. 20, 1896.)

CRIMINAL LAW—APPEAL—HARMLESS ERROR—RAPE—EVIDENCE—EXPERT TESTIMONY—INSTRUCTIONS.

1. Error in the admission of evidence is cured by an order striking out the same and an instruction that it should be totally disregarded.

2. In a prosecution for an assault to rape, the prosecution may show that the injured person made complaint of the injury while it was recent.

3. A person, though not a medical expert, may testify as to whether, at the time of her examination of the child on whom the alleged attempt to rape was committed, there was any hymen.

4. In a prosecution for assault to rape, it is not error to refuse to instruct as to the danger attending such cases of convicting an innocent person.

5. It is not error to refuse an instruction where its substance is subsequently substantially given.

6. In a prosecution for an attempt to rape, defendant, if he wishes the attention of the jury called to the lesser offense of simple assault, must request an instruction therefor.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

F. L. Barney was convicted of an attempt to commit rape, and appeals. Affirmed.

G. A. Whitby, A. B. Shoemake, and F. S. O'Donnell, for appellant. Atty. Gen. Fitzgerald, for the People.

BELCHER, C. The defendant was charged with the crime of an attempt to commit rape upon a female child of the age of about seven years. He was convicted of the offense charged, and has appealed from the judgment entered against him, and from the orders of the court denying his motions in arrest of judgment and for a new trial. The appellant contends that the court erred in several of its rulings upon the admission of evidence, and in refusing to give to the jury certain instructions asked by him, and in modifying and giving as modified certain other instructions.

1. There was no prejudicial error in admitting the testimony of the complaining child, Irene Boone. The court afterwards ordered all of her evidence stricken out, and expressly charged the jury to totally disregard it. The jury must be presumed to have obeyed the instruction of the court, and, therefore, if it was error to admit the testimony, the error was cured by the order and instruction.

2. There was no error in overruling defendant's objection to the question propounded to Mrs. Boone, the child's mother, as to whether, shortly after the date of the alleged offense, the child made any complaint to her about any injuries she had received from defendant. The objection was that the testimony was hearsay,—no part of the res gestæ. The court ruled: "I think she can testify as to whether the child complained of an assault having been made upon her, and stop there. The details of what the child stated I think is hearsay." Afterwards the court ordered all that portion of the direct testimony of the witness which connected the defendant with the alleged offense stricken out. In cases of this kind the prosecution is always permitted to prove that the injured party made complaint of the injury while it was recent. People v. Mayes, 66 Cal. 597, 6 Pac. 691; People v. Snyder, 75 Cal. 323, 17 Pac. 208.

3. There was no error in overruling the objection to the question propounded to Mrs. Boone as to what was the general health and appearance of the child for the two or three months before the alleged offense. The answer was, in fact, favorable to defendant, and could not have operated to his prejudice with the jury.

4. There was also no error in overruling the objection to the question propounded to Mrs. Draper as to whether, when she made an examination of the child on the Friday after the offense was alleged to have been committed, there was any hymen there. The objection was that the witness was not competent to testify in relation to a matter of this kind, that it was a matter connected with the anatomy of

a human being, and that, to be competent, a witness should possess the same intelligence and knowledge that a physician or professor of anatomy does. The witness testified that she thought she knew what the hymen is, and that, if it was what she thought it to be, it was not there. Certainly it cannot be necessary that a witness should be a physician or a skilled physiologist in order to be competent to testify as to the existence or nonexistence of any part of the human body, when the matter can be determined by ocular inspection.

5. The court refused to give instruction No. 4, asked by defendant, and in this refusal we see no error. The instruction stated no rule of law, but was simply argumentative as to the uncertainties and dangers attending this class of cases, in consequence of which "convictions will sometimes be wrongly had, and sometimes the guilty will go free." "In charging the jury the court must state to them all matters of law necessary for their information" (Pen. Code, § 1127); but it should not go further, and comment upon the facts.

6. The court also refused to give instruction No. 8, asked by defendant. That instruction stated the law correctly, but the rule declared in it was in substance again clearly repeated in instruction No. 9, which was given at the request of defendant. It was not, therefore, necessary that both instructions be given.

7. The court amended defendant's instruction No. 9 by adding thereto the following: "But, if you believe, from the evidence in the case, beyond a reasonable doubt, that at the time and place stated in the information the defendant attempted to have sexual intercourse with Irene Boone, and that she was at the time under fourteen years of age, you should find the defendant guilty." We see no error in this amendment. It stated the law correctly, and the fact that it was appended to another instruction was not prejudicial to defendant.

8. Defendant's instruction No. 10, as requested, was as follows: "You are instructed that that portion of the testimony of Mrs. Boone which connects the defendant with the alleged offense has been stricken from the record by the court, and you are instructed to entirely disregard the same," etc. The court amended the instruction by adding the word "direct" before the words "testimony of Mrs. Boone." This was proper, and without prejudice to defendant, as the only testimony of Mrs. Boone that was stricken from the record by the court was her direct testimony.

9. After acting upon all of the instructions requested by the prosecution and by the defendant, the court, of its own motion, gave to the jury, among others, the following instruction: "You understand, as I apprehend, gentlemen, that you can render but one of two verdicts, either guilty or not guilty. Of course, if you find him guilty, it will be guilty of an attempt to commit rape." It is objected that the jury might have found the defendant guilty of a simple assault, and that the court erred in not so instructing. The objection is not well taken, for two reasons: (1) It clearly appears, from the evidence, that the defendant was either guilty of the offense charged, or not guilty at all. (2) If the defendant wanted the attention of the jury specifically called to the lesser offense of simple assault, he should have requested the court to do so, which he does not appear to have done. People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Guidice, 73 Cal. 226, 15 Pac. 44.

We conclude that there was evidence sufficient to justify the verdict, and that no material error was committed by the court during the progress of the trial. The judgment and orders appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

115 Cal. 184

## FOLEY v. CALIFORNIA HORSESHOE CO. (S. F. 349.)

(Supreme Court of California. Dec. 3, 1896.)

MASTER AND SERVANT—INJURY TO MINORS—CONTRIBUTORY NEGLIGENCE — FELLOW SERVANTS — ACTION BY INFANT—APPOINTMENT OF GUARDIAN AD LITEM — TAXATION OF COSTS — REVIEW ON APPEAL.

1. A boy, 14 years old, employed to operate a punching machine, is not, as a matter of law, guilty of contributory negligence in going behind the machine, at the direction of the assistant foreman, to adjust a bolt (a task which the boy had never before performed), though he knew that by reason of a defect in the belt the machine was liable to start at any moment.

2. The relation of fellow servant does not exist between an assistant foreman in a horseshoe shop and a boy operative who is under his control and subject to his orders, so as to relieve the master from liability to the boy for negligence of the assistant foreman.

3. Failure to appoint a guardian ad litem for an infant plaintiff will not render a judgment in his favor void.

4. Where an infant plaintiff's allegation of the appointment of a guardian ad litem is not sustained by the proof, the court may allow him, over defendant's objection, to file a new petition, and may then and there appoint a guardian ad litem, and order the trial to proceed.

5. The action of the trial court in the matter of taxing costs is not reviewable on appeal if the amount allowed was less than $300.

6. Error of the clerk in entering a judgment for costs against defendant in the sum claimed in plaintiff's cost bill, before the determination of defendant's motion to tax costs, is cured by an order of court reducing the amount.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Patrick F. Foley, a minor, by his guardian ad litem, against the California Horseshoe Company, to recover for personal injuries. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

T. Z. Blakeman, for appellant. W. G. Burke and Sullivan & Sullivan, for respondent.

HENSHAW, J. This is an action for damages for personal injuries by a minor against his employer. Plaintiff recovered a judgment under the verdict of the jury, and defendant appeals from the judgment, and from the order denying its motion for a new trial. It also appeals from the order taxing costs, and denying its motion to vacate the judgment.

Plaintiff, at the time of the accident, was 14 years and 4 months old. He had been working in the shop of the defendant for 14 months, and for four months immediately preceding the accident he had been engaged in punching horseshoes with a punching machine. The complaint avers that plaintiff was employed by defendant to punch holes in horseshoes by means of a machine known as a "horseshoe punching machine"; that at all times during his employment he was in the performance of his duties in the factory under the control of and subject to the orders and directions of defendant's assistant foreman; that on the 17th of June he was ordered by said assistant foreman to adjust a portion of the machinery operating the said punching machine; that to adjust said machinery was a hazardous undertaking; that the hazard was well known to defendant and to the assistant foreman, but that plaintiff was unfamiliar with said machinery and the manner of adjusting the same, and was ignorant of the hazard. Plaintiff, in obedience to the order from the assistant foreman, was adjusting the portion of the machinery when the machinery, by reason of its defectiveness and the defective and unsecured condition of the belts and pulleys used in operating the same, was suddenly set in motion, whereby plaintiff's right arm was caught in the machinery, and crushed and mangled. Defendant claimed that the accident resulted from the plaintiff's own negligence, and from the negligence of plaintiff's fellow employé, the assistant foreman. The punching machine was moved by a belt. When it was desired to stop the machine, the belt was thrown from the tight pulley to a loose pulley. The belt was so defectively constructed that one end of it at the place of juncture projected. By constant striking upon this projecting end, the belt would work back from the loose pulley on to the tight pulley, and so set the machine in motion. This defect was known to the plaintiff, and had by him been reported to Rodifer, the assistant foreman, who told the boy "that would be all right; that would not hurt nothing." The shifter used in moving the belt from the fixed to the loose pulley was likewise defective, and its condition tended also to cause the belt to move back upon the fixed pulley without the intervention of an operative. Upon the day in question the boy's machine was at rest. A tap bolt, which had fallen out from the box holding the shaft wheels at the rear of the machine, was taken by Foley to Rodifer. Rodifer directed the boy to screw the bolt into its proper place. He did not know how to do the work, and Rodifer gave him directions. While obeying these directions, and standing behind the machine, inside the wheel, screwing on this tap bolt, the sleeve of his right arm became entangled with a small cogwheel, and, as the machine started while he was thus at work, his arm was drawn in and crushed.

It is, perhaps, proper to say that this statement presents the evidence in a light most favorable to plaintiff. Nevertheless it is a statement borne out by the evidence, and from their verdict it is the view which the jury must have accepted. From this statement appellant claims that it appears that plaintiff, by his own testimony, knew the special danger and risk which, because of the defective appliance, must have attended the working of the machine; and that, having this knowledge, and his injury having resulted from this known defect, he stood as an adult with respect to his master's liability for any injury arising from it, and cannot recover; that he undertook to screw the nut upon the machine while it was in the condition which he himself considered and testified to as dangerous. Where the ordinary and usual occupation of a minor is the running or management of a machine, or is some employment in and about it, and the minor is shown to have knowledge of the working of the machine, its dangers or its defects, and where it further appears that the minor is not of such tender years as to be unable to appreciate the nature of the dangers or defects, it is beyond question the rule, sanctioned by a long line of authority, that he takes upon himself, as will an adult under the same circumstances, the perils and risks of his employment; and that, if injured in the course thereof, he may not look to his employer for compensation. But there is a distinction which, as a matter of humanity as well as law, should be drawn between such cases and those where the minor is put to a task which, while within the range of his employment, is to him in his inexperience and youth unusual and strange; and it is a case of the latter kind which we are here called upon to consider. Had the accident to the boy occurred while he was engaged in the ordinary operation of his machine, it could be said without hesitation that, knowing the peculiar danger to which he might be exposed by its sudden starting, and knowing, as he did, that it was liable thus suddenly to start, he continued in his employment, taking upon himself the responsibility for any accident which might result therefrom. But the accident did not occur while he was engaged in his ordinary occupation at the machine. It occurred while he was engaged in the unusual task set him, that of screwing on a fallen bolt. It is true that while engaged in this task he had still the knowledge that the machine was liable to start, but does this fact establish that for which appellant contends, viz. that he had assumed that particular risk while screwing on the nut, as he had assumed it generally in operating the machine? We think that, as a proposition of law, this cannot be said. Were the employé in this case an adult, the rule might well be different; but the very reason why an adult, under these circumstances, would be held to have taken the risk while screwing on the nut, serves to show the injustice and hardship which would result if it were sought to be applied to a minor. The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employé, when the facts are known to him, is presumed in law to exercise the same judgment upon those facts as would the employer. The employer's duty is fulfilled, and he is not negligent, if he puts the employé in full possession of the facts, and makes him acquainted with the attendant dangers and risks. Therefore, if an adult employé engaged in operating the punching machine, and knowing that it was liable suddenly and unexpectedly to move, were told to screw on the misplaced nut, it might very properly be said that in the performance of this task his judgment of any increased risk or danger attending it would be as good as his employer's, and that, if he chose, under those circumstances, to undertake the work, the responsibility for any accident that might befall him therefrom would be upon him alone. The conduct of the child, however, is and should be viewed and measured by a different rule. Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but, in addition to this, and more important than all, the judgment of the child is the last faculty developed. Knowledge he may have; facts he may acquire; but the ability to apply his knowledge, or to reason upon his facts, comes to him later in life. A child might be capable of understanding the construction, the use, and the danger of firearms; yet one would not for that reason feel justified, after due explanation, in giving them to him as playthings. The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment. When sent out to labor, they are told by their parents or guardians to obey. In the factory or shop unquestioning obedience is expected and exacted. They must go where they are sent; they must do as they are told. It would be barbarous to hold them to the same accountability as is held the adult employé, who is an independent, free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position. So here the child might well be expected to comprehend the likelihood of accident, and to know how to provide against it, when engaged in his usual employment in front of the machine. But when he is sent to the rear of it, and in among the wheels and mechanism, to perform a novel duty, we cannot say as matter of law that he entered upon its performance with a full appreciation of the increased dangers and risks, and with sufficient judgment to know how to avoid them. These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court. In this case, it is true, the boy knew, when he was engaged in screwing on the nut, that the machine might start, but it does not appear that he knew or had judgment to appreciate any added risk which the particular task rendered him liable to. The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which the adult would be called upon to display under the same circumstances. Each is required to use ordinary care, but the amount of care which the person of perfected intelligence and judgment must display is very different from the amount which the law in its humanity exacts of a minor. It is well said by the supreme court of appeals of West Virginia, in Turner v. Railroad Co., 22 S. E. 89: "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, but he is taught the lesson of obedience from his cradle, and he is required to respect the commands and pay deference to the judgment of his elders, until legally emancipated at the age of twenty-one years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master." We cannot say, therefore, as matter of law, either that the child with knowledge assumed the risks incident to the task, or that in performing the task he exercised less than the ordinary care required of him.

It is next claimed that plaintiff was injured because of the negligence of the fellow servant, Rodifer, and that for this reason plaintiff cannot recover. The case of Fisk v. Railroad Co., 72 Cal. 38, 13 Pac. 144, is here relied upon; but in the Fisk Case the boy had been put to work in the tool room, and under the directions of the boss of that room. In excess of his authority, the boss of that room sent him into another part and department of the shops, there to work, and it was there the boy was injured. It is said: "He was a boss in the tool room, and as such we may fairly assume he was authorized to control and direct the manner in which the work of that room was to be performed, and all things relating to the order and proper conduct of his branch of the business. * * * The employment to work in the tool shop was the subject-matter, and the control given to Snape and the directions to plaintiff to obey him must be construed with reference to and confined to such subject-matter." In the case at bar the plaintiff pleads and shows that in the performance of his duties in defendant's factory he was under the control of and subject to the orders and directions of defendant's assistant foreman, Rodifer. It was in pursuance of Rodifer's order, within the scope of his authority, that plaintiff was injured. In the case of Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535, the machinist Brunig had general supervision of the boys, and gave them orders and instructions. He put the plaintiff to work as a press boy, and directed him generally about his work until he was injured. It was there held that Brunig was the representative of the employer, and not a mere fellow servant with the one who was injured. We will not say, under these circumstances, that, between Rodifer, in control of the work, and the boy subject to his orders, the relation of fellow servant existed so as to relieve the employer of liability.

Certain instructions given by the court at plaintiff's request are complained of. One will serve as an example for all. It is as follows: "'The owners of dangerous machinery, who employ a minor and inexperienced person about it, unacquainted with its nature and use, are bound to take care that such person is duly instructed therein; and, if they either neglect this, or if express directions are given to use the machinery in a manner which must lead to danger, of which such person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care or circumspection, in a child of tender years as in an adult." It is claimed that this instruction is erroneous in assuming as a fact that the machinery was dangerous; but it is spoken of as a dangerous machine, not because of the claimed defect in the belt and shifter, but because, as a matter of common knowledge, any machine operated by a swiftly-moving belt, and containing as parts of its mechanism pulleys and cogs, and used for punching holes in iron, is in and of itself a dangerous machine. The proposition of law is unassailable.

The complaint averred the appointment of a guardian ad litem, and this averment was traversed by the answer. Upon the trial, when plaintiff undertook to make proof of such appointment, the court held the proof to be insufficient, and the appointment void, but permitted plaintiff, over the objection of defendant, to file a new petition, and then and there made its order appointing a guardian ad litem, and ordered the trial to proceed. This is not ground for reversal. The judgment for plaintiff, even without the appointment of a guardian ad litem, would not have been void (Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382); and the practice adopted has been approved in Re Cahill's Estate, 74 Cal. 52, 15 Pac. 364.

Plaintiff filed a cost bill in the sum of $314, and the clerk, without awaiting the determination of defendant's motion to tax costs, entered a judgment for the sum claimed. Defendant moved to vacate the judgment. The court disallowed $22 of plaintiff's bill and allowed costs in the sum of $292, and likewise ordered the amount of costs specified in the judgment to be reduced to this amount. The amount of costs allowed being less than $300, the action of the trial court in the matter is not reviewable upon appeal. Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101. The clerk's error in entering the judgment for costs was cured by the order of the court reducing the amount, and the refusal to vacate the judgment could have worked no injury to appellant. The judgment and order appealed from are affirmed, as is also the order of the court refusing to vacate the judgment. The appeal from the order taxing costs is dismissed.

We concur: McFARLAND, J.; TEMPLE, J.

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(115 Cal. 89)

## SCOTT v. HOTCHKISS et al. (Sac. 91.)[1]

(Supreme Court of California. Nov. 27, 1896.)

MORTGAGE — RIGHT TO GROWING CROPS — RIGHTS OF TENANT — RECEIVER OF RENTS AND PROFITS.

1. A mortgage of real estate provided, in the case of foreclosure, for the appointment of a receiver of the rents and profits. *Held* that, in the absence of the affidavit required in mortgages of growing crops, such mortgage did not entitle the receiver to a crop growing on the land in possession of a tenant, but only so much thereof as was duly reserved for rent.

2. On an allegation that the security was insufficient, the court was authorized to appoint a receiver, in accordance with the stipulations of a mortgage, as against the claims of a purchaser without notice.

Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

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[1] Rehearing denied.

Action by P. F. Scott against O. E. Hotchkiss and others. From a judgment for plaintiff, defendants appeal. Affirmed in part, and reversed in part.

White, Hughes & Seymour, for appellants. Holl & Dunn, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage executed by defendant Hotchkiss. The mortgage contains a provision that in case of default and the commencement of an action to foreclose, on the filing of a complaint in foreclosure, or at any time thereafter, "the court shall, if requested by the plaintiff, name some disinterested person as receiver, and shall authorize such person as receiver, to take possession of the mortgaged premises, and collect the rents and profits, and to apply them to the satisfaction of such judgment, and to sell said premises in the same manner as lands are sold upon execution, and to continue in possession of such premises, and to collect the rents and profits, until the premises are redeemed from such sale or until title is vested in the purchaser." The mortgage was not accompanied with an affidavit, as required in mortgages of growing crops, and was not recorded or indexed as a chattel mortgage. After the mortgage, Hotchkiss sold and conveyed the land to defendant Fountain, subject to the mortgage; but it was found that Fountain had no actual notice of the provision in the mortgage in regard to the appointment of a receiver. The mortgage was executed in 1891. In 1892, Millard entered upon the land, as tenant of the mortgagor, and continued in possession as such tenant up to the time of the commencement of this action, and the appointment of a receiver herein. Each year he has cultivated the land in wheat, barley, and hay, rendering as rental one-fourth the crop; delivering the same in the field, the grain in sacks, and the hay in bales. Millard had no actual knowledge of the mortgage until after he took the lease, and no knowledge of the provision in regard to a receiver until the commencement of this action. This action was commenced in February, 1895. As to the condition of things when a receiver was appointed, the court found as follows: "That there is growing upon said premises a crop of wheat and hay, as follows: Sixty acres of summer fallow, twenty acres of winter sown, and about one hundred acres of volunteer. That said crop was put in by the defendant Millard, and was, except twenty acres of winter sown, put in prior to December 1, 1894. That the defendant Millard furnished all of the necessary seed, labor, and teams used in putting in said crop. That it is customary in leasing farming lands, such as the mortgaged premises, in the vicinity of said premises, where they are leased for a share of the crop, to reserve one-fourth of all grain and hay grown on the premises as rental, the grain to be delivered in sacks, and the hay in bales, to the lessor, on the leased premises; the other three-fourths of the crop to be retained by the tenant as compensation for the labor, seed, use of teams and machinery, and other necessary expenses incurred by him in producing the crop, excluding the harvesting, baling, sacking, and piling the same. In the production of such crop, the relative value of the use of the land to the value of the labor, seed, use of teams and machinery, and other necessary expenses of the tenant, is as one-fourth is to three-fourths; and, of the crops so growing on said premises, at least three-fourths thereof in value and quantity are the result of defendant Millard's industry and capital, except that the labor and expense incurred in harvesting, sacking, threshing, baling, and piling said entire crop would come out of said three-fourths." The appeals are separately taken. Millard claims three-fourths of the crop, contending that the right to rents and profits is all that is granted in the mortgage, and all that, according to equity, can be recovered by plaintiff. Fountain contends that this provision in the mortgage conferred no rights whatever, and that he (Fountain) is entitled to the rent reserved.

The general subject here under consideration was discussed in the late case of Simpson v. Ferguson (Cal.) 44 Pac. 484. It was there held that growing crops could be mortgaged only as provided in section 2955 et seq., Civ. Code. They are therefore not covered by an ordinary real-estate mortgage. While growing, they are real estate, and are included in the mortgage. But, if the mortgagor is in possession, he is entitled to the rents and profits, and to the crops if harvested before foreclosure, and the transfer of title thereby to a purchaser. In Simpson v. Ferguson the court quoted approvingly from Sexton v. Breese (N. Y. App.) 32 N. E. 133. In that case, the mortgagor, subsequent to the mortgage, sold a growing crop of wheat, and then delivered possession of the land to the mortgagee. It was held that the mortgagee in possession took subject to the rights of the purchaser of the crop, and that the fact that the mortgagee was entitled to the rents and profits did not matter. He was not therefore entitled to the crop, which was in part the result of the labor of the mortgagor. Practically the same thing was decided in West v. Conant, 100 Cal. 231, 34 Pac. 705, and in Freeman v. Campbell, 109 Cal. 360, 42 Pac. 35. These cases clearly establish the proposition that the court erred in appointing a receiver to take possession of the crop as against the tenant. He is entitled to his share of the crop, which was wrongfully taken from him by the receiver.

The case of Fountain must be discussed on different lines. It has been held both here and in other states that the stipulation in the mortgage that a receiver may be appointed, and directed to take possession and collect the rents and profits, enlarges the rights of the mortgagee; at least, as against the mortgagor. Unless such a clause in a mortgage gives the mortgagee an interest in the growing crop, or in the rents and profits, I do not see how it can affect the rights of others or authorize a court of equity to appoint a receiver. No stipulation can confer jurisdiction upon the court to appoint a receiver in a case where the court has no such authority given by law. It is not necessary to decide the matter in this case, however, because there is an averment that the security is insufficient. In such case the court is authorized to appoint a receiver (section 564, Code Civ. Proc.), and take and hold the rents and profits to secure the debt. See, also, Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414.

The purchaser from Hotchkiss is in no better position in regard to this matter than Hotchkiss would have been. It is to be noticed that it is expressly found that the rent reserved in the lease to Millard is fair and adequate, and represents the value of the use and occupation, as well as the actual rent of the land. The mortgagee, under the very terms of the mortgage, was not entitled to more than this. As to appellant Fountain, the judgment is affirmed, but as to defendant Millard the judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

We concur: McFARLAND, J.; HENSHAW, J.

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(115 Cal. 316)

## FASSETT v. WISE et al. (Sac 9.)

(Supreme Court of California. Dec. 14, 1896.)

CHATTEL MORTGAGES—RECORDING—REMOVAL OF PROPERTY.

A mortgagor of chattels, after the execution of the mortgage, but before it was recorded, removed the property to another county. The mortgage was subsequently recorded in the original county, but not in the county to which the property was removed, until after an attachment had been levied thereon. *Held*, that under Civ. Code, §§ 2957, 2959, providing that a chattel mortgage shall be void as to creditors unless recorded in the county in which the mortgagor resided, and also the county in which the property is situated or to which it may be removed, the mortgage was inoperative as against the attaching creditor. Garoutte and Van Fleet, JJ., dissenting.

In bank. Appeal from the superior court, Tulare county; William W. Cross, Judge.

Action by B. A. Fassett against John H. Wise and others. From a judgment for defendants, the plaintiff appeals. Affirmed.

Bradley & Farnsworth and Denson & De Haven, for appellant. E. O. Larkins and N. T. Clotfelter, for respondents.

TEMPLE, J. This case involves the right of defendants to seize under attachment against Nunes a certain flock of sheep. Nunes owned the sheep, but it is claimed that plaintiff had a chattel mortgage upon them, and the levy was made regardless of the alleged mortgage. Christy & Wise were creditors of Nunes, and the question is whether the mortgage was valid against creditors; and this depends upon the question whether it had been recorded as required by law. The mortgage was executed on the 14th day of March, 1894, in Kings county, where the sheep then were, and where Nunes then resided. The property was removed to Tulare county April 3d following, the mortgage not yet having been recorded anywhere. The mortgage was recorded for the first time in Kings county on the 28th of the same month, at 4:30 p. m. At 5:30 p. m. of the same day the property was attached in Tulare county at the suit of defendants. On the 30th of the month—that is, two days after the attachment—the mortgage was recorded in Tulare county.

The Civil Code prescribes (section 2957) that the mortgage shall be void as to creditors unless recorded. Section 2959 reads as follows: "A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resided, and also of the county in which the property mortgaged is situated or to which it may be removed." In section 2965 it is provided that, in case property mortgaged shall thereafter be removed to another county, it shall be void as to creditors unless it is recorded in such county within 30 days after the removal or the mortgagee shall take possession, as provided in the next section. For the plaintiff it is contended that the provision in section 2959 that the mortgage must be recorded where the mortgagor resides, and where the property is situated, refers to the time of the execution of the mortgage, and that, if the mortgage is recorded in those places before there are intervening rights, it becomes operative as to the whole world, although, when recorded in the county where the property was situated at the time of the execution of the mortgage, the property had been removed to another county; that section 2965 then comes into effect, and the mortgagee has 30 days after the removal of the property within which to record the mortgage in the county to which the removal was made. I cannot agree altogether with this conclusion. I think the recordation directed in section 2959 is that required by section 2957 to render the mortgage operative at all as against creditors. On the other hand, section 2965 plainly speaks of a removal which has taken place after the mortgage has been recorded so as to be effective against creditors. The clause, therefore, "or to which it may be removed," cannot be helped out or explained by reference to section 2965. The recordation provided for in that clause must be one which may, with other acts, avail to make the mortgage operative as to creditors and others in the first instance. Section 2965 adds a sort of condition subsequent, which, if not complied with, may defeat the mortgage after it has been recorded so as to be operative as against creditors. I am inclined to agree with the construction to the extent of holding that "resides" and "is situated" refer to the time of the execution of the mortgage. That construction seems in accord with authority, so far as we have authority upon that subject, and is, I think, the natural import of the language used. Jones, Chat. Mortg. § 267; Cobbey, Chat. Mortg. § 573; Ping. Chat. Mortg. § 362; Bank v. Weed, 89 Mich. 357, 50 N. W. 864. I think that it was intended that the mortgage should be recorded at once, and in such case it would be recorded where the mortgagor then resided, and where the property was then situated. But even if the mortgagee were to use due diligence in the recordation of his mortgage, still, if two records are required, both records cannot be made at once; and it has been elsewhere held that, even if not recorded at once, it is not void, but becomes operative, as against creditors and others, when it is recorded as required by law. It is not easy to give a definite meaning to the clause, "or to which it may be removed." It is evidently highly elliptical. Something must be supplied. If I am right in the position that it cannot refer to a removal after the mortgage has once been recorded so as to be in force as against creditors then, it must refer to a removal after the execution of the mortgage, but before it has been properly recorded. It means, I think, simply this: "Or, if the property has been removed to another county, then in the recorder's office of that county." That is to say, if the property has been removed to another county after the execution of the mortgage, and before it has been recorded in the county where the property was situated at the time of its execution, then it must be recorded in the county to which the property has been so removed; otherwise, it is void as to creditors and subsequent purchasers and incumbrancers in good faith. In this case the property had been removed to Tulare county before the mortgage was recorded in Kings county, and the mortgage had not been recorded in Tulare county at the time of the levy. It was, therefore, void as to creditors, and Christy & Wise, it is found, were creditors. It may be added that the property, during the whole time, remained in the possession of the mortgagor until the levy. The judgment is affirmed.

We concur: HARRISON, J.; HENSHAW, J.

VAN FLEET, J. I dissent. I agree with the construction of the statute contended for by plaintiff.

GAROUTTE, J. I dissent, and will hereafter express my views. [See 47 Pac. 1095.]

McFARLAND, J. I concur in the judgment of affirmance, and in most of the opinion of Mr. Justice TEMPLE. I do not think that a chattel mortgage which has never been recorded in the county where the property was situated at the time of the recordation is good against a creditor or subsequent purchaser. Surely, the latter is entitled to some reasonable opportunity of discovering whether or not there is a recorded mortgage on property which he contemplates buying or attaching. Upon inquiry he learns that the property has for several weeks been in the county where it then is, and that there is no recorded mortgage in that county. Inquiring further, he finds that the property had, several weeks before, been brought from another county, where it had been continuously for several months previous to that time, and no mortgage had been recorded there. He thus learns that there has been no mortgage recorded in either county, and that there then could be no valid recordation except in the county where the property was then situated. Under these circumstances he could, in my opinion, safely proceed to purchase or attach. Section 2959 is no doubt somewhat obscure; but I think it is intended to provide for a case where the property is removed soon after the execution of the mortgage, and before its recordation, and to declare that then the recordation must be in the county to which it has been removed, —the county where the property is then situated. Under appellant's contention a mortgagee might refrain from recording his mortgage until long after the property had been removed to a distant county, and then, getting information of a proposed sale or attachment where the property then was, defeat it by suddenly recording his mortgage in the original county. I do not think that the statute gives countenance to such strategy.

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(5 Cal. Unrep. 537)

## WARREN v. CONNOR et al. (Sac. 121.)

(Supreme Court of California. Dec. 15, 1896.)

ESTOPPEL IN PAIS.

In an action against C. and her son for conversion of farming implements on a certain ranch, it appeared that C. and her husband sold such ranch, and all farming implements on it, to one H.; that afterwards H. sold all the personal property to plaintiff; that, before the sale to H., the son bought all the implements on the ranch, and farmed the land as a tenant; that H.'s foreman, in company with the agent of C. and husband, made an inventory of the implements on the ranch; that the son did not point them out; that before the transfer of the personal property the son told H.'s agent that the implements were his, and the agent knew he was using them; and that, at the time, defendants were living in one of the houses on the ranch, the son being a tenant of H. There was no claim that the son had in any manner misled H. as to the ownership of the implements. *Held*, that the son was not estopped from asserting his ownership as against H. or plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action of trover by M. J. Warren against Sarah J. Connor and W. W. Connor for the conversion of certain personal property, consisting principally of farming implements, tried to the court without a jury, in which there was a judgment for plaintiff. From an order denying their motion for a new trial, defendants appeal. Reversed.

Hiram W. Johnson, for appellants. Armstrong & Bruner and J. C. Ball, for respondent.

HAYNES, C. This appeal is by the defendants from an order denying their motion for a new trial. The action is in trover for the conversion of certain personal property, consisting principally of farming implements, of the alleged value of $660. The cause was tried by the court without a jury, and the court found that the defendants had converted to their own use certain specified portions of the said property, of the value of $594. The plaintiff claims title to the property in controversy through an alleged sale thereof by Thomas Hovenden to her. This property was upon a large ranch containing about 3,900 acres, which was formerly owned by George D. Connor and the defendant Sarah J. Connor, his wife. On December 23, 1890, said George D. Connor and Sarah J. Connor entered into a contract with said Hovenden to exchange said ranch for certain real estate owned by Hovenden. This contract provided that said Hovenden should have, in addition to the real estate, "one-fourth of all growing crops, and all the farming implements of every description now upon said premises, and also the McClennan and the Sanders barn, with all the hay, straw, etc., therein, for the sum or price of $34 per acre." The first parties also agreed in and by said contract to sell to Hovenden "whatever hay is left in the home barn upon said premises for the sum or price of $10 per ton; also, 160 head of cattle, more or less, now upon said premises, at the sum or price of $15 each." On February 17, 1891, said George D. Connor and wife, by L. F. Ward, their attorney in fact, executed to Hovenden a bill of sale of the following described personal property, then on the ranch known as the "Connor Ranch," namely: "158 head of cattle, valued at $15 each; 27 hogs of 219 pounds, 87 hogs of 100 pounds, 50 pigs, in all valued at $700; 50 tons hay at $10 each, valued at $500; 70 sacks of wheat, 140 pounds, at 1¼ per pound, valued at $122; also, all the farming implements and vehicles, including wagons, on said ranch on the 23rd day of December, 1890, together with one-fourth of all growing crops upon said ranch, but excepting therefrom one covered spring wagon and all buggies,—it being the intention of this instrument to carry into effect a certain agreement made by the above-named parties of the first part with the party of the second part, and dated the 23rd day of December, A. D. 1890." Mrs. M. J. Warren, the plaintiff in this action, claims title to the property in controversy under the following instrument: "San Francisco, October 19, 1891. Mrs. M. J. Warren bought of Thos. Hovenden all the personal property that Geo. D. Connor and Sarah J. Connor sold me on the Connor ranch, Sacramento county, California, saving and excepting what was delivered to late Mr. Arthur Bunster to my account. Received payment in full, ten dollars. I authorize the said Mrs. M. J. Warren, who now lives on the ranch, to take full possession of the property as her own wherever she may find it. Thos. Hovenden." The defendant W. W. Connor claims to be the owner of all the property described in the findings, and, as to the hay, it is contended that Hovenden and his agent received all the hay mentioned in the contract and bill of sale above mentioned. In relation to his ownership of the farm implements in controversy, the defendant W. W. Connor testified, in substance: That, about 11 years before the trial, he and his two brothers, George T. and R. L. Connor, formed a co-partnership under the firm name of Connor Bros., and for about three years thereafter said co-partnership farmed a large part of the ranch. That, at the time they commenced farming, most of the implements then on the farm were old and nearly worn out. That the firm purchased farming implements with their own money, and in their own name, sufficient to run the place. This co-partnership continued for about three years, when the defendant W. W. Connor bought out the interest of his brothers, and he continued, to the time of the sale to Hovenden, to farm the land in the same manner as other tenants paying rent therefor. That said implements sued for were purchased in part by said co-partnership, and in part by said defendant after the dissolution of the partnership, and while he was farming the land on his own account. He specified the persons from whom he purchased all, or nearly all, of the implements included in the findings of the court, and as to these general facts there is no contradiction of his testimony.

It is contended, however, on behalf of the plaintiff, that the defendant W. W. Connor had seen the contract made by his father and mother with Hovenden in December, 1890, and also that he was present when the personal property was delivered over to Arthur Bunster, as the agent of Hovenden, and that he did not make any objection. But whatever farming implements were bought by Hovenden were bought in December, and their value was included in the price of the land, and there is no evidence that W. W. Connor, either by representations or conduct, misled him as to their ownership. Counsel for respondent is mistaken in saying that defendant W. W. Connor, on his cross-examination, "said he signed the agreement containing the clause, 'together with one-fourth of all the growing crops, and all farming implements, of whatsoever description, now upon said premises.'" At the folio cited by counsel, defendant was asked: "Q. You say you saw that agreement? A. I did." Besides, the contract itself was put in evidence, and it does not show such signature. The only evidence touching any signature by said defendant occurs in the testimony of Dalzell, who was Hovenden's foreman on the ranch, Bunster being the agent who received the cattle and hogs that were delivered in February. Dalzell stated that he (W. W. Connor) "put his name to the signature of the whole transaction. I do not know where the paper is now that he signed. I took an inventory, at the time, of all the property that was turned over, and pointed out as the property of Mr. Hovenden." The witness gave no explanation as to what paper it was that was signed by defendant, nor for what purpose it was made. He produced a book upon the trial in which he had made an inventory of all the farming implements, but he did not state where they were, nor by whom, if by any one, they were shown to him; but in his affidavit made in reply to the affidavit of Mr. Ward, the attorney in fact of George D. and Sarah J. Connor, and which was read upon defendant's motion for a new trial, Dalzell said "that on the 13th day of February, 1891, this deponent was driven in a buggy by said L. F. Ward over the said Connor ranch, and that while he and said L. F. Ward were in said buggy, as aforesaid, this deponent noted down in his pocketbook the several agricultural implements lying in different places on said ranch, and made an inventory thereof." It may be fairly assumed that said inventory was the one produced on the trial, and the circumstances under which it was made shows not only that there was no gathering up of the implements and formal delivery thereof, but that the defendant W. W. Connor did not point out the implements to the witness. The said defendant further testified that, at the time the bill of sale was made, his father had upon the ranch a truck wagon, a mower, one or two single plows, two seed sowers, and a hay rake; that at the time the cattle and hogs were transferred, in February, there was nothing said about the farming implements; that prior to said transfer he had many conversations with Mr. Bunster about the ranch, and told him that the farming implements were his; and that Bunster knew that he was using them. The evidence that the farming implements in controversy were purchased by and were the property of the defendant W. W. Connor at the time the contract of sale was made with Hovenden by his father is uncontradicted. His father could not, by any contract he could make with Hovenden, vest in him any right or title thereto, and the question, therefore, is whether the defendant is estopped by his conduct from asserting his ownership as against Hovenden or his transferee. There is no pretense that the defendant W. W. Connor was present at the time the contract was made in December, or in any manner misled Hovenden as to the ownership of the farming implements. They were not sold as separate property, but were included in the price paid for the ranch, while all the other personal property was purchased by Hovenden, as distinct from the ranch, at certain specified prices, and that property was not delivered or paid for until the number and value of the cattle and hogs were ascertained, in February. It is true, the defendants were still living in one of several houses upon the ranch, but W. W. Connor was there as the tenant of Hovenden of a portion of the land, cultivating the same upon shares, and using said implements; and Bunster, the agent of Hovenden, and the person to whom the other personal property was delivered, was told by the defendant, prior to the execution of the bill of sale, that the farming implements were his, and this testimony given by defendant is not contradicted. All the conversations with said defendant, testified to by the plaintiff and her son, occurred after plaintiff's purchase from Hovenden, and his alleged statements in those conversations, therefore, could not have influenced her purchase. We fail to find any evidence which would justify a finding that W. W. Connor was estopped by his conduct or declarations from asserting his ownership, either as against Hovenden or the plaintiff, as to the farming implements. As to the hay there was a direct conflict; but as the court did not find the value of the hay separately, but lumped the value of all the property, the judgment cannot be modified, and a new trial is therefore necessary.

In view of the conclusion above stated, it is not necessary to notice the affidavits of new evidence, and the counter affidavits filed thereto, further than to say that in our judgment they strengthened defendants' grounds for a new trial. It should be added, in view of a new trial, that the only ground of the alleged liability of the defendants is for a conversion of the property described in the complaint. We find in the record no evidence of a conversion by the defendant Sarah J. Connor; and if, upon another trial, a conversion should be shown to have been made by only one of the defendants, judgment should be rendered in favor of the other. The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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115 Cal. 301

## THOMPSON et al. v. WOOD et al. (S. F. 386.)

(Supreme Court of California. Dec. 15, 1896.)

EXECUTORS AND ADMINISTRATORS — RESIDENCE — PLACE OF SUIT—COSTS.

1. An executor, actually residing in another county, has no official residence in the county in which his testator resided and the will was probated, for the purposes of suit.

2. In an action against executors, a stipulation, on the part of plaintiffs, waiving their claim for costs against the executors personally, is inoperative, as against the provisions of the statute relating to costs as between the executors and the estate.

3. An executor is not a public officer, within the meaning of Code Civ. Proc. § 393, subd. 2, relating to the place of trial of actions against public officers.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Geneva S. Thompson and others against Harvey Wood and others, executors of the estate of Susan Scribner, deceased. From an order denying a motion for change of venue, defendants appeal. Reversed.

Reddick & Solinsky and Sullivan & Sullivan, for appellants. W. W. Foote, T. C. Coogan, and J. J. Lerman, for respondents.

TEMPLE, J. This is an appeal from an order refusing to grant a change of venue from the city and county of San Francisco to the county of Calaveras. The action is brought to obtain a money judgment against the defendants, as executors of the last will and testament of Susan Scribner, on account of moneys alleged to have been received by the testatrix in her lifetime. Susan Scribner was a resident of San Francisco at the time of her death. Her will was probated there, and her estate is now being administered there. Notice to creditors was there published, and in the notice a place is designated in San Francisco for the presentation of claims. The executors, defendants, however, all reside in Calaveras county, and made the motion for the change of venue to that county. The motion was made at the proper time and in the mode prescribed, and no counter motion was made that the case be retained for the convenience of witnesses, nor were any facts shown in reply except those above stated. The motion should have been granted, as the case made by appellants is clearly within the section alluded to.

The respondent makes two points in answer to appellants' claim:

1. He says that the official residence of the defendants is in San Francisco. The statute has not designated any official residence for executors, and they are not public officers within the meaning of subdivision 2 of section 393, Code Civ. Proc. It is said they are but representatives of the deceased. The executors are in a sense trustees, but not of the testatrix, who has no longer trustee or representative, but for the beneficiaries under the will and the heirs and creditors. No rule of law with which I am acquainted gives countenance to the idea that there is an official residence for an executor. In some states the venue of actions is specially declared to be where it would have been necessary to sue the deceased. We have no such law. At common law the executor was sued, in transitory actions, where he resided.

2. At the hearing the respondents waived their claim for costs against the executors personally, and agreed to look to the estate alone for them. In certain cases the executors may be held personally for costs. The plaintiffs have nothing to do with this, and cannot control the matter as between the estate and the executors. But this would make no difference. It is the executors who must defend the action, and they are responsible for a proper defense.

In no one feature does the case resemble Sayward v. Houghton, 82 Cal. 629, 23 Pac. 120. There the bank had not only no interest, but there was no reason why it should appear in the action at all. Here the executors were the real defendants, and the persons who are inconvenienced by being compelled to defend in a county which is not that of their residence. It is a matter entirely of statutory control, and the meaning of the Code provisions cannot be mistaken. The order is reversed, and the cause remanded.

We concur: McFARLAND, J.; HENSHAW, J.

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5 Cal. Unrep. 543

## STEPHENS et al. v. HAMBLETON et al.

(Sac. 165.)

(Supreme Court of California. Dec. 15, 1896.)

EJECTMENT—MOTION FOR NONSUIT.

In ejectment, defendant's motion for a nonsuit is properly denied where it appears that plaintiffs bought the property from its owner, and took a bond for deed, under which they entered into and held possession of the property, claiming title thereto for more than two years before defendants entered and ousted them.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; W. C. Van Fleet, Judge.

Action of ejectment by B. H. Stephens, administrator, etc., of P. H. White, deceased, and others, against J. W. Hambleton and others. From a judgment in favor of plaintiffs, and an order refusing a new trial, defendants appeal. Affirmed.

R. Clark, for appellants. F. E. Baker and Craig & Hawkins, for respondents.

BELCHER, C. This is an action of ejectment to recover possession of a strip of land, containing $25^1/_5$ acres. It appears that plaintiffs and defendants own adjoining tracts of land in Yolo county, plaintiffs' tract lying north of defendants' tract. The strip in controversy extends along the dividing line of the said tracts from the east to the west side thereof, and is claimed by both parties. The question is as to the true location of this dividing line. The case was tried by the court without a jury, and the findings upon all the issues were in favor of the plaintiffs. The judgment was that the plaintiffs recover possession of the said strip of land, and damages, in the sum of $475, sustained by plaintiffs by reason of the wrongful detention thereof. From this judgment, and an order refusing a new trial, defendants appeal.

1. The court did not err in denying defendants' motion for nonsuit. All of the deeds offered in evidence by plaintiffs were admitted without objection by defendants. Copies of

the deeds are not set out, but most, if not all, of them had been recorded, and, presumably, they were properly executed, acknowledged, and certified, so as to entitle them to record. The fact that plaintiffs bought the property from its owner, and took a bond for a deed, under which they entered into and held possession of the property, claiming title thereto, for more than two years before defendants entered and ousted them, was sufficient to enable them to maintain the action. Prior possession alone, as against a mere intruder, is sufficient to support an action of ejectment. Potter v. Knowles, 5 Cal. 88; Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; Shanahan v. Tomlinson, 103 Cal. 89, 36 Pac. 1009.

2. It is claimed that the findings were not justified by the evidence. It is true the evidence was conflicting in many respects, but there was evidence sufficient, in our opinion, to justify all of the findings. The judgment cannot, therefore, be disturbed on this ground.

3. It is also claimed that the court erred in admitting certain evidence over the objection of defendants, and in refusing to strike out, on their motion, certain evidence given. In our opinion the record discloses no material error in any of the rulings complained of. Each of the said rulings appears to have been justified and proper. The damages awarded were authorized by the pleadings, evidence, and findings. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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115 Cal. 330

## MARSHALL et al. v. FARMERS' BANK OF FRESNO. (No. 18,448.)

(Supreme Court of California. Dec. 17, 1896.)

PURCHASE OF LANDS—NOTICE OF TRUST.

Under Pol. Code, § 3519, requiring the register to prepare a patent on surrender of the certificate of purchase by the person entitled to it, and to certify to the governor that the party named in the prepared patent is entitled to it, a purchaser from one to whom a patent is issued absolutely on such a certificate of the register is not chargeable with notice that the certificate of purchase had been transferred to the patentee merely as an attorney. 42 Pac. 418, affirmed.

In bank. For opinion in department, see 42 Pac. 418. Reversed.

PER CURIAM (BEATTY, C. J., not participating). Upon further consideration of this cause in bank, we adhere to the views expressed in the opinion filed in department 1 (42 Pac. 418), and, for the reasons therein given, the judgment and order denying defendant's motion for a new trial are reversed.

TEMPLE, J., being disqualified, did not participate in this decision.

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5 Cal. Unrep. 544

## BYXBEE v. DEWEY. (Sac. 35.)

(Supreme Court of California. Dec. 15, 1896.)

REPLEVIN—ANSWER—SUFFICIENCY OF DENIAL—SALE—CHANGE OF POSSESSION.

1. A complaint alleged that plaintiff was the owner and entitled to the possession of certain personal property taken by defendant. The answer denied that plaintiff was "the owner in possession and entitled to the possession" of the property, and alleged that defendant was, and had been for a long time, the owner and in the possession of the property. *Held*, that the affirmative averment was sufficient to negative the allegation that plaintiff was entitled to the possession.

2. Defendant purchased of a debtor a number of raisin trays in payment of a debt. The trays were not removed from the shed on the debtor's farm where they were stored, but defendant wrote his name on a large number of them, and kept a man continuously at the debtor's house to look after the trays. *Held*, that there was no such open and continuous change of possession as would render the alleged purchase valid as against execution creditors of the vendor.

McFarland, J., dissenting.

In bank. Appeal from superior court, Fresno county; Stanton L. Carter, Judge.

Action by J. O. Byxbee against Henry Dewey. From a judgment for defendant, plaintiff appeals. Reversed.

L. L. Cory, for appellant. W. D. Grady, for respondent.

PER CURIAM. The plaintiff brought this action to recover the possession or value of 11,000 raisin trays, more or less. The case was tried before a jury, and the verdict and judgment were in favor of defendant. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order denying his motion.

Two propositions are relied upon and urged as grounds for a reversal. They are: (1) That the denials in defendant's answer were not sufficient to raise an issue as to plaintiff's right to recover possession of the property sued for; (2) that the purchase of the said property by defendant was not accompanied by an immediate delivery, and followed by an actual and continued possession thereof, as required by section 3440 of the Civil Code, and hence it was subject to seizure by a creditor of the seller. The complaint alleges that on the 24th day of June, 1893, the plaintiff was the owner and entitled to the possession of the personal property before mentioned, and that on said day the defendant, without the consent and against the will of the plaintiff, took said property from the possession of plaintiff and still retains the same. The answer "denies that heretofore, to wit, on or about the 24th day of June, 1893, plaintiff was the owner, in the possession, and entitled to the possession" of the personal property described in the complaint, and further "denies that heretofore, to wit, on or about the 24th day of June, 1893, the said defendant, without the consent of plaintiff and against his will, took the said trays from plaintiff's possession, and still withholds the same," and alleges "that said trays were at said time, and for a long time prior thereto, the property of the defendant and in his possession." And it further alleges, in a separate answer, and by way of cross complaint, that on or about the 1st day of March, 1893, the defendant purchased the said trays from one William Applegarth, and thereupon took possession thereof, and ever since has been in the continuous possession of said property.

It is argued, for appellant, that the denials in the answer are conjunctively stated, and are therefore evasive and insufficient, and that, in effect, there is no denial of the averment that plaintiff was entitled to the possession of the property. The answer was not well drawn, but it must all be read together, and, when so read, we think it must be held sufficient. The affirmative averment that the trays were, and for a long time had been, the property of defendant, and in his possession, was sufficient to negative the averments of the complaint as to plaintiff's ownership and right of possession. "It is not essential that a traverse should be expressed in negative words. The averment in the answer of the contrary of what is alleged in the complaint has been held to be equivalent to a denial." Perkins v. Brock, 80 Cal. 320, 22 Pac. 194; Miller v. Brigham, 50 Cal. 615.

As to the second proposition, section 3440 of the Civil Code provides: "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. The rule declared by this section was not new in this state when the Codes were adopted. Substantially the same provision was found in the statute of frauds in 1860, when the case of Stevens v. Irwin, 15 Cal. 503, was decided. In that case the court, in construing the meaning of the statute, said: "The delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee." And in Cahoon v. Marshall, 25 Cal. 198, the court, speaking of the same statute, said: "What constitutes an actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is not of difficult solution. It is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased." Since the above-mentioned decisions were rendered there have been numerous other decisions by this court to the same effect, and the rule is now firmly established that to constitute such a change of possession of personal property as will make the transfer valid against creditors of the vendor, there must be such a change of the apparent custody of the property as to indicate to the world that a change of ownership has taken place, and to put one dealing with the vendor with respect to the property upon inquiry as to its ownership.

The question, then, is, was there such a change of possession of the trays in controversy as was required to make a valid transfer thereof as against a creditor of the former owner? For the plaintiff it was proved that he purchased the trays on June 8, 1893, at a sale thereof made by the sheriff under and by virtue of a writ of execution issued on a judgment recovered by one Yancey against William Applegarth in the superior court of Fresno county, and that the trays were then stored in a dry house and shed situated on a place occupied by Applegarth, about six miles west of Fresno. For the defendant Mr. Applegarth testified: "I sold the trays as they laid in the shed and dry house to Henry Dewey on the 25th day of February. At the time of the sale I went with Mr. Dewey to the shed, and I said, 'There is your trays and your sweat boxes,' and that was, I presume, all the actual delivery that was made. I don't know that Mr. Dewey did anything after that in reference to the trays. He stayed in the shed awhile, but went back to the house. I do not know of anything else being done. I owed Mr. Dewey a debt, and he said he wanted a settlement, and I sold him the trays. At that time I did not expect to have any opportunity to use the trays. I did nothing with the trays after the sale. I put Mr. Dewey in charge of them when I sold them to him. After the sale his son Charles came there, and, as I understood, was in charge. He stayed there until the property was sold, and I had no more control of the property, and then he went away. The trays remained there just the same as they did before and up to the time of the execution, and Mr. Dewey never attempted to take any of them away. I never saw him attempt to take any of them away. A while after I sold them I noticed there was a writing on some of them. Some of them had 'H. Dewey,' and some of them 'H. Dewey's trays.' I live in the house on the place where the trays were. I cultivated and took care of a part of the place. Where the trays are there is no cultivation. I exercised the same acts of ownership over the place as I did before. I lived there the same as before. Mr. Dewey's son came over there and did some work for me. He told me he was going to take charge of the trays. He ate and slept in my house, and was around the place generally during the day. He didn't stay near the trays any more than I did. There was nothing to indicate to anybody passing there that he was in possession of the trays any more than I was." The defendant testified that he lived in Riverdale, and was a vineyardist, and that he bought the trays of Mr. Applegarth in February, 1893. "They were in Mr. Applegarth's shed at the time I purchased them. After the purchase, in the first place, I marked them with a pencil,—wrote my name on the outside of them; and in a few days I sent a man over there to take possession of them. It was high water at our place, so that I could not haul them away. The road was all under water, and I sent a man over there, and he stayed there about a month. * * * I had two different men there, and I was there most of the time. I continued to hold this property, and, when they were going to take them away, I went over and nailed them up. I was there when they came after them, and prevented it. I was prevented from hauling them away at the time I purchased them because there was high water in our district. There was two miles of water, and it was impassable for heavy teams pretty near from the time I bought these trays until after they were seized, so that I could not haul those trays away. * * * I had my son there to watch and keep the trays. My son Charles went there first. He stayed there, probably a month, in possession of the trays after I purchased them. I then sent John Dewey, who was there the balance of the time. * * * The trays at that time (when the bill of sale was made) were all piled up in the shed and outside of the shed. They were in the same position there, piled there, when the execution was levied as when the bill of sale was made. I had not removed any of them. I couldn't. There was no flood around the trays. They could have been moved from there, but that would have been a big expense. There was no difficulty about moving the trays, but cost a good deal of money. It would have cost to take them to Riverside. I would have to take them there. It was a question of flood. I was not going to move them four or five times and wear them out. * * * These trays were stacked in the dry house, most of them inside, and about 400 outside. I marked them by writing my name on them in lead pencil,—'H. Dewey,'—200 or 300 of them; wrote on the edge of the trays. My son and I did that two or three days after the purchase." J. C. Dewey testified for defendant as follows: "I am acquainted with the trays. On the 2d of March I went with father, and he surrendered the note, and marked the trays with the name of 'H. Dewey,'—marked about four hundred trays. There were two rows of trays in the shed. The front row was in view, and I should think we marked about every fourth or fifth tray with the name of 'H. Dewey,' and the same was true of the trays you could see in opening the doors. The ends of the trays presented themselves to view. One side there was not so many, but only the edges of the trays, and I think we marked those pretty thoroughly. I saw the note surrendered to William Applegarth. I was there off and on for a week or two. Father told me to just keep a lookout for the trays. My brother came about the 5th or 6th of April. I was there once, if not twice, when my brother was there continuously as keeper of the trays. * * * I went away one day, and came back the next day, and I was there until the day before they were seized. I had some business to do up at Plainsburg, and when I came back I found I had left the day before they said the officer came and seized the stuff. * * * I had an understanding with my father that I was there in charge of the trays, and I was there off and on until the day before they were seized. In reference to the trays, I watched them to see that no one touched or moved them off. * * * The roads on the 2d of March were not bad, but the water was rising, and it raised afterwards. It was a week or ten days before the water got up. It then went over the road and washed it out. We could always go by a spring wagon. It was some time in June before we could haul loads. I was there to see after the trays, and saw that no one touched them. Mr. Applegarth lived there in the house. I lived in the house, too. I had control, and he didn't. I watched the trays, and saw that nobody tried to move them. A person passing along the road would not see me in charge. * * * There was nothing to indicate to any one that there had been a sale or delivery of the trays, unless they came and asked about it. The writing on the trays would have indicated a change of possession, and that was the only difference there was after the sale and before. On March 1st the roads were good. The water was rising at the time."

The above was, in substance, all of the testimony bearing upon the question in hand, and it was not, as it seems to us, sufficient to justify the verdict. It did not show such an immediate delivery and subsequent actual and continued change of possession as is required by the statute to make a transfer of personal property valid against creditors of the vendor. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

McFARLAND, J. I dissent. I think that the judgment should be affirmed.

115 Cal. 372

Ex parte BOHEN. (Cr. 165.)

(Supreme Court of California. Dec. 17, 1896.)

MUNICIPAL CORPORATIONS — CEMETERIES — PRESCRIBED DISTRICTS—VALIDITY OF ORDINANCE.

1. Where the burial of a human body within a prescribed district is prohibited by ordinance, and the sale or purchase of a lot therein for burial purposes is made a misdemeanor, such sale or purchase cannot be made the basis of a misdemeanor till the offense of such burial has been committed.

2. The ordinance of the city and county of San Francisco prohibiting the further purchase of lots for burial purposes within such city and county, also providing for further burials only in lots theretofore acquired by persons or associations for burial purposes, is invalid, because, so long as burials are permitted in a prescribed district, the privilege cannot be limited to one class of citizens, and denied to another class within the same district.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Habeas corpus proceedings on the petition of one Bohen, to test the validity of an ordinance for whose violation he was convicted. Ordinance held invalid, and the prisoner discharged.

E. S. Pillsbury, for petitioner. Harry T. Creswell, for respondent.

HARRISON, J. The petitioner was convicted of violating an ordinance of the city and county of San Francisco, and has sued out a writ of habeas corpus for the purpose of testing the validity of the ordinance. The ordinance is as follows:

"Order No. 2950. Prohibiting the further purchase of lots for burial purposes within the city and county of San Francisco; also providing for further burials being made only in lots heretofore acquired by persons or associations for burial purposes.

"Whereas, the unlimited burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health; and, whereas, the right of those persons or associations who have already purchased lots or plots for their own use or for the use of their families or members in the cemeteries in the city and county of San Francisco should be recognized: Now, therefore, the people of the city and county of San Francisco do ordain as follows:

"Section 1. It shall be unlawful, after the passage of this order, for any person, association or corporation to hereafter, within the limits of the city and county of San Francisco, purchase, acquire, sell, lease or in any other manner dispose of, or make available, any land situated therein for the purpose of interring any human body, or any portion of any human body. Nor shall any interment of any human body be made except in such lots or plots as may have been already purchased by persons, associations or corporations for their own use, or the use of their families or members; provided, the said lots shall not be used for general interment purposes."

Section 2 makes a violation of the ordinance a misdemeanor, and prescribes the penalty therefor.

The Odd Fellows' Cemetery Association was incorporated in 1865, under the act of the legislature entitled "An act to authorize the incorporation of rural cemetery associations" (St. 1859, p. 281); and the petitioner is the president of the corporation, and the offense with which he is charged is that as such president he executed a deed of conveyance of a lot of land within the tract of the cemetery, that had been sold by the association, and thereby aided and abetted in the violation of the ordinance. The validity of the ordinance is maintained on behalf of the people, upon the right of the municipality, when authorized thereto by the legislature, to restrict or prohibit burials within its limits, or within certain districts therein, and is resisted upon the ground that in the present case such authority has not been conferred upon the municipality, and also that the ordinance under consideration is unreasonable, by reason of not being operative upon all citizens alike.

By the act of April 25, 1863 (St. 1863, p. 540), the board of supervisors of San Francisco have power by ordinance "to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases." It may be conceded that, under the authority thus given, the city of San Francisco could pass an ordinance prohibiting burials of the dead within certain portions of the city; but the power of the legislature to prohibit burials in the entire city, as well as the power of the city to pass ordinances therefor, are questions not presented for consideration in determining the validity or effect of the ordinance under which the petitioner was convicted. This ordinance does not prohibit burials within the city, or within any designated district of the city, nor does it prohibit burials within the cemetery of which the petitioner is president. On the contrary, there is, by the terms of the ordinance itself, an express sanction of the right of those who have purchased lots for the purposes of burial in any portion of the city, to continue to bury human bodies therein until the capacity of the lots is exhausted; and it appears in this case that in the Odd Fellows' Cemetery alone these lots will allow the interment of upward of 18,000 bodies, in addition to those already buried there, while the capacity of the unsold lots within the same cemetery is sufficient for only 3,600 bodies. There is no restriction in the ordinance upon the persons whose bodies may be buried within these lots that have been sold, except that the lots shall not be used for "general" interment purposes; and under section 613 of the Civil Code the owner of a lot may consent to the burial therein of one who had no interest in the lot. By the terms of the ordinance, also, burials are permitted of any member of a corporation or association that has purchased a lot within either of the cemeteries of the city, irrespective of the size of the lot or the number of such members, so long as there shall be space within the lots for such burials. The effect of the ordinance is, therefore, in no respect to prohibit burials, but simply to limit the right to those who have been fortunate enough to secure a lot therefor before the passage of the ordinance. The fact that the "unlimited" burial of the dead within the city is "dangerous to life and detrimental to the public health" may be a sufficient reason for the enactment of an ordinance fixing a term after which such burials shall cease within certain portions of the city; but, while burials are permitted within a district, the privilege cannot be limited to one class of citizens, and denied to another class within the same district. The police power is to be exercised for the good of the entire public, and any restriction of the rights of the individual by virtue of this power must extend to all the individuals who might otherwise exercise the right. The owner of a lot within a cemetery, who has purchased it for the purpose of burial, holds the same subject to the right of the city to prohibit further burials within the cemetery (Coates v. Mayor, etc., 7 Cow. 585), and has no greater right to use it for burials after such prohibition than has the cemetery association itself to subject its unsold lots to such use. The right to prohibit burials within a certain district rests upon the proposition that any burial within that district is injurious to the public health; but an ordinance permitting burials within that district to an extent greater in number than it prevents cannot be upheld as an exercise of the police power. An ordinance forbidding the burial of human bodies within the city, or upon any designated portion thereof, cannot be sustained, if such burial be permitted upon other lots similarly situated, any more than can an ordinance forbidding the conducting of a soap-boiling factory, or any other occupation which may, under certain circumstances, be deleterious to health; and the owner of lands cannot be restrained from selling them for the purpose of being used as a place of burial, or conducting a soap-boiling factory, or any other use which in the future may become deleterious to health, and for that reason be forbidden, but which is not forbidden at the time of the sale. In Mayor, etc., v. Thorne, 7 Paige, 261, the city of Hudson, under the power in its charter authorizing it to adopt regulations for the prevention of fires, had passed an ordinance forbidding the erection of any wooden or frame barn, stable, or hay press within certain limits in the city, except of certain dimensions, without permission of the common council, and a resolution by it that such building was not dangerous in causing fires. The defendants, without such permission, commenced the erection of a building within the prohibited limits, which was to be occupied for storing and pressing hay, and a bill to restrain them from erecting the building was dismissed, the chancellor saying: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power, expressly given by their charter, to prevent the carrying on of such manufacture; but, as all bylaws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected, and to prohibit these defendants, whose building was destroyed by an incendiary, from rebuilding the same for the purpose of carrying on a manufacture which is permitted to others." In Tugman v. City of Chicago, 78 Ill. 405, the city of Chicago had passed an ordinance prohibiting the erection or operation, after January 1, 1872, of slaughterhouses within a designated portion of the city, "in any building not now used for such purpose." It was held by the court that the ordinance was invalid by reason of its discrimination between those owning and operating slaughterhouses prior to 1872, and those erecting and operating them after that date, upon the ground that an ordinance which would make an act done by one penal, and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained, because it would be unjust and unreasonable; saying: "If the health or comfort of the city require the prohibition of new slaughterhouses within a designated part of the city, the same reason would surely demand that old ones should be discontinued. If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and for that reason void, but its direct tendency would be to create a monopoly, which the law will not tolerate. The fact that certain persons were engaged in the business within the district designated in the ordinance, at the time of its adoption, gave them no right to monopolize the business; nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege, who should engage in the business at a later period. If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced. A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation." In City of Lake View v. Tate, 130 Ill. 247, 22 N. E. 791, the municipality had passed an ordinance for the purpose of regulating the speed of railroad trains, and dividing the city into two districts therefor, —the east district and the west district,—and providing that no train should be run within the limits of the east district at a greater speed than 10 miles per hour, making no restriction, however, upon the speed within the other district. It was shown that the route of the Chicago & Evanston Railroad was within the east district, and that of the Chicago & Northwestern Railroad in the west district, and it was held that the ordinance was unreasonable and invalid, for the reason that it constituted a special and unwarranted discrimination between two lawful and competing lines of railway; that as the line of each of the roads ran through a thickly settled portion of the city, with no appreciable difference of danger to those crossing the tracks of the two railways, there was no justification for the discrimination. See, also, City of Chicago v. Rumpff, 45 Ill. 90; State v. Hinman, 65 N. H. 103, 18 Atl. 194; State v. Pennoyer, 65 N. H. 113, 18 Atl. 878; State v. Mahner, 43 La. Ann. 496, 9 South. 480; Dill. Mun. Corp. § 322.

The ordinance in question forbids the purchase or sale of any parcel of land, if made for the purpose of doing an act thereon which is in itself not only not illegal or forbidden, but is by the same ordinance recognized as a legal act, and is permitted to others. Irrespective of the rule that the motive with which an act is done is not the subject of punishment unless the act itself is wrong, the act with which the petitioner is charged—the sale of a lot of land—was done in the exercise of one of the rights of an owner, and can be made an offense only in case such act contributed to the violation of law. The burial of a human body is the act sought to be prohibited; and, while it may be conceded that, if such prohibition had been made by a valid ordinance, the burial of a human body within the lot purchased therefor would have been an offense for which the petitioner might have been charged as an aider and abettor; yet, until the offense of such burial has been committed, the sale and purchase of the lot cannot be made the basis of a crime or misdemeanor.

As the ordinance, by its terms as well as by its operation, discriminates, in its operation, between individuals similarly situated, it is upon that ground unreasonable and invalid, and the petitioner should be discharged.

We concur: BEATTY, C. J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent. If the future sale and purchase of lots for burial purposes cannot be prohibited unless all burials in lots already purchased are also prohibited, then it is evident that there can be no gradual progress towards the extinguishment of the cemetery evil. But an ordinance which would absolutely and immediately prohibit any further burial within the city would be a sudden and abrupt measure that would result in great confusion and distress. No such ordinance is likely to be passed; and yet, without such an ordinance, it seems to me that, under the opinion of the majority of the court, the cemetery evil must be perpetual. The ordinance in question operates uniformly upon all of the class who come within its provisions. The petitioner would be in no better situation if the ordinance had absolutely prohibited all future burials. As long as sales and purchases of lots for burial purposes are allowed, the cemetery evil will be greatly magnified, and its suppression made correspondingly more difficult.

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115 Cal. 326

## **WHELAN, Sheriff, v. SHAIN et al.** (S. F. 497.)

(Supreme Court of California. Dec. 15, 1896.)

PARTNERSHIP—FIRM ASSETS—RIGHTS OF CREDITORS.

A judgment rendered in an action upon a note executed by the members of a partnership jointly, but as individuals, the proceeds of which were not used for partnership purposes, is not a lien upon the partnership assets, as against a subsequent judgment rendered upon a firm debt.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by R. I. Whelan, sheriff, to determine the rights of Joseph E. Shain and J. S. Reid as claimants of a fund arising from execution sale. From a judgment in favor of the defendant Reid, the defendant Shain appeals. Affirmed.

James Z. Sweeney, for appellant. Rodger Johnson, Nagle & Nagle, and Reddy, Campbell & Metson, for respondents.

BELCHER, C. On January 5, 1895, the defendant Joseph E. Shain commenced an action against William Binz and L. Martella upon their joint promissory note, signed, "Wm. Binz. L. Martella," and caused to be attached certain personal property belonging to a co-partnership of which they were the only members. On January 16, 1895, judgment was entered in the action that he "have and recover from L. Martella and William Binz, defendants," the sum of $1,410.60, as prayed for. On January 8, 1895, the defendant J. S. Reid commenced an action against the same defendants as co-partners, doing business under the firm name of Binz & Martella, upon certain partnership obligations, and caused to be attached the same property that had been attached by Shain. On January 22, 1895, judgment was entered that he "have and recover from William Binz and Lawrence Martella, co-partners," the sum of $986.48, as prayed for. Under executions issued on both of the said judgments the plaintiff, Whelan, as sheriff, sold the said attached property for the sum of $1,200, and, after deducting his proper fees and charges, there was left in his hands the sum of $1,059. Shain and Reid each claimed and demanded of the plaintiff that the proceeds of the said sale be applied in satisfaction of his judgment, and the plaintiff, being uncertain as to how the money should be applied, commenced this action, setting forth the facts, and asking that the defendants be required to interplead and set up their respective rights to the money in his possession, and that the matter be determined by the court. And subsequently, with the consent of the parties and under an order of court, plaintiff paid the money into court. The defendants answered the complaint, each setting up his claim and right to the money as against his co-defendant. Upon the issues thus framed the case was tried, it being admitted, during the trial, that the property sold was the partnership property of Binz & Martella. The court found the facts and gave judgment in favor of defendant Reid, from which judgment and an order denying his motion for a new trial defendant Shain appeals.

The law is well settled in this state that partnership property must first be applied to the payment of partnership debts. "The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners." Chase v. Steel, 9 Cal. 64. "The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not obtained judgment." Conroy v. Woods, 13 Cal. 626. "It has been repeatedly decided by this court that the creditors of a partnership are entitled to a preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens." Bullock v. Hubbard, 23 Cal. 501. And see, also, Jones v. Parsons, 25 Cal. 100; Robinson v. Tevis, 38 Cal. 611; Furniture Co. v. Halsey, 54 Cal. 315, and Bank v. Mitchell, 58 Cal. 42. In his answer Shain alleged, on his information and belief, in substance, that the note on which he obtained judgment was executed by Binz & Martella as co-partners, and was a partnership contract and obligation, and that the money received thereon from the payee was invested and used in and about the partnership business, and in furtherance of its objects. The court, however, found against him on this issue, to the effect that the said note was not executed by Binz & Martella as co-partners and was not a partnership obligation, and that the money obtained thereon was not invested or used in or about the said partnership business, or in furtherance of its objects, "but that the obligation to pay said sum was the obligation of William Binz and L. Martella as individuals, and not otherwise." There was evidence tending to support this finding; but, if it were otherwise, under the law laid down in Bank v. Mitchell, supra, the result would not be changed. The court below was right, therefore, in adjudging that respondent Reid was entitled to have the said money first applied to the payment of his judgment. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

115 Cal. 279

## FOSTER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 470.)

(Supreme Court of California. Dec. 14, 1896.)

APPEAL—EFFECT.

Code Civ. Proc. §§ 942–945, provide a mode by which the "execution" of the judgment or order appealed from may in certain cases be stayed until the determination of the appeal. Section 949 provides that, "in cases not provided for" in such sections, the perfecting of the appeal by giving the $300 undertaking "stays proceedings in the court below upon the judgment or order appealed from," except in certain designated cases. *Held*, that where a judgment declared that S. was elected a director of a corporation instead of L., who was declared elected at a meeting held to elect directors, and enjoined the other directors from interfering with S. in the exercise of his office as director, a perfected appeal by such other directors from such judgment stayed all proceedings on the judgment, including the enforcement of the injunction, such case not being "provided for" in sections 942–945.

In bank. Writ of review to superior court of city and county of San Francisco; J. M. Seawell, Judge.

Application by A. W. Foster for the review of an order by the superior court of the city and county of San Francisco, adjudging the applicant guilty of a contempt in disobeying an injunction previously issued by such court. Order annulled.

W. S. Goodfellow, Garrett W. McEnerney, and Jesse W. Lilienthal, for petitioner. Page, McCutchen & Eels, for respondent.

HARRISON, J. At the annual election for directors of the San Francisco & North Pacific Railway Company, held in February, 1896, certain votes offered in favor of Sidney V. Smith, as one of the directors, were rejected by the chairman of the meeting, and, at the close of the election, Antoine Borel, J. B. Stetson, Andrew Markham, A. W. Foster, P. N. Lilienthal, George A. Newhall, and John L. Howard were declared by the chairman to have been chosen the directors for the year then next ensuing. Thereafter Smith, together with Borel, Stetson, and Howard, filed their application in the superior court of San

Francisco, under the provisions of section 315 of the Civil Code, setting forth their claim that the votes offered for Smith should have been counted, and that he, instead of Lilienthal, should have been declared elected as one of the directors. Upon the issues presented by the answer of the other directors to this application, the court held that Smith, and not Lilienthal, had been elected a director, with the others, and that he was entitled to exercise the office, and that Lilienthal should be excluded therefrom. Judgment was entered March 23, 1896, in accordance with these findings, and also enjoining the defendants from interfering with Smith in the exercise of his office as director. On the same day that this judgment was entered, an appeal therefrom to this court was taken and perfected by the defendants, and thereafter, at a meeting of the directors which had been called pursuant to the by-laws of the corporation, Smith sought to enter the room at which the meeting was to be held, but was excluded therefrom by Foster, who had been chosen the president of the board, and the meeting of directors was held without permitting him to be present. Upon an affidavit setting forth these facts, the superior court cited Foster before it to show cause why he should not be punished for contempt, and upon the hearing adjudged him guilty of contempt in thus preventing Smith from being present at the meeting of directors. Upon an application made to this court by Foster for a review of the last-named order, and that it be annulled upon the ground that upon the appeal from its judgment the superior court ceased to have jurisdiction for its enforcement, an alternative writ of review was issued to the superior court, and the foregoing facts are set forth in its return to the writ.

The effect of an appeal from the judgment, upon the judgment appealed from, is a matter of statutory regulation, and, as this effect is to be determined by a construction of the statutes under which the appeal is taken, the decisions in other states upon statutes differing from our own are not entitled to a controlling consideration. Sections 942–945, Code Civ. Proc., provide a mode by which the "execution" of the judgment or order appealed from may in certain cases be stayed until the determination of the appeal; and section 949, Code Civ. Proc. provides that, "in cases not provided for" in these sections, the perfecting of an appeal by giving the $300 undertaking "stays proceedings in the court below upon the judgment or order appealed from," except in certain designated cases. As the present case is not provided for in any of the preceding sections, it follows that the appeal had the effect to stay all proceedings in the court below "upon the judgment." While the judgments or orders referred to in sections 942–945 are such as direct some act to be performed by the appellant, or require some process for their enforcement, the foregoing provision of section 949 includes not only judgments of this character, but also those which are self-executing. To the extent that a self-executing judgment is effected in accordance with its terms, and requires no proceeding for its enforcement, an appeal therefrom does not impair this effect, except that, while the appeal is pending, it is not available as evidence of the facts adjudged. The provision in the section that the appeal stays all proceedings upon the judgment "in the court below" does not restrict its effect elsewhere. In Dulin v. Coal Co., 98 Cal. 304, 33 Pac. 123, the court had decided that Dulin was elected a director instead of Clugston, and an appeal was taken from this judgment. After the appeal, Dulin was allowed by the other directors to take his seat in the board with them, and Clugston was excluded from their deliberations. Clugston thereupon sought from this court an order restraining Dulin from acting as director, upon the ground that the appeal had the effect to suspend his right so to do. In denying his application we held that, while the appeal had the effect to prevent the court from enforcing its judgment, it could not prevent the other directors from recognizing the judgment as a sufficient reason for considering that Dulin had been properly elected, and was entitled to a seat with them; that the only effect of the appeal was "to leave the parties in the same situation with reference to the rights involved in the action as they were in prior to the rendition of the judgment." We also said that "if, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order or writ restraining its action"; and, again: "The appeal from the judgment suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character." In Welch v. Cook, 7 How. Prac. 282, it was held, under similar provisions in the statute of that state, that the stay of proceedings effected by the appeal was limited to proceedings "in the court below," and did not include proceedings in another court, authorized by a statute of that state to be taken upon the rendition of such judgment.

The provision in section 949, by which an appeal does not stay proceedings upon the judgment "where it adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within this state," authorizes the construction that proceedings upon the judgment are stayed when it affirms the right of the plaintiff to any office which is not "public." A director in a private corporation cannot be said to hold a public office. This provision in the section is in harmony with section 806, Code Civ. Proc., and is applicable to such "public office" as may be involved in an action brought by the attorney general under the provision of section 803. The cases of Jayne v. Drorbaugh, 63 Iowa, 712, 17 N. W.

433, and People v. Stephenson, 98 Mich. 218, 57 N. W. 115, cited by the respondent, were decided under statutes similar to section 806; and it is stated in the opinion in Fylpaa v. Brown Co. (S. D.) 62 N. W. 962, that the statute of that state contained no provision staying the execution of the judgment. See, also, State v. Woodson, 128 Mo. 497, 31 S. W. 105; Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co. (N. J. Err. & App.) 35 Atl. 433. The action of the superior court in the present case was a proceeding "upon the judgment" from which the appeal had been taken, and was instituted for the purpose of enforcing a compliance therewith. By the judgment it was declared that Smith had been elected a director, and was entitled to exercise the office. It was by reason of the refusal of Foster and other directors to allow him to exercise this office that the proceedings now under review were taken by the superior court, and the action of that court was based upon Foster's disregard of the judgment. The injunction, in the judgment, against the interference with Smith's right to act as a director, was but ancillary to the judgment determining that he had such right, and was merely incidental thereto. Although preventive in form, it was in effect mandatory, as it required Foster and the other directors to recognize Smith as one of their number, and to refuse to recognize Lilienthal. As that portion of the judgment declaring that Smith was elected was suspended by the appeal, the injunctive portion of the judgment, being merely incidental thereto, was also suspended, and the power of the court to enforce any portion of its judgment by inflicting punishment for its violation was stayed. An enforcement of this portion of the judgment would operate to carry the decree into effect, and would change the relative positions of the parties from those existing at the time the decree was entered, and might render a reversal of the judgment entirely ineffectual. Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563. "During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered." Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333. The effect of the appeal from the judgment was "to leave the parties in the same situation, with reference to the rights involved in the action, as they were prior to the rendition of the judgment" (Dulin v. Coal Co., supra); and the authority of the court, after the appeal, to punish Foster for preventing Smith from attending a meeting of the directors, was no greater than existed prior to the rendition of the judgment. If, however, the court could indirectly compel the recognition of Smith as a director, after its determination that he had been so elected was suspended by the appeal, it would exercise an authority in the proceeding after the judgment that it did not possess while the matter was pending before it and undetermined. See State Inv. & Ins. Co. v. Superior Court of City and County of San Francisco, 101 Cal. 135, 35 Pac. 549. The order is annulled.

We concur: BEATTY, C. J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

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115 Cal. 285

## ILLINOIS TRUST & SAVINGS BANK v. PACIFIC RY. CO. et al. (No. 19,547.)

(Supreme Court of California. Dec. 14, 1896.)

RECEIVERS — PROCEEDINGS TO APPOINT — NECESSARY PARTIES—PRESUMPTIONS—COLLATERAL ATTACK—CORPORATIONS — AUTHORITY TO EXECUTE MORTGAGE—APPEAL — OBJECTIONS — PARTY AGGRIEVED.

1. The C. Street-Railway Company conveyed all its property to the P. Railway Company by a deed afterwards declared void. In the meantime, in an action against the P. Railway Company "and others," a receiver was appointed, who operated the road and issued receiver's certificates under order of the court. In an action to foreclose a mortgage on the property, these certificates were declared a first lien. *Held* that, in the absence of anything affirmatively showing the contrary, it would be presumed that the C. Railway Company, as rightful owner of the road, was a party defendant to the proceedings for the appointment of a receiver.

2. Where the court, under circumstances apparently authorizing such action, took possession of a street railway through a receiver, the certificates issued by such receiver under order of the court must be regarded as valid, even though there may have been a failure of jurisdiction as to the rightful owner of the road.

3. In the absence of evidence to the contrary, it will be presumed, in support of a judgment holding certain receiver's certificates valid, that there was shown everything necessary to authorize the court to order the issue of the certificates.

4. An order appointing a receiver cannot be collaterally attacked on the ground of failure of jurisdiction.

5. The complaint in an action to foreclose a mortgage executed by a street-railway company to secure its bonds alleged that the bonds were duly issued, and the mortgage duly executed by the corporation. *Held* that, in the absence of objection raised at the time, it could not be objected on appeal that it was not alleged that stockholders of the corporation had authorized the creation of the bonded debt or the execution of the mortgage.

6. In a proceeding to foreclose a mortgage upon a street railway, it was found, as a conclusion of law, that a half interest in a certain portion of the track was not subject to the lien of the mortgage, as it had been sold to another corporation. In the decree, however, such portion was not excepted from the foreclosure and sale. *Held*, that objection to the decree on that ground could be made only by the purchasers of such half interest, or one claiming under them.

7. On the foreclosure of a mortgage, a decree was entered fixing the priority of five lienholders. The property sold for only enough to satisfy the first two liens. *Held*, that the adjudication as to the relative rights of the holders of the fourth and fifth liens would not be reviewed on appeal.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Illinois Trust & Savings Bank against the Pacific Railway Company, S. J. Hendy, and others, to foreclose a mortgage.

From a decree fixing the rights of the various lienholders, the representatives of the deceased defendant, Hendy, appeal. Affirmed.

W. H. H. Hart and Aylett R. Cotton, for appellants. John D. Pope, W. P. Gardner, E. Walker, and Hunsaker & Stevens, for respondent.

VAN FLEET, J. Plaintiff brought this action to foreclose a mortgage lien claimed by it upon certain street-railroad property belonging to the defendant the Los Angeles Cable Railway Company, and consisting of all the franchises, roadbeds, rolling stock, and other property, real and personal, owned by that company in the city of Los Angeles. On the 24th day of August, 1889, the defendant Pacific Railway Company, having acquired a majority of the capital stock of the said defendant Los Angeles Cable Railway Company, and being desirous of securing funds with which to meet certain unsecured obligations of the latter company, and to complete the construction of the system of roads projected by it, and also with a view to the ultimate purchase of all the property of said Los Angeles Cable Railway Company, made an issue of $2,500,000 in bonds, and, as security for the payment of said bonds, executed to plaintiff, as trustee, a deed of trust intended as a mortgage, covering all the title the grantor then had, and all it might thereafter acquire, to all of the property above mentioned of said Los Angeles Cable Railway Company. Subsequently, on the 9th day of October, 1889, said Los Angeles Cable Railway Company made a deed to the Pacific Railway Company, intended and purporting to convey to the latter all of said property; and under this deed the possession of the property passed formally into the hands of said Pacific Railway Company. Thereafter, on July 18, 1890, some question having arisen as to the validity of the trust deed made by the last-named company to plaintiff, the said Los Angeles Cable Railway Company itself made to plaintiff a trust deed or mortgage confirmatory of that of the Pacific Railway Company, indorsing all of its provisions, and covering all of said property, as further security for the payment of said issue of bonds, in which last-mentioned deed the Pacific Railway Company united as a grantor. It is under these two trust deeds that plaintiff's lien was claimed, and under which, default having been made in the payment of the indebtedness thereby secured, a decree was asked for a sale of said property in satisfaction thereof.

Certain third persons claiming liens upon the mortgaged property were made defendants in the action. Of these William Alvord and Thomas Brown held a trust deed or mortgage, executed to them as trustees by the defendant Los Angeles Cable Railway Company, on September 15, 1887, given to secure an issue of $1,500,000 in bonds made by the latter company, and which mortgage had not been satisfied; M. L. Coenan and F. J. Coenan held a judgment lien upon the property under a judgment theretofore secured against the defendant the Los Angeles Cable Railway Company in the sum of $18,376.81; and the estate of Joshua Hendy, deceased, held a lien of like character under a judgment theretofore recovered by it against the same company in the sum of $23,017.12. J. F. Crank was also made a defendant. Prior to the commencement of this action, in another action commenced in the superior court of Los Angeles county by one E. W. Russell against the Pacific Railway Company and others, the property involved had been taken from the possession of the Pacific Railway Company, which was then holding and operating the same, and placed by order of the superior court in the hands of said Crank, a receiver appointed in that action; and Crank, while holding said property as such receiver, had, under the orders of that court, issued receiver's certificates, amounting to $15,200, to secure funds required in its management. These certificates were outstanding and unliquidated at the commencement of this action. By its findings and decree the court below declared these certificates, so issued by Crank, with certain others issued by the receiver appointed in the present action, the first lien upon the property, and entitled to priority in payment; the mortgage claim of Alvord and Brown, trustees, amounting to $1,323,353.35, with certain attorneys' and trustees' fees, the second lien, and entitled to be next paid; the confirmatory deed or mortgage of the Los Angeles Cable Railway Company to the plaintiff, given to secure the bonds of the Pacific Railway Company, the third lien, in the sum of $1,677,106, together with certain attorneys' and trustees' fees; the judgment of the Coenans the fourth lien; and the judgment of the Hendy estate the fifth lien,—and directed the property to be sold, and the proceeds applied, after the payment of costs and expenses, etc., to the extinguishment of said several liens in the order named. The trust deed given by the Pacific Railway Company to plaintiff, and the deed of the Los Angeles Cable Railway Company to the Pacific Railway Company, purporting to convey said property to the latter, were held to be unauthorized and void; but the indebtedness created by the bonds of the Pacific Railway Company was held valid and subsisting, and it was adjudged that, should the proceeds of the sale of the mortgaged property prove insufficient to satisfy said last-named indebtedness, the plaintiff should have a judgment for the deficiency against the Pacific Railway Company. The only parties dissatisfied with the decree are the representatives of the estate of Hendy, deceased. They alone appeal, and their appeal is from the judgment upon the judgment roll; the several objections urged being, it is claimed, such as arise upon the face of that record. Certain of these objections, if sustained, appellants contend, would result in preferring the lien of their judgment to other liens to which it was postponed, and these we will first notice.

1. It is contended that the court erred in declaring the $15,200 in receiver's certificates issued by Crank in the case of Russell against the Pacific Railway Company et al. a lien upon the mortgaged property, and in directing its payment as a preferred claim over that of appellants, and that in this respect the findings do not sustain the judgment. This contention is based upon the fact that it was found by the court that the deed from the Los Angeles Cable Railway Company to the Pacific Railway Company, purporting to convey the mortgaged property, was void, and that the title never passed to the latter company. The argument of counsel is that, as the court was dealing with the property in that action as that of the Pacific Railway Company alone, while it was in fact the property of the Los Angeles Cable Railway Company, which latter, it is said, was not a party to that action, the court never had jurisdiction of the property, and consequently had no competent authority to authorize the creation of any obligations against it, which are binding upon the property, or valid as against the parties to the present action. But, in the first place, this argument is based upon an assumption of facts which the present record does not disclose. The finding upon which the decree rests in this respect is this: "While J. F. Crank was acting as receiver of the Pacific Railway Company, appointed in the case of E. W. Russell vs. Pacific Railway Company et al., and while he was operating the street-car lines mentioned in the second amended complaint herein as such receiver, and while D. K. Trask, the receiver appointed in this action, was in possession and operating said street-car lines as such receiver, orders of court were entered in said actions respectively authorizing and directing the issuance of receivers' certificates, and providing that said certificates should be a lien upon the property in the hands of said receivers, respectively, superior to the liens of the mortgages or trust deeds and judgments therein mentioned. The above-mentioned receivers' certificates which are now outstanding and unpaid are as follows." And then follows a statement of these certificates. This finding does not show, nor does it competently appear anywhere in this record, what the character of the action of Russell against the Pacific Railway Company et al. was, nor who all the parties thereto were; nor does it appear, except inferentially, that the property held by the receiver in that action was held and dealt with solely upon the theory that it was the property of the Pacific Railway Company. For all that appears, one of the very questions in issue in that action may have been the title to this property; and not only the Los Angeles Cable Railway Company, the owner thereof, but these very appellants, may have been parties to that action. The action is simply referred to in the finding as entitled "E. W. Russell vs. Pacific Railway Company et al.," and makes no statement as to who the other parties to the suit were. In fact, there is nothing in this record to show that there was not before the court in that action everything in the way of subject-matter and parties requisite to give the court jurisdiction to bind the property and parties hereto. In the absence of anything showing the contrary, we will presume that such was the fact. Inferences are never to be indulged to defeat the judgment, but always in support of it; and, if we can imagine a state of facts not inconsistent with the record before us, which would have authorized the action of the court, those facts will be presumed to have existed. But, moreover, when a court, in a proper case, and under circumstances apparently authorizing such action, takes property into its possession through a receiver, which, as in this instance, is of a character to give the public a right to its continued operation and use, the court acquires a right and assumes the obligation of keeping such property in operation, and for that purpose is authorized to incur such expenses and create such obligations against the property as are necessary to keep the same in repair and pay operating expenses. And such expenses and obligations "are burdens necessarily on the property taken possession of; and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership." Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Kneeland v. Machine Works, 140 U. S. 592, 11 Sup. Ct. 857. In the absence of the evidence and everything in the findings to show the contrary, we must presume, in support of the judgment, that there was shown at the trial the existence of every fact in that case which would render proper the action of the court in authorizing the receiver to issue these certificates.

It is said that the court had no power to appoint a receiver in the case of Russell against the Pacific Railway Company et al.; but why it had not, counsel does not enlighten us. It is not denied that the superior court has jurisdiction to appoint receivers in proper cases, and, as above suggested, it nowhere appears in any cognizable form what the character of that action was; and the presumption to be indulged, therefore, is that it was one which authorized the appointment of the receiver. This is in the nature of a collateral attack upon the order appointing a receiver in that case (Van Fleet, Coll. Attack, § 3); and, as against such an attack, it is well settled that, if the jurisdiction of the court can in any event be upheld and its action validated, this will be done, even though the facts showing such jurisdiction are defectively stated, and inferences must be indulged in to support the judgment (Id. § 17).

2. It is contended that the cross complaint of Alvord and Brown, under which their mortgage was foreclosed and given priority as a lien over appellants' judgment, does not state facts sufficient to constitute a cause of action, in that it is not alleged therein that the stockholders of the Los Angeles Cable Railway Company authorized or consented to the creation of the bonded indebtedness which that mortgage was given to secure, or that they ever authorized the making of said mortgage. Of a number of answers made in the briefs of respondents to this objection, one, at least, we deem conclusive against appellants. There is a general allegation in the pleading, in substance, that these bonds were duly issued, and the mortgage in question duly executed, by the corporation. There was no demurrer interposed, but the parties apparently went to trial upon the assumption that the pleading was sufficient to raise the issue and authorize proof of the necessary facts; and it was so treated by the court below, since it was there found that "said Los Angeles Cable Railway Company, by a resolution duly adopted and passed by the unanimous concurrence of its board of directors, and by its stockholders duly assembled, authorized" to be issued the bonds in question, and the execution of the mortgage to secure the same. It is well settled that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact, and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issues. King v. Davis, 34 Cal. 100; Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Moore v. Campbell, 72 Cal. 251, 13 Pac. 689; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497. If, therefore, it be assumed that it was necessary to specifically allege the consent of the stockholders, it will now be presumed that the pleading was treated by the parties in the court below as alleging that fact. Moreover, we think the allegations of the pleading were sufficient in themselves to admit proof of the fact.

3. But one other point is made which we deem it essential to notice: The Los Angeles Consolidated Electric Railway Company was one of the defendants in the action, and set up in its answer that, while Crank was in possession of the property as receiver in the case of Russell against the Pacific Railway Company et al., this defendant applied to the court in that action for permission to use, jointly with the Pacific Railway Company, certain portions of the cable railway tracks, as provided in section 499 of the Civil Code; that it had paid to Crank, as such receiver, one-half the cost of the portions of the track of which it desired to make joint use, and had received a conveyance of a one-half interest therein; and it prayed that its one-half of the portions of track acquired as aforesaid should be exempted from the operation of the judgment of foreclosure to be rendered in the action. There is in the findings no mention of the facts set forth in the answer of this defendant, but among the conclusions of law is found this declaration: "The undivided one-half of the tracks, ties, and appurtenances conveyed under orders of court by J. F. Crank, receiver, to the Los Angeles Consolidated Electric Railway Company [describing the property] is free from the incumbrance of the said mortgage or deed of trust of the Los Angeles Cable Railway Company to Alvord and Brown, trustees, mentioned in their cross complaint, and from any lien of the indenture marked 'Exhibit B,' all mentioned in the second amended complaint herein; and the said undivided one-half of all the said tracks, ties, and appurtenances is the absolute property of the said Los Angeles Consolidated Electric Railway Company, and free from incumbrance." In their opening brief, appellants treat this as being what it purports to be,—a mere conclusion of law,—and object to it as not only wholly unsupported by any finding of fact, but as being at variance with the finding that the Pacific Railway Company acquired no title to the mortgaged property by its deed from the Los Angeles Cable Railway Company; that it appearing from this last finding that the Los Angeles Cable Railway Company was the owner of the property at the time of the attempted sale of this interest by the receiver, and that such sale was made in a case to which the latter company was not a party, the sale was wholly void, and passed no title to the purchaser; that, consequently, the interest thus reserved from sale remained subject to the lien of appellants' judgment, and to sale in satisfaction thereof; and that in declaring it free from such lien, and withholding it from sale, the court below erred to appellants' injury. As to the objection that no title passed because the Los Angeles Cable Railway Company was not a party to the action, the same answer applies which is suggested in the point as to the receiver's certificates,—that it nowhere appears that said company was not a party to that action. But an inspection of the decree which was entered in this case shows that, notwithstanding the reservation thus made in the court's conclusions, all of the mortgaged property, including the interest thus declared to have passed to the Los Angeles Consolidated Electric Railway Company, was ordered to be sold thereunder in satisfaction of the liens established thereby; and, as will hereafter appear, all of said property, without the reservation of any part, was sold thereunder, and the proceeds applied in satisfaction of said liens as therein directed. It thus appears that, whatever might have been

the effect of this reservation had it been carried into the decree, the appellants have not in any wise been injured thereby. The decree gave them the benefit of everything to which they were entitled, and appellants have no cause of complaint. These considerations having been suggested in the briefs of respondents, appellants, in their reply brief, have changed front, and now take the ground that what they had theretofore regarded and treated as merely an erroneous conclusion of law was in truth a finding of fact; and that being such, and the decree not being in accord therewith, it must be held, to that extent, as unsupported by the findings. But if there is any merit in this new claim, the objection cannot avail the appellants. There is no want of support in the decree as to any fact affecting appellants' rights. If there is any error in the particular urged, the appellants have not been injured thereby, and hence it is not a ground of reversal at their instance. The only party injured would be the purchaser, the Los Angeles Consolidated Electric Railway Company, and they would seem to rest content.

4. Some further points are made by appellants, involving the rights of the plaintiff and of the Coenans to have their liens preferred to that of appellants. But appellants have rendered the consideration of these questions wholly immaterial. At the submission of the cause in this court, the appellants filed herein the following stipulation: "It is hereby stipulated and agreed that an order of sale was issued by the superior court upon the decree of foreclosure contained in the transcript in this case, and that the commissioner advertised and sold the property described in the decree, as required therein, on the 4th day of October, 1893, subject to the receiver's certificates; that the entire proceeds of the sale were applied by the commissioner to the payment of costs of suit, expenses of sale, allowances to trustees, Brown and Alvord, and attorneys for Alvord and Brown, trustees, and to the payment of the sum of money decreed to be due to the holders of the bonds secured by the trust deed to Alvord and Brown, trustees, and the sale produced no more than that amount; and that the commissioner made a report of the sale to the court, which was confirmed." The object of this stipulation is not stated, but its effect is to render the remaining objections mere moot questions, the determination of which would be of no material consequence to appellants. The entire property covered by the lien of appellants' judgment having been sold, and the proceeds absorbed in satisfaction of claims which, it has been determined, were prior in right to that of appellants, the latter are left no further interest in the controversy which we are called upon to consider. The judgment is affirmed.

We concur: HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(115 Cal. 380)

## J. I. CASE PLOW WORKS v. MONTGOMERY et al. (No. 15,655.)

(Supreme Court of California. Dec. 17, 1896.)

CORPORATIONS—ACTION TO ENFORCE STOCKHOLDER'S LIABILITY—COMPLAINT.

In an action under Civ. Code, § 322, to enforce a stockholder's liability, a complaint alleging that on a certain day, while defendant was a stockholder, the corporation made and delivered to plaintiff its note (setting it out), is insufficient, since it does not necessarily show that defendant was a stockholder when the debt was incurred. Wagon Co. v. Bull, 40 Pac. 1077, 108 Cal. 1, followed.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the J. I. Case Plow Works against Charles Montgomery and others. The complaint was held insufficient, and plaintiff appeals. Affirmed.

Michael Mullany, William Grant, and Charles S. Cushing, for appellant. William H. Jordan, for respondents.

TEMPLE, J. This is an action against a stockholder to recover his proportionate share of a corporate debt under section 322, Civ. Code. It is alleged in the complaint that on a certain day the corporation made, executed, and delivered to plaintiff its certain promissory note, which is then set out at length. In no other way is corporate indebtedness averred. The complaint sufficiently shows the amount of subscribed capital stock and the amount of stock owned by defendant at the time the note was executed, and the only question involved on this appeal is whether this is a sufficient allegation that the indebtedness was incurred while the defendant was a stockholder. The question was suggested in Tilden v. Gashwiler, which was not reported, but was referred to in Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, where Mr. Justice McFarland expressed some doubt upon the subject. It is again discussed in Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077, in which case the question was decided. It was there held that the complaint must show that the indebtedness was incurred while the defendant was a stockholder, and that the mere allegation that on a certain day, while the defendant was a stockholder, the corporation made its promissory note, does not show that fact. It is a question merely of pleading and evidence, and a rule, having once been declared, should be adhered to. Of course, the indebtedness might be incurred at the time of giving a note, or even by giving the note; but, if so, such fact should appear. I do not think it was correctly said in the opinion rendered in the case last cited that the action was brought upon the promissory note. Setting out the promissory note did show the indebtedness of the corporation, and it is a proper method in which to show such indebtedness, and this was a material fact in the plaintiff's case. The trouble was, however, that the complaint did not show that the indebtedness was then for the first time incurred, nor when it was incurred. It, therefore, failed to show that it was incurred while defendant was a stockholder. I think if the allegation had been that on a certain day the corporation became indebted to plaintiff, and on that day executed its note, it would have been sufficient. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

(115 Cal. 247)

## GOLDEN CROSS MINING & MILLING CO. v. SPIERS et al. (L. A. 271.)[1]

(Supreme Court of California. Dec. 9, 1896.)

ACTION TO REMOVE TRUSTEES—VENUE.

An action to remove trustees under a deed of mining property providing that they should work the mine and pay the proceeds to certain creditors of the grantor, on the ground of inefficiency and mismanagement, is not within Code Civ. Proc. § 392, providing that actions for the recovery of real property, or of an estate or interest therein, or for the determination of such right or interest, or for injuries to real property, shall be tried in the county in which the subject of the action is situated, but is included in "all other cases" which, by section 395, are made triable in the county in which defendants, or some of them, resided at the commencement of the action.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the Golden Cross Mining & Milling Company against James Spiers and others to remove defendants from their office as trustees under a deed, and for other relief. From an order denying a motion by defendants for a change of venue, they appeal. Reversed.

Graves, O'Melveny & Shankland and A. Heyneman, for appellants. Gibson & Titus, Ben Goodrich, and Jefferson Chandler, for respondent.

HARRISON, J. The plaintiff executed to the defendants, January 4, 1896, a conveyance of certain real and personal property, consisting of mining ground, with the materials and implements for working the same, situated in the county of San Diego, in trust as security for the purpose of securing certain indebtedness, and with authority to develop and work the mines, and out of their proceeds, after paying the expenses of working and managing the same, to pay the creditors of the plaintiff in proportion to their respective claims. It was also provided in the instrument of conveyance that if, after a fair trial and bona fide effort, it should, in the opinion of the defendants, become impracticable to operate said mining property according to the terms of the trust, except at a permanent loss, they might so declare, and thereupon make a peremptory sale of the same at public auction, and apply the proceeds in a certain manner specified in the instrument. The defendants entered into possession of the property, and, after working and developing the same for more than three months, on April 22, 1896, declared that it was impracticable to operate it according to the terms of the trust, except at a permanent loss, and thereupon advertised it for sale, in accordance with the provisions therefor in the instrument under which it had been conveyed to them. The plaintiff thereupon commenced the present action against them in the superior court of the county of San Diego, alleging their insufficiency and mismanagement in operating the mining property; that by reason of their extravagance and waste great and unnecessary expense had been created by them during their management, and that the property itself had deteriorated in value; that the property is valuable, and by judicious management can be made to yield sufficient returns to pay all the indebtedness for which it was given as security; that the defendants have not given the property a fair trial, or made a bona fide effort to operate it profitably; and that the sale intended by them would be arbitrary, and in violation of their trust, and that its announcement has itself had the effect to injure the value of the property: and that by reason of their misconduct the plaintiff has been damaged in the sum of $150,000. Judgment was prayed that the defendants be enjoined from selling the property, and that an account of their trust be taken by the court, and they be removed from said trust, and new trustees appointed, to execute the same, and that the plaintiff have judgment for damages against them in the sum of $150,000. Of the defendants, four reside in Los Angeles and two in San Francisco, and at the time of their appearance in the action, upon proper showing therefor, moved the court that the place of trial be changed from the county of San Diego to the county of Los Angeles. The court denied their motion, and from this order the present appeal has been taken.

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[1] Rehearing denied.

Section 392, Code Civ. Proc., enumerates as local actions which must be tried in the county in which the subject of the action, or some part thereof, is situated: "(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property; (2) for partition of real property; (3) for the foreclosure of all liens and mortgages on real property." And section 395 requires that in "all other cases" (except those named in sections 393 and 394, which are inapplicable here) the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action. The present action does not fall within either of the classes enumerated in section 392, but is eminently a personal action, in which the judgment sought is purely one in personam. The main object of the action, as appears by the allegations of the complaint and the judgment sought thereon, is the removal of the defendants as trustees, by reason of their inefficiency and mismanagement of the trust, and the appointment of other trustees in their stead. It is only when there is no existing trustee, or when all the trustees renounce, die, or are discharged, that the appointment of another trustee is to be made by the superior court of the county where the trust property, or some portion thereof, is situated. Civ. Code, § 2289. An action to remove a defendant from his position as trustee is personal, and one in which he has the right to have the cause tried in the county of his residence, as is any other personal action. The fact that the property held by him in trust is situated elsewhere does not deprive him of this right. See Smith v. Davis, 90 Cal. 25, 27 Pac. 26.

The injunction against the threatened sale by the defendants, and the prayer for an accounting, are but incidental to this relief, and are dependent thereon. Even if an injunction was the sole relief sought by the plaintiff, the action would still be personal, which the defendants would have the right to have tried in the county of their residence. The plaintiff does not allege that the defendants have caused any physical injury to the mining ground itself, but the damages for which it seeks a recovery are for the depreciation in the market value of the property consequent upon the misconduct of the defendants, and the loss resulting from their neglect and willful mismanagement, and their inefficiency in the execution of the trust. The order is reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

115 Cal. 339

## McMENOMY v. WHITE et al. (S. F. 347.)

(Supreme Court of California. Dec. 17, 1896.)

AGREED CASE—NECESSITY OF FINDINGS—MECHANICS' LIENS—FILING CONTRACT AND SPECIFICATIONS—LIABILITY ON CONTRACTOR'S BOND.

1. Where a cause is submitted on an agreed statement of facts, no findings of fact by the court are necessary.

2. Code Civ. Proc. § 1183, providing that a building contract shall be void if not filed with plans and specifications, and that in such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof, does not render the owner personally liable for labor done and materials furnished at the instance of the contractor, but the contractor is liable to a personal judgment in an action to foreclose a lien.

3. The sureties on a building contractor's bond, conditioned for his faithful performance of the

contract, and the delivery of the building, free from all liens that may be filed on account of any claim against the contractor, are liable on the bond, though the contract, as between the owner and the contractor, was void, under Code Civ. Proc. § 1183, for failure to file the plans and specifications forming part of the building contract.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. H. McMenomy against A. L. White and others. The cause was heard on an agreed statement of facts. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

William H. Jordan, for appellants. John H. Dickinson and Henry E. Monroe, for respondent.

BELCHER, C. This case was submitted to the court below upon an agreed statement of facts. From this statement it appears that on the 20th day of June, 1890, plaintiff and one L. C. Judkins entered into a written contract, by the terms of which Judkins agreed to construct for plaintiff, and to furnish all the materials and labor therefor, a frame dwelling house, in conformity with the plans and specifications for the same prepared by certain architects, and to deliver the house to plaintiff, free from all liens and charges, within 100 working days from the date of the contract. The contract price for the work was $4,858, of which sum 75 per cent. was to be paid in installments as the work progressed, and the remaining 25 per cent. was to be paid 35 days after the final completion of the work. On the day the said contract was executed, there was written on the back thereof, and signed by the defendants, a bond or contract of guaranty, which reads as follows: "Bond. Know all men by these presents, that we, the undersigned, in consideration of value by us and each of us received, have, and we do hereby jointly and severally, become sureties and guarantors for the full and faithful performance on the part of L. C. Judkins, the contractor, of all the terms and conditions of the foregoing contract to be by him performed, and we do hereby jointly and severally guaranty the faithful performance of the above contract, and the delivery of the building therein described and contracted for, free from all liens that may be filed on account of any claim against the contractor in the above contract, not exceeding the sum of four thousand eight hundred and fifty-eight ($4,858) dollars. Witness our hands and seals, this —— day of June, 1890." After these papers had been signed, Judkins committed the matter of filing the contract in the office of the county recorder of the county where the property was situated to the plaintiff, and he filed the contract, but the plans and specifications were never attached to the contract, and were never filed. Judkins proceeded to construct the house, but it was not delivered to or accepted by the plaintiff until February 19, 1891, the reason for such failure of delivery and acceptance being that the same was not finished. Plaintiff paid to Judkins, on account of the construction of the building, upon the certificates of the architects as the work progressed, sums of money aggregating $2,750, and thereafter certain liens were filed for materials and labor furnished to the said building upon the order of Judkins. In due time actions were commenced to foreclose the liens, and all of the actions were consolidated, and tried together. In the complaints it was alleged that the contract between the plaintiff and Judkins was void, because the plans and specifications were not filed with it; and the court found the fact to be as alleged, and gave judgment foreclosing the liens for various sums in favor of the lien claimants. Plaintiff, by reason of Judkins' failure to keep his contract, and perform the work thereunder, and by reason of the liens filed and the suits brought thereon, was compelled to pay, and on January 9, 1894, did pay, in satisfaction of said liens, and the costs incident to their foreclosure, the sum of $1,295.33 more than the contract price named in said contract. Subsequently the plaintiff commenced this action to recover from the defendants, upon the bond or contract of guaranty before set out, the sum so paid by him, with interest thereon from the time of payment. Upon the facts agreed upon, the court below gave judgment in favor of the plaintiff for the said sum of $1,295.33, with interest thereon; and from that judgment, and an order denying defendants' motion for a new trial, this appeal is prosecuted.

1. The objections to certain findings upon the ground that they were not justified by the evidence cannot be sustained. As the case was submitted upon an agreed statement of the facts, no findings were necessary, the only question being as to what was the law applicable to those facts. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364. Besides, the judgment was in accord with the facts stated as to the amount the plaintiff was entitled to recover, if entitled to recover at all.

2. It is true, the building contract was void because the plans and specifications were not filed, and the statute declares that "in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Code Civ. Proc. § 1183. The owner, however, is not personally liable for labor done and materials furnished at the instance of the contractor, even though the contract be void, for the reason stated; the only remedy against the owner in such case being a foreclosure of the liens. But the contractor is personally liable for labor and materials so done and furnished at his instance, and he may be made a party defend-

ant in actions to foreclose the liens, and a personal judgment may be entered against him. Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. 516; Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419; Lumber Co. v. Gottschalk, 81 Cal. 647, 22 Pac. 860; Wood v. Transit Co., 107 Cal. 502, 40 Pac. 806.

3. As to whether, under the circumstances shown here, the defendants can be held liable on their contract of guaranty, is the principal question presented for decision. Without following the elaborate arguments of counsel, it is enough, in our opinion, to say that the case comes plainly within the rule of law declared in the cases of Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. 662; Kiessig v. Allspaugh, 99 Cal. 452, 34 Pac. 106 (decided by the court in bank); and Blyth v. Robinson, 104 Cal. 239, 37 Pac. 904. The law, as declared in the last-named case, is correctly stated in the syllabus as follows: "A bond given by a contractor to the owner of a building, the contract price of which exceeded one thousand dollars, guarantying the performance of all the conditions of the contract, and that the house to be constructed by the contractor should be delivered to the owner free from all liens that might arise from or be filed against the building on account of material or labor furnished by the contractor, and used in or about the structure, is valid and binding upon the sureties, notwithstanding the plans and specifications forming a part of the building contract were not filed with the county recorder." The cases cited are not, perhaps, in harmony with that of Lumber Co. v. Neal, 90 Cal. 213, 27 Pac. 192 (decided in department), but they are the latest decisions, and must control. We advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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115 Cal. 337

## PEOPLE v. TUCKER. (Cr. 178.)

(Supreme Court of California. Dec. 17, 1896.)

CRIMINAL LAW—VERDICT—NECESSARY FINDINGS.

Where defendant pleads "Not guilty," and "Once in jeopardy," a conviction will be set aside if the jury fail to find on the latter plea, unless the record shows that it was waived or withdrawn.

Department 2. Appeal from superior court, San Joaquin county.

E. N. Tucker was convicted of extortion, and appeals. Reversed.

W. R. Jacobs and J. G. Swinnerton, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant, E. N. Tucker, was indicted, tried, and convicted of the crime of extortion, in the county of San Joaquin, and sentenced to imprisonment in the state prison of the state of California at Folsom for the term of 2½ years. He appeals from the judgment. A single question is raised on the appeal. The plea of defendant Tucker to the indictment was: "(1) That he is not guilty of the offense charged. (2) That he has been once in jeopardy for the offense charged, to wit, on the 10th of January, 1896, in the superior court of the state of California in and for the county of San Joaquin, in department No. 1 of said superior court, before Hon. Joseph H. Budd, judge, and a jury, in the said superior court, held in the city of Stockton, said county and state." At the trial the jury, after listening to the testimony of witnesses, and after being instructed by the court, rendered the following verdict: "We, the jury in the above-entitled cause, find the defendant guilty of extortion, as charged in the indictment." There was no finding by the jury upon the plea of "once in jeopardy," and, so far as appears, there was no evidence introduced or offered in support of the plea; nor is there anything in the record to indicate that the defendant withdrew or waived the plea. When the defendant was called for judgment, he moved the court for a discharge from custody, and that the judgment be perpetually stayed, which motion was denied by the court, and judgment entered. Aside from the plea of guilty, which raises no issue of fact, there are three pleas to an indictment or information, any one or more of which a defendant may interpose in bar of the prosecution, viz.: (2) Not guilty; (3) a former judgment of conviction or acquittal of the offense charged; (4) once in jeopardy. Of these pleas, the defendant, as before stated, interposed those of "not guilty" and "once in jeopardy." He was entitled to have both these pleas passed upon by a jury before judgment could properly be pronounced in the case against him. In People v. Kinsey, 51 Cal. 278, the defendants entered a plea of not guilty and of former acquittal. The jury found the defendants guilty of manslaughter, but failed to find upon the issues made by the plea of former acquittal, and, judgment having been rendered against them, this court, on appeal, held that the defendants were entitled to a verdict on each plea, and that until there is such a verdict there can be no judgment of conviction. People v. Helbing, 59 Cal. 567, contained like pleas, was disposed of in like manner, and reversed for like cause. People v. Fuqua, 61 Cal. 377, was a similar case, and followed by like effect. To the argument of the attorney general that, in the absence of anything appearing to the contrary, the appellate court must presume, in support of the correctness of the judgment of the court below, that the defense was withdrawn or waived, this court held that, where the record failed to show that the defendant withdrew or waived either plea, it would not be presumed that he did so. People v. Hamberg, 84 Cal. 468, 24 Pac. 298, and People v. Eppinger, 109 Cal. 294, 41 Pac. 1037, are of the same general tenor, and to the same effect. The judgment is reversed, and the cause remanded for a new trial.

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115 Cal. 421

## BUCHEL v. GRAY et al. (S. F. 341.)

(Supreme Court of California. Dec. 19, 1896.)

APPEAL—NEGLIGENCE—FINDING OF JURY—PLEADING.

1. The question of the negligence of a defendant and the contributory negligence of the plaintiff are peculiarly for a jury, and their finding thereon will not be disturbed where it finds reasonable support in the evidence.

2. In an action to recover damages for an injury to plaintiff's property, alleged to have resulted from the negligent blasting of rock by three defendants, a denial in the answer that defendants blasted any rock except from the private quarry owned by two of the defendants is not a denial that blasting was done by the third defendant.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Ernst Buchel against Gray Bros., the Artificial Stone Paving Company, and others. Judgment for plaintiff, from which, and from an order refusing a new trial, defendants appeal. Affirmed.

Fisher Ames, for appellants. F. J. Castelhun and J. C. Bates, for respondent.

TEMPLE, J. This action is for damages alleged to have been caused by negligent blasting of rock near plaintiff's house, by which a rock slide was caused, which destroyed plaintiff's house, and covered his lot with débris. A jury gave a verdict in favor of plaintiff for $3,000, and defendant now appeals from the judgment, and from an order refusing a new trial. On the appeal but two points are made: (1) Plaintiff was guilty of negligence which contributed proximately to the injury; and (2) there was no evidence whatever to connect the corporate defendant with the alleged tort.

As has often been observed, the question of negligence is peculiarly for the jury. Even when the evidence is not conflicting, the verdict will not be disturbed if different conclusions can reasonably be drawn therefrom. Plaintiff's lot was on Vallejo street, 136 feet west from Sansome. North of his lot was a steep ridge of hard trap rock, some 200 feet high. Plaintiff's lot had been graded back to its full depth, and, as it was claimed, some 7 feet beyond his line. This grading had been done before plaintiff owned the lot, and before defendants owned the adjoining property upon which the ledge was situated. The rock beyond plaintiff's line had been removed by blasting, but there was no proof whatever as to who did it. Probably it was done by some one who formerly owned plaintiff's lot, but this was not shown, and it may have been done by some one who had use for the material, but did not claim the lot, and did not convey to plaintiff. At all events, such was the condition of things when plaintiff bought, and also when defendants acquired their interest in the ledge. The defendants were blasting upon this ledge, some 150 feet away. The last blast, some two days before the rock slide, was a very heavy blast, and shook down large masses of rock at the time, and, as the jury found, caused the slide. Defendants contend that the removal of the rock at the base of the cliff destroyed the support, and caused the "overhang" of the cliff, and thus contributed directly and proximately to the accident. According to some of the witnesses, there had for a long time been a crevice or seam at the top of the ledge, and some 25 feet from the edge. This seam was found to be wider just after the heavy blast, and, of course, just before the fall. The idea is that this rift was caused by the removal of the support by excavating back of plaintiff's lot; that the accident could not have occurred but for this; and it is assumed that this was done by plaintiff's grantor. The evidence is, however, not clear that in the slide anything but the top of the ledge above the bulging wall came down. Whether the removal of the rock at the base back of plaintiff's lot contributed to the slide is not clear from the evidence. And it does not appear that plaintiff or his grantor were responsible for the excavation. I do not wish to be understood as conceding that, if it had so appeared, it could have been attributed to plaintiff as contributory negligence. The support was not removed by plaintiff, nor since the defendants became owners in the property. The judgment cannot be disturbed on the ground of contributory negligence.

There was an abundance of evidence to justify the jury in the conclusion that the slide was caused by the blasting. On this point the evidence is conflicting. As to the point that there is no evidence that the corporate defendant had any connection with the blasting, it is enough to say that in the answer all the defendants admit the blasting. The complaint charges: "That the said defendants have for one year last past been, and still are, engaged in cutting down said hill, and removing rock therefrom, by blasting and excavating. That said defendants prosecuted said work by cutting down said hill in the rear of plaintiff's said premises so carelessly and negligently that the blasts caused the walls and ceilings of the rooms of the house on the front of the said lot to crack, and plastering to become loose, whereby said house was damaged in the sum of $2,000. That by reason of said defendants' carelessness and negligence in cutting down said hill as aforesaid, a large mass of rock became loose, and on the 16th day of January, 1894, fell upon plaintiff's rear house, and completely demolished the same, and all the appurtenances thereto belonging." The only denial of these allegations contained in the answer is as follows: "Deny that defendants have been for one year last past, or for any other time, or that they still are, engaged in cutting down said or any hill, or in removing rock therefrom by blasting or excavation or otherwise, except from the private quarry of said defendants George F. Gray and Harry N. Gray. Deny that said defendants, or any of them, prosecuted said or any work of cutting down said or any hill in the rear of plaintiff's premises or otherwise, carelessly or negligently, or that the or any blasts caused the walls or ceilings of the rooms of the house on the front of said lot or elsewhere to crack, or the plastering to become loose, whereby said house, or any house, was damaged in the sum of $2,000, or any other sum; and allege that the work of taking rock from their said quarry has at all times been conducted in a safe and lawful manner. Deny that by reason of the carelessness of said defendants, or any of them, in cutting down said or any hill, a large or any mass of rock became loose on the 16th day of January, 1894, or at any other time, or fell upon plaintiff's rear or any house, or completely or otherwise demolished the same, or at all, or any of the appurtenances thereto belonging. On the contrary, these defendants allege that the damages claimed by plaintiff to have been sustained by him, as set forth in his complaint, if any damages have been suffered by him, were caused and occasioned by his own negligence, which was the direct and immediate cause of said damages." It was shown by the testimony of both George F. and Harry N. Gray that the ledge upon which blasting was done, and part of which was precipitated upon the lot of plaintiff, was the private quarry of George F. Gray and Harry N. Gray. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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(115 Cal. 345)

## PETERS v. BOWMAN. (S. F. 203.)[1]

(Supreme Court of California. Dec. 17, 1896.)

NEGLIGENCE—ACCUMULATION OF SURFACE WATER—DEATH OF TRESPASSING INFANT.

One who allows surface water to accumulate in a pond on his land, without fencing or inclosing the same, is not liable for the death of a trespassing infant who was drowned therein.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Henry Peters against C. E. Bowman. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Geo. D. Collins, for appellant. Myrick & Deering, for respondent.

McFARLAND, J. This action was brought by plaintiff to recover damages for the death of his infant son, who was drowned in a pond of water upon a lot of land owned by the defendant, Bowman. The jury returned a verdict for the defendant, and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The facts are practically undisputed, and may be stated briefly: Defendant owned the lot in question, and resided on it for several years prior to 1889. It was part of what is known as "Ashbury Heights," in San Francisco. The land sloped towards the west, and on the westerly side fronted on Ashbury street. It does not appear whether or not it was in a thickly-settled neighborhood. In its natural condition the surface water which came from the lot flowed off through a gully across Ashbury street (over which there was a small bridge), and emptied into a pond a couple of blocks away. At some time prior to 1889 the city of San Francisco graded Ashbury street, and threw up an embankment along the street and across the gully, and on the westerly side of said lot, to the height of eight or ten feet. This prevented the flow of surface water from the lot, and on this account defendant removed his residence, in 1889, to an adjoining county. From that time until 1894, when the boy was drowned, the surface water, being stopped by said embankment, would form during the rainy season a pond, which disappeared during the dry season. Defendant did nothing to create the pond, or to prevent the water from flowing away; and, so far as he is concerned, it may be considered as a natural pond. The lot was not inclosed by a fence or otherwise After defendant removed his residence, he did not often visit the lot, and did not give permission to or invite anyone to go upon it; but children did visit it, and play upon the pond, and he must be presumed to have known that fact. He drove children away once, and a policeman did the same several times. The plaintiff knew of the existence of the pond, and knew that his son knew of it, and he "never told him not to go rafting on the pond." The son was over 11 years old, and was "a bright, active boy, an intelligent boy for 11 years, more so than the average boy of that age." He lived with his father, the plaintiff, on Castro street, "four or five blocks over the hills" southerly from the pond. He had been at the pond often before the day of the accident. He was allowed by his father to run on the streets. On February 16, 1894, he went with two other boys to the pond, and while floating on the pond on a rudely-constructed raft made of railroad ties, and when running along one of the timbers, he fell off, and was drowned. They went onto the pond from the southeasterly side,—the side furthest away from Ashbury street.

Upon these facts the verdict was right, and a verdict for plaintiff would have been unwarranted. The deceased boy was, at the time of the accident which caused his death, a trespasser on the land of defendant, and the general rule undoubtedly is that the owner of land is under no duty to keep his premises safe for trespassers. The rule has been applied, also, where there was an implied license. Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256. The exceptions to the general rule are instances where the owner maintains on his land something in the nature of a trap or other concealed danger, known to him, and as to which he has given no warning to others, and instances where there had been something in the nature of a wanton injury to a trespasser, as where the owner had set spring guns on his premises, by which the trespasser had been shot. There is, also, the instance of an excavation adjoining a public highway, into which a traveler on the highway, where he had the right to be, had accidentally fallen. There are other exceptions not necessary to be here mentioned. And the general rule applies to children as well as to adults, with some exceptions hereinafter noticed. "The rule is that, ordinarily, the owner of premises owes no duty of immunities to trespassers, though the latter be infants." Note on page 67 of Whitt. Smith, Neg. (2d Ed.) and cases there cited.

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[1] For opinion on rehearing, see 47 Pac. 598.

Plaintiff seeks to take this case out of the principle above stated by applying to it what is now known as the "Rule of the Turntable Cases." That rule, which is a marked exception to the general principle, has been approved in many of the states, and in others has been repudiated. It must be taken as approved in this state by the decisions of this court in Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, and other cases cited by appellant. The rule originated in a case where a railroad company had erected on its land near a public way a turntable, and left it unlatched and unprotected, and young children, attracted by the turntable, went upon it to play, and started it in motion, whereby one of them was injured; and the rule, as thus applied, rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that therefore the railroad company was liable for legal negligence in erecting it and leaving it exposed, as an attraction to children and a temptation to them to intermeddle with it. See Barrett v. Southern Pac. Co., supra, and cases cited on page 303, 91 Cal., and on page 667, 27 Pac. But the rule of the Turntable Cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land had erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds. It has also been applied to a few other cases, where the owner, by some affirmative act, has caused some artificial danger to exist on his premises, as in the case of Bransom's Adm'r v. Labrot, 81 Ky. 638, cited by appellant, where the defendants had "stacked a large quantity of lumber in one large and irregular pile, so negligently and badly done that, as the deceased, an infant, was playing near it, one of the timbers fell upon and killed him."

It is not contended by appellant that the rule of the Turntable Cases has ever been applied to facts like those in the case at bar. His contention is that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing, as in ponds and lakes; or running, as in rivers and creeks; or ebbing and flowing, as on the shores of seas and bays—is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall. However, general reasoning on the subject is unnecessary, because adjudicated cases have determined the question adversely to appellant's contention. No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation, while it has been repeatedly held that in such a case no damages can be recovered. It was directly so held in Klix v. Nieman, 68 Wis. 271, 32 N. W. 223; in Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74; in Hargreaves v. Deacon, 25 Mich. 1; in Gillespie v. McGowan, 100 Pa. St. 144; and in the recent case of Richards v. Connell, 45 Neb. 467, 63 N. W. 915. In the last-named case the complaint alleged that the plaintiff's infant son was drowned in a pond on defendant's land in the vicinity of a public school, and the other facts alleged were almost exactly the same as those alleged and proven in the case at bar; but the trial court sustained the demurrer to the complaint on the ground that it did not state a cause of action, and, on appeal, the supreme court of Nebraska affirmed the judgment. The court, in its opinion, after reciting the averments of the complaint, say: "The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water, or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such liability exists." After citing authorities, and distinguishing the cases from those where injuries result from lawful use of sidewalks and streets near dangerous excavations, the court further say: "We are referred to a number of cases which, counsel argue, sustain the plaintiff's right to recover on the facts alleged, and which may be classified as follows: (1) Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use thereof. * * * (2) Cases in which the owner has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class, which constitute a recognized exception to the rule, are the so-called 'Turntable Cases.' (3) Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition. But in no case has a recovery been allowed on a state of facts substantially like those alleged in the petition under consideration. It follows that the judgment of the district court must be affirmed." It will be observed that the supreme court of Nebraska recognizes the rule of the Turntable Cases, and distinguishes the case under consideration from those cases; and this is an answer to the contention of appellant that the authorities cited by respondent are from courts in which the rule of the Turntable Cases was repudiated. That rule was also recognized in the two cases above cited from Missouri and Michigan.

It may be well to notice briefly one or two of the other cases in point. In Klix v. Nieman, supra, the plaintiff's son fell into a pond on defendant's land which had been caused by water collecting in an excavation, and was drowned. The case was very similar to the one at bar, and the supreme court of Wisconsin, in delivering its opinion, says, among other things, as follows: "So the single question presented is: Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made), where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be unreasonable to so hold." In Overholt v. Vieths, supra, the eight year old son of plaintiff had fallen into a pond of water partly on defendant's land, which had been formed by water collecting in an excavation which had been made by quarrying several years before the accident. The plaintiff had a verdict for $10, and the case was reversed. The court alluded to the cases which go upon the turntable doctrine, and said: "While the authorities above cited recognize the liability of the owner, if a child is injured by dangerous machinery, so situated and exposed that it will naturally attract children, who cannot be expected to comprehend the danger of its use, and takes no precaution to prevent access to it, and thereby impliedly invites children to it, they distinctly deny the liability of a lot owner under the facts disclosed in this case." The court also say that "the facts in evidence would have justified the court in directing a verdict for defendant." In Hargreaves v. Deacon, supra, a child had fallen into an uncovered cistern on defendants' land. The court in its opinion discussed at length the principles involved in the case, and, after noticing the decisions which declare the turntable doctrine, says: "We have examined the decisions with some care, and can find no support to any doctrine which would authorize a recovery in the case before us. We cannot help feeling much sympathy for the sad case of a child who was only following the natural and innocent curiosity of his age when he met with the accident which caused his death. But there is nothing to indicate any wanton or inhuman disposition in the defendants, and no illegality in the management of their business, and they have violated no right of the plaintiff or his intestate." In Gillespie v. McGowan, supra, plaintiff's son, eight years old, had fallen into a cistern on defendants' land which had been abandoned, but had once been used in connection with brickmaking. The court, in delivering its opinion, among other things, say: "We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or deadfall, as in Hydraulic Company v. Orr [83 Pa. St. 332]. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusement. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned. There are any quantities of surface where they may be injured. To compel the owners of such property either to inclose it or to fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is a part of the boy's nature to trespass, especially where there is tempting fruit; yet I have never heard that it was the duty of the owner of a tree to cut it down because a boy trespasser might possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

The foregoing are a few of the many authorities which are particularly applicable to the case at bar, and show that in a case like this there can be no recovery. Under these circumstances it is useless to consider the points raised by appellant on the instructions of the court on the subject of the contributory negligence of plaintiff and of the boy who was drowned. Under no view of the case could a verdict for the plaintiff be sustained. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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5 Cal. Unrep. 551

## SKYM et al. v. WESKE CONSOLIDATED CO. et al. (Sac. 167.)

(Supreme Court of California. Dec. 18, 1896.)

MINING CONTRACT — LABORER'S LIEN — TIME OF SIGNING—EXECUTION OF CONTRACT—ATTORNEY'S FEES—CONFLICTING EVIDENCE.

1. A contract for labor on a mine provided that the laborers should receive certain supplies in part payment, and that, after those supplies were paid for, the balance of income remaining should be divided pro rata to the extent of each laborer's wages at three dollars per day. In case of failure of profits, the personal property of the mine should be sold to pay the wages due. *Held* that, in the absence of anything to show a profit, an action would not lie to enforce a lien for wages unless it were alleged and proved that there had been a request for a sale of the personal property, and a refusal on the part of the owner.

2. The contract not being restricted in application to the labor performed after it was signed, the actual time of signing is immaterial.

3. The date when the contract purported to be signed by plaintiff is conclusive evidence that the labor performed after that date was done subject to its terms.

4. Evidence that a contract purporting to have been made by plaintiff was read to him, he being unable to read or write, with comments thereon representing that it meant something very different from its true meaning, and that thereupon he assented to it, and authorized his name to be signed thereto, is sufficient to justify a finding that plaintiff did not make the contract.

5. A judgment for attorney's fees in an amount in excess of that claimed in the complaint cannot be sustained.

6. A finding based on conflicting evidence will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by Archibald Skym and others against the Weske Consolidated Company, William Muir, and others. From a judgment for plaintiffs, defendant Muir appeals. Modified.

F. P. Tuttle and Pullen & Wallace, for appellant. John M. Fulweiler and Ben P. Tabor, for respondents.

HAYNES, C. This action was brought by the plaintiffs to foreclose their several alleged liens for labor performed by them, respectively, upon the Weske Consolidated Placer Mine, of which all the defendants were alleged to be reputed owners, and that defendant Muir was the person in charge, and by whom they were employed. Muir answered, alleging that at all the times covered by the alleged claims of the several plaintiffs he was and is the sole owner of said mining property. He admitted the employment of the several plaintiffs, the length of time they had labored in the mine, and, except as to plaintiff Skym, the rate of wages agreed upon. He alleged, however, that the labor performed by the plaintiffs, respectively, was under a special agreement, a copy of which was attached to his answer, and which reads as follows:

"We, the undersigned, laborers of the Weske and Mattan claims, accept and subscribe to the following terms, to wit: (1) We agree to receive our board, tobacco, and clothes. (2) The balance due us to be received over and above expenses for supplies, etc., for working mine. (3) The provision bill and supplies for the mine to be paid first, and the balance over to be divided pro rata amongst us until such pro rata makes up our full quota of three dollars per day.

"If I, Wm. Muir, should fail to pay from proceeds hereinbefore referred, I, Wm. Muir, agree to co-operate with men in making sales of all personal property to make up said wages with the least possible cost.

"Wm. Muir."

This agreement was signed by plaintiff Skym under date of April 15, 1893, and by plaintiff Jones under date of December 21, 1893, but does not show that it was signed by plaintiff Bowen. This agreement was set out in the finding made by the court, and in relation to said agreement the court found that the defendant William Muir did not perform the conditions of said agreement, and thereafter, and before the 4th day of August, 1894, failed and refused at divers times to co-operate with the said Skym in making sales of personal property to pay the wages due to the said plaintiffs Skym and Jones, or to perform the other conditions of said agreement by him to be performed. No question was made as to the form or sufficiency of the said liens filed, and the court sustained the lien of plaintiff Bowen, who had not signed said agreement, and denied the liens of plaintiffs Skym and Jones, but gave personal judgment against defendant Muir for the amount found due said Skym and Jones, respectively, and entered judgment foreclosing the lien of plaintiff Bowen. Defendant Muir moved for a new trial, his motion was denied, and this appeal is from the judgment and the order denying his said motion.

The only errors specified go to the sufficiency of the evidence to justify the findings, and to an alleged variance between the allegations of the complaint and the evidence. The genuineness and due execution of said agreement were not denied under oath, and were therefore admitted. Code Civ. Proc. § 448. It was also alleged in the answer that by mistake there was omitted from said agreement a provision to the effect that, in case any of the laborers quit work before they had been paid from the proceeds of the mine, they should forfeit all claim to compensation, and that by mistake the name of respondent Bowen was not subscribed to the contract; and a reformation of the contract is sought as to these alleged omissions. The court found against appellant in relation to these alleged mistakes and omissions, and, as the evidence was conflicting, that finding cannot now be disturbed. The allegations of the complaint in respect to the hiring of the plaintiffs, respectively, were that a contract was entered into with each of them, whereby it was mutually agreed and contracted that the defendants should hire said plaintiffs to work as miners in said mining claims at the agreed price of three dollars per day, payable in cash, gold coin, as fast as said labor was performed; that such hiring should continue as long as mutually agreeable; and that, in pursuance of said contract, said plaintiffs worked the number of days alleged. The findings of the court substantially followed the language of the complaint as to the agreement or terms of hiring, but inserted the words "except as modified as hereinafter stated," and in the next finding set out the said written agreement, a copy of which the defendant attached to his answer. The written agreement fixed the wages of the laborers who signed it (unless as to plaintiff Skym), and the mode or manner of payment, and the sources from which payment should be made. It is true, there is no clause declaring that, if the employés should quit before enough to pay them had been realized from the mine, they should forfeit all pay except that which they had received before quitting; and we may further assume that, after the profits of the mine and the proceeds of the personal property had been exhausted, appellant would be personally liable to those who signed the contract for any deficiency, since the rate of wages was fixed, and there was no provision by which any part of their wages should, in any contingency, be forfeited. But we think it equally clear that, as to those who signed said contract, no part of their compensation became due except that which they were to take in boarding, tobacco, and clothes, until it should be realized from the profits of the mine, and, if no profits, or insufficient profits, were realized, until a refusal on the part of Muir to apply the personal property or its proceeds to the payment of their wages. If the plaintiffs Skym and Jones had set out this agreement in their complaint, it is evident they would not have stated a cause of action without alleging facts showing a breach of the contract by defendant Muir, since the mere statement of the amount earned, and that a certain balance was unpaid, would not show that such balance was due or payable when the action was commenced.

Whether, in view of the allegations of the complaint as to the terms of the contract under which the labor was performed, and the admission made by the plaintiffs by their failure to deny the genuineness and due execution of the written contract set out in the answer and the testimony relating thereto, there was a material variance between the allegations of the complaint and the evidence, as appellant contends, or whether it was a failure to prove the contract alleged by the plaintiffs, need not be determined. By whatever name it may be called, the result must be the same. It was realized by the court below that, as to the plaintiffs Skym and Jones, the written contract, if performed by Muir, must defeat their action; but the court found, as to each of said plaintiffs, that defendant Muir "did not perform the conditions of said agreement, and thereafter, and before the 4th day of August, 1894, failed and refused at divers times to co-operate with the said Skym in making sales of personal property to pay the wages due and owing to said Skym, or to perform the other conditions of said agreement by him to be performed, and on the 4th day of August, 1894, there was and became due and owing to plaintiff Skym on said contract of employment" the sum demanded. A similar finding was made as to plaintiff Jones. These findings are not sustained by the evidence. There is no evidence tending to show that anything was realized from the mine beyond the expenses, which, under the agreement, were to be first paid. Skym was foreman, and he testified that but little was taken out of the mine, and nowhere is there any evidence that any profit was realized, which, under the contract, was to be distributed to the men; nor is it shown that the enterprise was abandoned, nor that any request was ever made for the sale of the personal property, or that there was no personal property to be sold. It is therefore clear that as to the judgments in favor of Skym and Jones there must be a reversal. It may be that, upon the facts as they really exist, Skym and Jones may each be entitled to a personal judgment against defendant Muir. What is now decided as to them is that, upon the pleadings, and the evidence appearing in the record, neither of them is entitled to such judgment.

Some question is made as to when the written contract was signed. As to Skym and Jones, the dates attached to their signatures, whether the true dates at which their signatures were written or not, is, in the absence of satisfactory evidence to the contrary, conclusive evidence that the labor performed after that date was done under its terms and conditions; and we also think that the time when the contract was actually signed is immaterial, for the reason that it was not limited to work done thereafter, and that it applied as well to compensation theretofore earned, and remaining unpaid, as to earnings which accrued thereafter.

In the absence of proper allegations and proof of mistake or omission in the written agreement touching the wages of plaintiff Skym, he is bound by the rate therein expressed. The facts affecting Bowen's judgment are different. His name was not signed to the contract. Concerning this agreement, Bowen testified: That he did not have an understanding with Muir that he was to get three dollars per day, that he was to furnish him with grub, clothing, and tobacco, and that he was to look for the balance of the three dollars per day from the mine itself. That Muir wanted him to sign this paper, and he asked him what he wanted him to sign that for, and he said, "Only to get my money;" that when they got down they would have plenty of money; that he meant from No. 3, which is a tunnel. That Muir said there was plenty in there, and it was coming out of the mine. He further testified that the agreement was read to him by Mr. Yarnold, and that he authorized Yarnold to sign it for him; that he could neither read nor write; that Yarnold told him "it was to work down in No. three, and get the water out, and we would have plenty of money,—all the money we wanted;" that he did not understand that he was to wait until the money came out of the mine. That Muir and Yarnold made these statements to Bowen is not disputed. It would appear from Bowen's testimony that the paper was read with running comments thereon, so that his assent to the contract and his direction to Yarnold to sign it for him were based, not upon the reading of the paper itself as it was in fact written, but were based upon the supposition that the paper contained and meant all that was said. We think the evidence was sufficient to justify the court in finding that Bowen did not make the contract set out in the answer of defendant, and in sustaining his lien. The court erred, however, in the allowance of $250 as an attorney's fee for foreclosing his lien. The allegation in the complaint is that $150 is a reasonable sum to be allowed for the foreclosure of Bowen's lien, and no more than that sum can be allowed.

As to plaintiffs Skym and Jones, the judgment and order appealed from should be reversed, with leave to amend their complaint; and, as to plaintiff Bowen, the judgment should be modified by reducing the allowance of attorney's fees for foreclosing the lien to $150, and, as so modified, the judgment in his favor, and the order denying a new trial as to his cause of action, should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed as to the plaintiffs Skym and Jones, with leave to amend their complaint; and, as to the plaintiff Bowen, the judgment is modified by reducing the allowance of attorney's fees for foreclosing the lien to $150, and, as so modified, the judgment in his favor, and the order denying a new trial as to his cause of action, are affirmed.

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115 Cal. 425

## BADOSTAIN v. GRAZIDE. (L. A. 137.)

(Supreme Court of California. Dec. 19, 1896.)

ASSAULT AND BATTERY—CIVIL ACTION—EVIDENCE—INSTRUCTIONS—MALICE—EXEMPLARY DAMAGES.

1. In a civil action for assault and battery, where it appeared that the altercation arose over defendant's right to charge plaintiff for the pasture of his horse, evidence as to the existence of any contract and its terms was inadmissible.

2. An instruction that, if the jury believed defendant committed the battery,—"that is, wrongfully used force and violence on the person of plaintiff, in a malicious manner; that is, a manner that showed he intended to vex, injure, or annoy him," etc.,—they might give exemplary damages, was error, in that it ignores the question whether the assault was deliberate, or made in sudden heat of passion.

3. An instruction that, in cases of personal injuries for which a criminal prosecution might be brought, exemplary damages may be recovered in a civil action, is improper, as eliminating the question of mitigating circumstances.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Bernabe Badostain against Francisco Grazide. From a judgment for plaintiff, defendant appeals. Reversed.

J. Brousseau, for appellant. J. B. Dunlap, for respondent.

BRITT, C. Plaintiff had a verdict and judgment for damages for an assault and battery committed on him by defendant. It was in evidence at the trial that plaintiff had been in the employ of defendant for a period of about eight months next before the said battery, during which time he had kept a horse on pasture at defendant's premises. On settlement of accounts, defendant deducted from the wages due him the sum of $12, for pasturage of the horse. Plaintiff testified that, when he began work for defendant, he told the latter he wanted the horse pastured at his place, and defendant replied, "All right;" that he (plaintiff) did not expect to pay for pasturage; that he told defendant, when the latter proposed to make such deduction from his wages, that it was more than the horse was worth; that thereupon defendant became enraged, and struck him in the face. On behalf of defendant, there was evidence that he gave to plaintiff an order or draft for the wages due him, less said charge for pasturage, which plaintiff accepted, but at the same time angrily applied to defendant an obscene and insulting epithet; that this occurred in the presence and hearing of defendant's wife and two young daughters; that the conversation between the parties was amicable until plaintiff addressed to defendant the said obscene language; and that the latter, being thus incensed, struck the blow described by plaintiff, and which occasioned the suit. On cross-examination of defendant by plaintiff's counsel, he stated that there had been no agreement to pasture plaintiff's horse without pay. In rebuttal, plaintiff testified that defendant had so promised when he went to work for him. All the evidence concerning the terms of the contract about pasturage was admitted over the objection, and exception of defendant. The court instructed the jury, among other matters, that if they believed from the evidence that defendant committed a battery,—"that is, wrongfully used force and violence upon the person of plaintiff, in a malicious manner; that is, in a manner that showed he intended to vex, injure, or annoy him,—and that plaintiff was injured and damaged thereby, then you, in fixing the damages, should not be confined to the actual damage sustained, but may give, in addition," exemplary damages; also, that "in case of personal injuries, for which a criminal action might have been brought, exemplary damages may be recovered in a civil suit."

The court erred in admitting evidence of the agreement relative to pasturing the horse,—a matter long past, and not requisite, as regards any proper purpose of this case, to the comprehension of things done and said at the time of the assault. The affair was an instance, not unprecedented, of the settlement of an account between parties, in which argument over some disputed item is followed by abuse and that by blows. In such a case the particulars and circumstances of the contract in which are involved the merits of the disputed charge, instead of being relevant and helpful in determining the liability of either party to the other for violence then inflicted, are more likely to be a confusing and misleading element in the inquiry. The jury are apt to conceive that one party or the other is wrong in his notion of his contractual rights, and to allow this conception to influence their verdict. If it be said that evidence of an agreement to pasture the horse without charge was admissible in the present case, in order to show the animus of the defendant, and justify the visitation of punitive damages on him, the answer is that, if he was in the wrong in demanding pay for the pasturage, his wrong lay in the breach of a contract, to be redressed by an action thereon, and not confounded with the breach of an obligation of wholly different nature, viz. to abstain from injury to the plaintiff's person. If plaintiff could rightfully give his version of the prior contract, defendant could with equal right produce proof that no such contract was made, or that it had been in some way discharged; "and thus the attention of the jury would be distracted with a multiplicity of questions and issues." Matthews v. Terry, 10 Conn. 458. Compare Lee v. Woolsey, 19 Johns. 319; Currier v. Swan, 63 Me. 323; Cushman v. Waddell, Baldw. 57, Fed. Cas. No. 3,516.

There was error, also, in the instructions, which may have enhanced the verdict. To say that "if defendant wrongfully used force and violence upon the person of plaintiff, in a malicious manner,—that is, in a manner that showed he intended to vex, injure, or annoy him,"—then the jury, "in fixing the damages, should not be confined to the actual damage sustained," but might give exemplary damages in addition thereto, was to say, in effect, that, if a battery was committed at all, the jury should award punitory damages; for it is hard to conceive of any battery intentionally committed which does not involve the intent on the part of the assailant to vex, injure, or annoy the person assailed. In cases like the present, "the law, in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from sudden heat." Lee v. Woolsey, 19 Johns. 321. As in a prosecution for homicide, when there is evidence tending to show that the killing was the consequence of a sudden quarrel or heat of passion, the jury may find that the offense was without malice, and therefore manslaughter only, so here they should have been instructed that the presence or absence of a malicious intent in the mind of defendant was a question of fact to be determined by them from the evidence; that they might allow punitive damages if they believed from the evidence that such intent existed; but that if the battery was the consequence of a sudden heat, resulting from provocation first offered by the plaintiff, and not of a design for his injury deliberately formed by defendant, and that the force used was not so disproportionate to the provocation as to repel the inference that it was induced thereby, then no exemplary damages should be included in their verdict. The cases tend to this conclusion. Lee v. Woolsey, supra; Robison v. Rupert, 23 Pa. St. 523; Ward v. Blackwood, 41 Ark. 295, 300; Crosby v. Humphreys, 59 Minn. 92, 96, 60 N. W. 843; Kiff v. Youmans, 86 N. Y. 324; Childers v. Publishing Co., 105 Cal. 284, 291, 38 Pac. 903. Considerations similar to the preceding apply to the charge that "in case of personal injuries, for which a criminal prosecution might have been brought, exemplary damages may be recovered in a civil suit." This was entirely too broad. Suppose two persons fight by mutual consent; each is punishable criminally; but neither may recover exemplary damages in a suit against the other; so, even though they fight "with great spirit and brutality." Shay v. Thompson, 59 Wis. 540, 18 N. W. 473. Defendant here was liable criminally for the breach of public order, but whether he was liable to plaintiff in exemplary damages depended upon the strength and cogency of the mitigating circumstances in evidence tending in some measure to palliate such violation; and this was a matter for the jury. The judgment and order should be reversed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

115 Cal. 404

### HUGHSON et al. v. CRANE. (No. 18,390.)

(Supreme Court of California. Dec. 18, 1896.)

IRRIGATION DISTRICTS—SALE OF BONDS—APPLICATION OF PROCEEDS.

1. Irrigation Act, § 12, provides that, in case of a purchase of lands and other property necessary for the work, the directors may pay for the same with bonds issued under the act at their par value. Section 15 provides for the sale of such bonds after due notice, and on sealed proposals. *Held*, that the bonds can be disposed of only in one of the manners provided by such sections.

2. Irrigation Act, § 37, provides that the cost of property and the construction of the works shall be wholly paid out of the construction fund. *Held*, that the bonds provided for under the irrigation act can be applied to no other object than the construction fund.

3. Directors of an irrigation district cannot appropriate bonds issued for the construction of the works to the payment of salaries or expenditures incurred in regard to the management of the property.

4. Irrigation Act, § 22, authorizes the board of directors to levy assessments sufficient to raise the annual interest on the outstanding bonds. Plaintiff filed a bill to enjoin an assessment for such purpose, on the ground that the bonds to pay the interest on which the assessment was made were illegally issued. The bill did not definitely show that there were no outstanding bonds on which the district was liable, but alleged that the business of the district had been so conducted that the books did not show what bonds, if any, were legally issued. It alleged that, of the $524,000 bonds outstanding $150,000 were illegally issued; that the interest on the balance would amount to $22,000; and that there were $10,000 in the treasury for the payment thereof, and alleged an assessment of $40,000. *Held* sufficient to justify an injunction against the levy of the assessment.

5. Where a bill to enjoin the levy of an assessment to pay interest on outstanding irrigation bonds shows that a large portion of the bonds were illegally issued, and that the exact amount of them cannot be shown, because of failure of officers of the district to keep a record of their acts, the rule requiring the payment of such portion of the assessment as is admitted to be just is inapplicable.

6. Where bonds are illegally issued by an irrigation district, one taking them is charged with knowledge of the powers of the officers of the district, and has no right of action upon the bonds if given in disregard of the statutory requirements.

7. To a bill to enjoin the collection of an assessment of an irrigation district levied to pay interest on outstanding bonds alleged to be illegally issued, neither the district nor the holders of the bonds are necessary parties.

In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Hughson and others against Crane. Judgment for defendant, and plaintiffs appeal. Reversed.

Eastin & Griffin, for appellants. P. J. Hazen, for respondent.

HARRISON, J. The plaintiffs brought this action to restrain the defendant, who is the collector of Turlock irrigation district, from selling certain lands belonging to them, in satisfaction of a delinquent assessment levied upon the real property in the district, for the purpose of paying the interest on the outstanding bonds of said district for the year 1893. It is not alleged that any of the steps required by the statute for making the levy of the assessment were omitted, but the complaint is based upon the ground that the assessment was unauthorized, by reason of the invalidity of the bonds for paying the interest on which the assessment purports to have been levied. The plaintiffs herein did not pay this assessment upon certain parcels of land described in the complaint, and, after the same became delinquent, the collector made the publication of the delinquent list, as required by the provisions of the irrigation act, with a notice that on a certain day he would sell the same at public auction, for the purpose of making the said assessments. The present action was thereupon commenced to restrain said sale, and a preliminary injunction therefor was granted. The defendant demurred to the complaint, and, his demurrer having been sustained, the injunction was dissolved, and judgment entered in favor of the defendant. From the order dissolving the injunction, and from the judgment in favor of the defendant, the plaintiffs have appealed.

The Turlock irrigation district was organized in 1887, and, shortly after its organization, an issue of bonds to the amount of $600,000 was voted by the district. Subsequently, in the year 1892, the district voted an additional issue of $600,000. In September, 1888, after the board of directors had declared its intention to sell its bonds to the amount of $550,000, it accepted a written offer made to it by L. M. Hickman, in which he proposed to buy the said amount of bonds "at the price of ninety per cent. of the face value thereof," but was not to make payment therefor until he could sell the same at not less than that price. Said proposal contained also the following agreement: "I further offer and agree to pay to said district all sums I may receive for said bonds over and above said ninety per cent. and the cost and expenses of negotiating and making sale thereof. I further agree to use due diligence and all reasonable means to sell said bonds, and to sell the same for the best sum obtainable, but not to make any such sale without the consent of the president of the board of directors of said district; and in case said board shall, by resolution, request the surrender of said bonds, then I agree to surrender the same to said district, on payment to me of all the costs and expenses theretofore incurred in the negotiation and sale thereof." Similar offers by Hickman subsequently made in reference to other portions of its bonds were accepted by the board; but it is alleged in the complaint that it was not intended thereby that he should take or pay for the said bonds, and that he did not, in fact, take or pay for any of said bonds. In December, 1891, the board of directors entered into an agreement with J. R. Wilbur, by which he was authorized, as the agent of the district, to sell the bonds of the district to the amount of $252,500, at the rate of 90 per cent. of their par value; and it is alleged that under this agreement a large portion of the bonds of the district were disposed of through his agency, at the lowest price allowed by law, but without taking any of the proceedings for the sale thereof required by section 16 of the act. In 1891 the board of directors entered into a contract with R. W. Gorrill for the construction of a dam, which was to constitute a portion of the works of the district; and, for securing the payments to be made to him for the work that he should do under this contract, the following clause was inserted therein: "The district shall advertise for sale, as prescribed by law, sufficient bonds for such payments; and said first party (Gorrill) shall bid therefor, at least, ninety per cent. of the face value thereof; and, if no higher bids be received, such bonds shall be awarded to him, and he shall be credited in payment therefor the sum due him from the district, and the district shall be credited on such payment under this contract the sum so bid for such bonds." The board of directors did not, however, follow these terms of the contract, and did not advertise for the sale of any of its bonds, nor did Gorrill make or the board receive any proposal for the purchase of said bonds, nor did the board award any purchase of the bonds to Gorrill, but delivered to him bonds to the amount of $150,000, in exchange for the amount due him upon the contract, and as a payment thereon, at the rate of 90 per cent. of their face value. It is also alleged in the complaint that bonds to the amount of a few thousand dollars were exchanged by the board with its officers for their salaries, and also in payment of certain obligations of the district. At the date of the assessment, October 3, 1893, the amount of bonds outstanding, including those legally as well as illegally disposed of by the board amounted to $524,000; and, for the purpose of paying the interest thereon, the board levied an assessment of $40,855.51. There was at that time in the treasury of the district, to the credit of the bond and interest fund, the sum of $9,598, applicable to the payment of interest, and which, it is alleged, was more than sufficient to pay the interest upon the bonds that had been legally issued.

Section 15 of the irrigation act provides that, after the organization of the district, the board of directors shall determine the amount of money necessary to be raised "for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act," and shall thereupon submit to the electors of the district, at a special election to be called for the purpose, the question whether the bonds of the district shall be issued "in the amount so determined." Section 16 of the act is as follows: "The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to fully carry out the objects and purposes of this act. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper in each of the cities of San Francisco, Sacramento and Los Angeles, and in any other paper at their discretion. The notice shall state that sealed proposals will be received by the board at their office for the purchase of the bonds till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said board shall in no event sell any of the said bonds for less than ninety per cent. of the face value thereof." By section 12 the board of directors is given authority to acquire, either by purchase or condemnation, all lands and waters and other property necessary for the construction and maintenance of the canals and works of the district; and it is provided that, "in case of purchase, the bonds of the district hereinafter provided for may be used at their par value in payment." These are the only provisions in the act for any disposition by the directors of the bonds of the district; and it follows that the only mode in which they can exercise their power of disposing of the bonds so that they may become valid obligations against the district is either to exchange them for property at their par value, or to sell them for money in the open market, under the restrictions and limitations given in section 16, at not less than 90 per cent. of their face value. The express provision giving to the board power to exchange them for certain property at their par value excludes the right of the board to exchange them for any other purpose, or to dispose of them in any other manner than by the sale authorized by section 16.

It is provided in section 37 that "the cost and expense of purchasing and acquiring property, and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund"; and the authority given to the board of directors in the subsequent portion of this section to levy special assessments for defraying the expenses of the organization of the district, and the payment of the salaries of the officers and employés, clearly indicates that the construction fund thus referred to consists of the moneys received from the sales of the bonds authorized by section 16, and that the disposition of the bonds is not only limited to providing for this construction fund, but that they can be applied to no other object. It was held in Tregea v. Owens, 94 Cal. 317, 29 Pac. 643, that the directors have no authority to levy an assessment for the payment of the expenditures authorized by section 37, without a previous approval of the voters of the district, at an election held for that purpose. Under the principles of that case, the directors have no authority to appropriate the bonds which the electors have voted to issue for the construction of the irrigation works, to the payment of salaries, or expenditures incurred in the management of the property. If, instead of selling the bonds, as directed by section 16, they could use them for these purposes, the provisions of section 41 would be futile; and, under an improvident or reckless board of directors, the bonds which had been voted for the purpose of raising "money" with which to construct a canal, might be frittered away in useless expenditures and salaries, and the district receive no benefit whatever.

The irrigation act is evidently framed upon the theory, and with the intention on the part of the legislature, that the affairs of the district shall be conducted upon a ready-money basis, and not upon credit; and, to enable the directors to carry out this purpose, provision is made for levying special assessments for the payments of salaries, wages, and expenses of management, and also for the sale of bonds by which to make the payments required upon the contracts for the construction of the works. This is clearly seen by the provision in section 16, authorizing the board to sell the bonds "from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works," coupled with the provision in section 36 that "the board may draw from time to time from the construction fund, and deposit in the county treasury of the county where the office of the board is situated, any sum in excess of the sum of twenty-five thousand dollars," and requiring the county treasurer to receive and be responsible for the disbursement of the same. The provision of section 15 requiring the directors to estimate and determine the amount of "money" necessary to be raised for the construction of the works, and to submit to the electors of the district the question whether bonds shall be issued "in the amount so determined," clearly implies that the estimate is to be of the "amount of money" which may be received upon a sale of the bonds, at not less than 90 per cent. of their face value; that the cost of the works is to be estimated in money, and not in bonds, and is to be paid out of the construction fund created by the sale of the bonds. For the protection of the taxpayers, a limit is placed upon the rate at which the bonds may be sold,—90 per cent. of their face value; and, as a special assessment cannot be levied without their vote, they have control over the expenditures of the district. The wisdom of this provision is manifest, and is fully illustrated in the financial history of irrigation district bonds during the last few years,—a matter of which we can take judicial knowledge. If the construction of the works is to be paid for in money immediately upon their completion, or in installments as the work progresses, a contract for their construction can be obtained at a much less price than if payment is to be made in the obligations of the district whose value is constantly fluctuating.

The plaintiffs base their right to the relief sought in the complaint upon the grounds that, during the first 10 years after the issuing of the bonds, the board of directors have no authority, under the act, to levy a greater assessment in any one year than will be "sufficient to raise the annual interest on the outstanding bonds"; and that the greater portion, if not all, of the outstanding bonds of the district have been illegally issued, and were received, and are now held, by the persons to whom they were issued with such knowledge of their invalidity, by reason of having been illegally issued, that they do not constitute valid obligations of the district upon which any interest should be paid, or for whose payment the defendant is authorized to sell the lands of the plaintiffs. The plaintiffs do not show the amount of bonds which may have been legally disposed of by the board of directors, but allege that they are unable to state whether any have been legally disposed of. In support of this averment, they allege that neither the secretary nor the board of directors have kept any record of the bonds sold, their number, the date of sale, the price received, or the name of the purchaser, as required by section 15 of the act, and that the district has never had any such record; that, although they have endeavored to ascertain the number and amount of bonds sold by the district, they have, by reason of the omission to keep such record, failed to ascertain the same, and are unable to state said amount; and they contend that the failure of the proper officers to keep a bond register, as required by the act, relieves them from the necessity of showing with greater definiteness that any of the bonds have been sold or otherwise legally disposed of, and that, even if it should be shown that a portion of the outstanding bonds are legal obligations of the district, the portion is so small that the assessment in question is so excessive of the requirements to pay the interest thereon as to be in itself illegal.

While the authority given to the board of directors by section 22 to levy an assessment sufficient to raise the annual interest on the outstanding bonds is limited to providing for the interest on the bonds that are outstanding at the time of the levy, it does not require that the amount of the assessment shall be the exact amount of that interest. The phrase "sufficient to raise" the annual interest is more elastic than would be the phrase "to the amount of" the annual interest, and must be held to authorize the board of directors to exercise a reasonable discretion in determining the amount to be levied. It is a matter of common experience that the entire levy of a tax or an assessment is very rarely paid as it matures, and the provision in the act for the sale of any real estate upon which the assessment is delinquent, and, if there be no other bidder, its purchase by the district, shows that it was in the mind of the legislature that the assessment might in some instances be not fully paid, and justifies the conclusion that it was not intended that the assessment should be the exact amount of the interest. The board of directors must be allowed to exercise a discretion in determining how great an assessment will be "sufficient to raise" the annual interest; and, unless it can be seen that they have abused this discretion, courts ought not to interfere with their action. If, however, the disparity between the amount of the assessment and the amount of the annual interest is so great as to make it appear that their action was improper, and not in the exercise of any discretion, so that the assessment is excessive, courts are authorized to prevent its enforcement. Although the levying of an assessment is an act of a legislative character, yet the board of directors is not clothed with the supremacy of the legislature in this respect, but is in the exercise of a delegated power, and subject to control by the judiciary if it steps beyond the limits of the power conferred upon it. As the assessment can be levied for the payment of only the interest upon the outstanding bonds, the property owner has the right to show that there are no outstanding bonds upon which there is interest to be paid, or that the amount of the assessment is not within any reasonable estimate of that interest.

The complaint contains a great deal of matter relative to the conduct of the directors in the management of the district which cannot be considered for the purpose of determining the validity of the assessment. For this purpose, the court could not look into the contract with Gorrill for building the dam, whether it was for an excessive price, or was properly let in accordance with the terms of the statute. Neither is the validity of the election for the second issue of bonds a matter of consideration in this proceeding. Nor is it a ground for impeaching the assessment that former assessments for interest were in excess of the requirements for the interest on the bonds then outstanding, or that the moneys so raised had been misapplied by the directors. If, at the time of the levy of the present assessment, it was required for the payment of interest on the outstanding bonds of the district, the directors were authorized to levy it, and the property of the plaintiffs is liable for its proportion thereof. The complaint is far from being clear in all its averments, but a careful examination leads to the conclusion that it is sufficiently alleged therein that none of the outstanding bonds of the district were issued in conformity with the requirements of the statute, and that the persons to whom they were issued took them with such knowledge of their invalidity that they do not constitute enforceable obligations against the district, for which the property of the plaintiffs is liable. The averments of the complaint are sufficiently pointed to these defects against the liability of the plaintiffs' property, so that, if they are true, the plaintiffs would be entitled to the relief they seek.

The complaint does not definitely show that there are no bonds outstanding upon which the district is liable for the interest; and, although it is alleged in general terms that all of the outstanding bonds were illegally issued, the specific allegations of the circumstances under which they were severally disposed of do not cover all of the bonds which are outstanding; nor is it entirely clear and conclusive in respect to the amount of such bonds; but this lack of clearness and precise averment is due to the mode in which the business of the district has been conducted by the officers of the district, and the averments of the complaint in that respect are sufficient to exonerate the plaintiffs from the necessity of making their averments more precise. It is fairly to be inferred therefrom that, if any of the outstanding bonds were legally disposed of, their amount is so small that the assessment was excessive. At least, the averments of their illegality are sufficient to require the defendant to show that he is authorized to make the sale of their property. Deducting from the $524,000, alleged to be the amount of the outstanding bonds, the $150,000 thereof which are specifically shown to have been illegally delivered to Gorrill, and the amount of the other bonds of which specific averment is made, there remains only $370,000 for which an assessment for interest could be levied. The interest on this amount at the rate of 6 per cent. per annum would be $22,200, and, as there was nearly $10,000 in the treasury applicable thereto, it must be held that the assessment of upward of $40,000 was unauthorized. If the facts set forth in the complaint are true they sufficiently justified the refusal of the plaintiffs to pay the assessment, and call upon the defendant either to deny their existence, or to establish other facts which will give him the right to collect the assessment by a sale of the plaintiffs' lands.

As the inability of the plaintiffs to determine the amount of the bonds that have been legally disposed of results from the failure of the officers of the district to keep such a record of their disposal as is required by the act, by which the plaintiffs are exonerated from the necessity of making a definite allegation in this respect, the rule of equity which requires the payment of that portion of an assessment which is admitted to be just, as a condition of invoking the aid of equity, becomes inapplicable.

Whether a bona fide holder of any of the bonds thus illegally disposed of could enforce them against the district, or whether the district would be liable for the interest upon any of the bonds thus illegally disposed of, is not involved in this action. It is not shown by the complaint that any of the bonds are in the hands of a bona fide holder, and, in the absence of any averments to the contrary, it is to be assumed that Gorrill and the other persons to whom they were delivered still retain them. Neither is the right of Gorrill to a recovery against the district for the work done by him under his contract presented in this action. If the benefits received and enjoyed by the district under his performance of the contract give him an equitable right of recovery therefor, such right is independent of any liability of the district upon the bonds. If the bonds were issued to him in violation of the statute, they cannot in his hands be valid obligations against the district, even though they were taken in payment for his work. The law is well settled that one dealing with a municipal corporation is charged with a knowledge of all the limitations upon the power of its officers, and that he can have no right of action upon its written obligation if it was entered into in disregard of statutory requirements. Gorrill must be held to have taken the bonds with notice of their illegality by reason of the want of power in the board of directors to dispose of them in this manner, or without following the course prescribed in section 16 of the act.

It was not necessary to join the district as a party to the action. No relief is sought against it, nor is its presence necessary to a proper solution of the questions presented by the complaint. The plaintiffs are not seeking to set aside or vacate the assessment, or to prevent its enforcement, except as against their own lands, which constitute but a small fraction of the district; and the validity of the assessment is involved only incidentally, as it may be invoked by the defendant in support of his threatened action. The defendant is charged with threatening to do an act which will result in injury to the plaintiffs, under the color of an authority which, it is alleged, he does not possess; and the plaintiffs are merely seeking to have him restrained from doing this act. The district can be represented only by its officers; and for the purpose of collecting the assessment, and therein defending the validity of the levy, the collector represents the district as fully as did the directors for the purpose of levying it. If, upon the coming in of his answer, the court shall be of the opinion that the presence of the district is essential to a complete determination of the controversy, it can order it to be brought in (Code Civ. Proc. § 389); but, upon the allegations in the complaint, its presence is not necessary to a determination of the rights of the plaintiffs as against the defendant. A demurrer for defect of parties defendant is generally but technical; and, unless the omitted party is indispensable to giving the relief sought, the court should not sustain such demurrer, but should order him to be brought in, if it shall be made to appear that his presence is proper for a determination of the entire controversy.

Neither was it necessary to make Gorrill or Hickman defendants herein. The transactions with Hickman did not have the effect to make him a purchaser of the bonds, but he thereby became merely the agent of the board for their sale; and whatever right of action Gorrill may have against the district, either upon his contract or upon the bonds received by him, will not be affected by the judgment herein.

The order dissolving the injunction and the judgment in favor of the defendant are reversed, and the court below is directed to overrule the demurrer to the complaint, with leave to the defendant to answer within such time as the court may direct.

We concur: VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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(119 Cal. 249)

## ALASKA IMP. CO. v. HIRSCH et al.

(S. F. 372.)[1]

(Supreme Court of California. Dec. 17, 1896.)

INJUNCTION BOND—CONSTRUCTION—CONSIDERATION —ACTION ON—EFFECT OF APPEAL—PLEADING— PRESUMPTIONS—DAMAGES—ITEMIZED STATEMENT —COUNSEL FEES.

1. An injunction bond recited the commencement of the action, and the issuance of a preliminary restraining order, and an order requiring plaintiff to execute a bond which was given "in consideration of the premises and of the issuing of said restraining order," and bound the obligors to pay such damages as the respondent "may sustain by reason of said restraining order." *Held*, that the continuance of the restraining order was a sufficient consideration for the bond.

2. Under Code Civ. Proc. § 1049, providing that an action shall be deemed pending from its commencement until its final determination on appeal, or "until the time for appeal has passed unless the judgment is sooner satisfied," a satisfaction of the judgment makes it final, though the time for appeal has not yet expired;

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[1] Rehearing granted.

so that a complaint in an action on an injunction bond which alleges the rendition of a final judgment against plaintiff in the injunction suit is not met by an answer, claiming that the action was premature, which alleges that the time for taking an appeal had not elapsed, but does not negative the satisfaction of the judgment.

3. A finding as to the aggregate damages sustained by breach of an injunction bond will not be disturbed on the ground that the damages were not itemized, in the absence of a request for a finding upon each item.

4. Counsel fees for services in defeating an order to show cause why a restraining order should not be granted pending suit cannot be allowed in a suit for damages for breach of the injunction bond, as damages sustained by reason of the previous existence of the restraining order.

5. Damages sustained by a defendant during three days which intervened between the issuance of an injunction and the giving of the bond in suit may be recovered, where the bond recites the commencement of the action, and the issuance of a preliminary restraining order and an order requiring a bond "on said restraining order," and the undertaking was made "in consideration of the premises and of the issuance of said restraining order," and was conditioned to pay such damages as might be sustained "by reason of said restraining order."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Alaska Improvement Company against Charles Hirsch and others on an injunction bond. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Modified.

J. H. Miller and Albert C. Aiken, for appellants. Daniel Titus, for respondent.

HAYNES, C. Action upon an injunction bond. The plaintiff had findings and judgment in its favor, and this appeal is from the judgment and an order denying defendants' motion for a new trial. The action in which said bond was given was brought by the Alaska Packers' Association, a corporation, against the plaintiff herein, the Alaska Improvement Company, in the circuit court of the United States for the Ninth circuit, Northern district of California, the sole object of which was to obtain an injunction against the said Alaska Improvement Company, enjoining and restraining it from using a certain label and trademark, which the said Alaska Packers' Association claimed the exclusive right to use, and which it was alleged said Alaska Improvement Company was then using in its said business, and had placed upon about 5,000 cases of its salmon. Said suit was commenced on the 23d day of October, 1893, and upon filing the bill of complaint in said circuit court a temporary restraining order was granted, and an order made requiring the defendant therein, the Alaska Improvement Company, to show cause at a future day why an injunction should not be granted pending the litigation. Said restraining order and order to show cause were duly served upon the defendant in said suit the same day, and on the next day the defendant in said suit (the plaintiff in this action), upon its motion, obtained an order from said court "requiring complainant to give a bond in the sum of $10,000, conditioned for the payment to respondent of such damage as it may be awarded by reason of the issuance of said temporary restraining order, if the court should finally determine that complainant was not entitled thereto." The bond given in pursuance of said order, and upon which this action was brought, is as follows: "Whereas, the above-named complainant has heretofore commenced the above-entitled suit in the circuit court of the United States, Ninth circuit, Northern district of California, against the above-entitled respondent, and has applied for and obtained a preliminary restraining order in said suit against the said respondent, enjoining and restraining it from the commission of certain acts, as more particularly specified in the said restraining order; and whereas, thereafter, to wit, on October 24, 1893, said respondent applied to said court for an order requiring the complainant to make and execute to respondent an undertaking on said restraining order, conditioned as hereinafter specified; and whereas, said court has granted said motion, and fixed the amount of said undertaking in the sum of ten thousand dollars: Now, therefore, in consideration of the premises and of the issuing of said restraining order, we, the undersigned, residents of the state of California, do jointly and severally undertake, in the penal sum of ten thousand dollars, and promise, to the effect that said complainant will pay to the said respondent such damages, not exceeding the sum of ten thousand dollars, as said respondent may sustain by reason of said restraining order, if the said court shall finally decide that the said complainant was not entitled thereto."

The first point made by appellant is that the court failed to find upon material issues raised by the answer. The complaint alleged that "the said defendants undertook, upon consideration of the issuance of said injunction, and the continuation of the same," etc. The answer denied that the continuation of the restraining order was any part of the consideration. The court found, "that, upon the granting of said injunction by the circuit court, no bond of indemnity was required by the said court or the judge thereof, but on the day following, to wit, on the 24th day of October, 1893, on motion of the defendants in that action (the plaintiff in this), the circuit court ordered the said Alaska Packing Association to make and enter into the bond set out in plaintiff's complaint herein; that under and in pursuance of said order the said defendants in this action made, executed, and filed in said court and cause the bond set out in plaintiff's complaint." Whether the continuance of the restraining order was the consideration of the bond, in whole or in part, is a question of law to be determined from the order and the bond, the interpretation of which is within the province of the court. Even if it should be regarded as a conclusion of fact, the order and the bond were the only competent evidence by which the consideration could be shown. The correctness of this conclusion is apparent from appellants' second and principal point, viz. that the only consideration for the making of the bond was the issuance of said restraining order; that, the restraining order having been issued and served, there was no consideration for the bond; and that the bond was not given in consideration of the continuance of said restraining order. It is conceded that a surety has a right to stand on the express terms of his contract, and that a past or executed consideration is not sufficient to support his promise. But we think that the recitals of the bond and the consideration expressed therein are sufficient. The bond recites the prior commencement of the action; that a preliminary restraining order had issued; that afterwards the respondent in said action applied to the court for an order requiring the complainant therein to make and execute "an undertaking on said restraining order, conditioned as hereinafter specified,"—and further recites that said motion was granted, and that the amount of the undertaking was fixed by the court, and the obligatory part of the undertaking in which the expressed consideration upon which it is made is as follows: "Now, therefore, in consideration of the premises and of the issuing of said restraining order, we, the undersigned," etc. It is thus apparent that the "issuing" of said restraining order is not the only consideration for the execution of the bond. The word "premises" expresses part of the consideration. The word "premises" means "that which is before; introduction; statements previously made." Bouv. Law Dict. In Rap. & L. Law Dict., the word "premises" is defined as follows: "In the primary sense of the word, 'premises' signifies that which has been before mentioned. Thus, after a recital of various facts in a deed, it frequently proceeds to recite that, in consideration of the premises (meaning the facts recited), the parties have agreed to the transaction embodied in the deed." The said recitals in said bond clearly show the previous issuance and present existence of said restraining order, and that the application for an undertaking was made in view of its existence, and therefore of its intended continuance. Besides, the obligatory part of the bond is not that the sureties therein will pay such damages as the defendants in that action might sustain by reason of its issuance simply, but their undertaking and promise is that they will pay to the "respondent such damages, not exceeding the sum of ten thousand dollars, as said respondent may sustain by reason of said restraining order."

It is said, however, that the circuit court had power, under section 718 of the Revised Statutes of the United States, to issue such restraining order without requiring any bond or security, and that the order requiring a bond did not provide that, upon a failure to give it, it should be dissolved; and that, therefore, it must be assumed that the continuance of the restraining order did not depend upon the giving of the bond. It is quite true that the court might have rescinded its order requiring a bond to be given, or, upon the other hand, upon the failure to give it, might have discharged the restraining order. The only question in fact, however, is that the bond was given, and the restraining order remained in full force, so that all the benefit the complainant could derive from the restraining order was realized, and all the injury inflicted thereby upon the respondent therein was suffered. This case is broadly distinguishable from that of Carter v. Mulrein, 82 Cal. 167, 22 Pac. 1086, cited by appellant. In that case the order was that an injunction issue upon the filing of the bond. The writ was issued without the filing of the bond, and the bond then in controversy was dated and issued several days after the issuance of the writ. The bond in that case recited the order that, upon the filing of the bond, a writ of injunction should issue; and the consideration expressed in the bond was as follows: "That now, therefore, in consideration of the premises, and that said writ of injunction may issue, we undertake," etc. No writ was issued after the filing of the undertaking. It was held, as we think, rightly, that the bond was without consideration. The sureties there were not, as here, charged with notice that the injunction had already issued. A case much more nearly in point is that of Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327. In that case a preliminary injunction had been issued on an insufficient undertaking, and upon a motion to dissolve it was ordered that the injunction be dissolved unless a proper undertaking be given. In response to that order the undertaking was given, and the consideration expressed in the new bond is as follows: "Now, therefore, we, the undersigned, * * * in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of ten thousand dollars, and promise to the effect that, in case said injunction shall issue, the said plaintiffs will pay," etc. The court said: "If the language had been 'in case said injunction shall be continued in force,' instead of 'shall issue,' there could have been no doubt. The question is, therefore, whether the words 'shall issue' can be construed to mean 'shall continue in force.' Now, we think that there might be cases in which the circumstances show that the two phrases were used as equivalent to each other." The execution of the bond is admitted by the defendants, and, as it recites the pendency of the suit and the previous issuance of the temporary restraining order, the defendants are conclusively charged with knowledge of those facts. Pierce v. Whiting, 63 Cal. 540. And not only so, but the very condition of the bond is that they will pay such damages "as said respondent may sustain by reason of said restraining order," thus expressly admitting a liability for its continuance. The provision of the Civil Code (section 2836) that "a surety cannot be held beyond the express terms of his contract" must be read in connection with other provisions of the same Code. The next section (2837) is as follows: "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." Section 1636, Civ. Code, provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." So, "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties." Civ. Code, § 1643. Interpreted by these rules, we think the bond is not open to appellants' objection that it was without consideration, but that it was given in compliance with the obvious purpose and intent of the order of the court.

Appellants further contend that this action was prematurely brought, inasmuch as the time for appeal from the judgment of the circuit court had not expired. The complaint alleged that a final judgment had been entered in that action. To this the defendants answered that it had not yet become final "in the sense contemplated by the said bond, for the reason that said judgment or decree, if ever made or entered at all, was not made or entered prior to the 20th day of July, 1894, and that, under and by virtue of the laws of the United States in that behalf made and provided, the complainant in that suit had the right to appeal to the circuit court of appeals of the United States from the said judgment and decree at any time within six months from said 20th day of July, 1894." In support of their said contention, appellants cite section 1049 of the Code of Civil Procedure, which reads as follows: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." We are not cited to any case where it has been held that an action upon an injunction bond will not lie until the time for appealing the case in which it was given has expired, nor have I found any case where that question has been directly raised. The cases upon injunction bonds are numerous, and all seem to assume that, when a final judgment has been entered by the court in the suit in which the bond was given, an action upon the bond may be brought. But we think it is not necessary here to decide that question. The answer only alleges that the time for taking an appeal had not elapsed, and does not allege that the judgment had not been satisfied, while, under the code provision relied upon by appellants, a satisfaction of the judgment makes it final, though the time for appeal has not expired; and, if necessary to support the judgment against the sureties, we must assume, in the absence of allegation or proof to the contrary, that the judgment in the circuit court had been satisfied. That judgment was that the complainant take nothing by its action, and that the respondent recover its costs; and upon the trial of this case in the court below it was stipulated and agreed between the parties "that no damages of any kind were assessed or awarded to the defendant in that suit, except the costs of the court, which were awarded in the usual manner, and duly paid by the complainant." In the light of the fact that satisfaction of the judgment was not negatived in the answer, we must assume that it was satisfied at the date of its entry.

Appellants further contend that the items of damage, making up the aggregate of $2,195, are not segregated or itemized in the finding (except as to counsel fees), and said finding is also attacked as not justified by the evidence. In the testimony of Mr. Madison the several items of damage and the amount of each are stated, aggregating a larger sum than that stated by the court in its finding, so that there was evidence tending to sustain the finding as to the total amount. We have, however, gone over the testimony of Mr. Madison as to each item enumerated by the witness, and think his evidence would have justified the court in finding a slightly larger sum (aside from attorneys' fees) than that for which judgment was rendered. We think the item of $520, loss on salmon purchased, should not be wholly disallowed, as appellants claim, but that at least $135 thereof might be properly allowed. Reducing that item as above, and excluding the item of interest ($315) and the $20 paid for transcript, our computation exceeds that of the court below by $6.50 as to the damages, aside from attorneys' fees, which will be considered separately. It would have been convenient if the damages had been itemized, but we know of no rule requiring it, at least in the absence of a request for a finding upon each item.

The findings show that $1,000 was allowed as attorneys' fees for services rendered in procuring a dissolution of the injunction. We think no part of this sum should have been included in the damages awarded the plaintiff. That sum was paid counsel, and it was all that was paid him for his services in the case. It is claimed, however, that no other services of value were rendered. There was no motion made to dissolve the preliminary restraining order. If the order to show cause why an injunction should not be granted pending the suit had not been accompanied by the restraining order, all the services that were in fact rendered upon the hearing of the order to show cause would have been necessarily performed in preventing the granting of that order, and in such case it is well settled that attorneys' fees are not allowed. The restraining order, by its very terms, could only continue until the decision of the order to show cause, and a denial of an injunction pendente lite, upon the hearing of that order, necessarily terminated the existence of the restraining order. It is true, it had the effect of showing that the restraining order should not have been granted, and entitled the party enjoined to recover damages suffered during its continuance, and these have been properly allowed; but it does not follow that counsel fees for services in defeating the order to show cause can be allowed as damages sustained by reason of the previous existence of the restraining order, any more than attorneys' fees for services upon the final trial of the cause in preventing a perpetual injunction could be allowed as damages because the denial of a perpetual injunction necessarily dissolved an injunction granted pendente lite. The recent case of Curtiss v. Bachman, 110 Cal. 433, 42 Pac. 910, is conclusive of this question, and relieves us from its further discussion.

It is also contended that three days intervened between the issuing of the injunction and the giving of the bond; that much of the damage accrued during that time; and that the sureties are not liable therefor. We think the consideration stated in the recitals and conditions of the bond covered the whole time from the service to the dissolution of the restraining order; but, if it were otherwise, the defendant should have raised the question by objecting to plaintiff's evidence, which apparently covered the whole of said period, or have sought to segregate and exclude the portion of damages accruing before the bond was executed, or in some way raised the question in the court below. Besides, we do not find any specification of error which presents that question.

The judgment should be modified by deducting therefrom said sum of $1,000, and, as so modified, the judgment and order appealed from should be affirmed; the appellant to recover the costs of this appeal.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by deducting therefrom said sum of $1,000, and, as so modified, the judgment and order appealed from are affirmed; the appellant to recover the costs of this appeal.

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115 Cal. 303

## PEOPLE v. MUHLNER. (Cr. 184.)

(Supreme Court of California. Dec. 17, 1896.)

HOMICIDE—NEW TRIAL—CONVICTION OF LESSER CRIME CONTRARY TO EVIDENCE.

Pen. Code, § 1404, which provides for the granting of a new trial on motion of a defendant for an omission or error prejudicial to him, does not authorize the granting of such motion on a conviction of manslaughter, under an information for murder, on the ground that the evidence established murder, and not manslaughter; the jury having the power (Id. § 1159) to convict of any crime necessarily included in the one charged, and the error, if any, not being prejudicial to defendant.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Louis A. Muhlner was convicted of manslaughter, and the people appeal from an order granting a motion for a new trial. Reversed.

Atty. Gen. Fitzgerald, for the People. C. G. Nagle, for respondent.

SEARLS, C. The defendant, Louis A. Muhlner, was informed against in the county of Alameda for the crime of murder, alleged to have been committed on the 12th day of August, 1895, by the unlawful and felonious killing of one Jennie Lewis, at the said county of Alameda. The defendant entered a plea of not guilty, and upon a trial he was found guilty of the crime of manslaughter. Thereafter, and before judgment, defendant moved for a new trial upon all the statutory grounds provided by section 1181 of the Penal Code, except the first and seventh; that is to say, the motion was not based upon the ground that the trial was had in the absence of the defendant, or upon the ground of newly-discovered evidence. The motion for a new trial, as appears by the order granting the same and from the bill of exceptions, was granted for the reasons shown by the following copy of said order: "Comes now the court, being fully advised in the law and the premises, and orders that the motion for a new trial may be granted solely upon the ground that the evidence in this case was sufficient to warrant the jury in believing beyond every reasonable doubt that the defendant did, at the time and place charged in the information, take the life of the deceased, and to warrant them in believing beyond and to the exclusion of all reasonable doubt that the act of killing upon his part was committed with malice, and that, therefore, the evidence was sufficient to warrant them in returning a verdict of guilty of murder. But that there was no evidence tending to show that such killing was not committed with malice, but, to the contrary, there was evidence showing beyond and to the exclusion of all reasonable doubt that such killing was committed with malice." The people appeal from the order granting a new trial, and urge that the court erred in granting said motion at the instance of defendant. A careful review of the record fails to convince us that there was any good cause for granting a new trial other than that assigned by the trial court as a reason thereof. Was the reason assigned sufficient to justify the order? We think not. Section 1159 of the Penal Code provides that: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged," etc. The offense of manslaughter is necessarily included in the charge of murder, and the court very properly so instructed the jury, and advised them that in a certain state of the case they could find the defendant guilty of manslaughter. We agree with the court below that the evidence was quite sufficient to warrant a verdict of murder. It follows that the jury had a perfect right to bring in a verdict of manslaughter, if they thought the evidence warranted such verdict.

A verdict should not be set aside, and a new trial granted, on the motion of the defendant, except for some omission or error prejudicial to him. Pen. Code, § 1404. In the case at bar the verdict was set aside, and a new trial granted, on the ground that the verdict was too favorable to the defendant. The doctrine is well settled by this court that a defendant cannot complain where the determination of his case was more favorable to him than the evidence warranted. People v. Barnhart, 59 Cal. 381; People v. Maroney, 109 Cal. 277, 41 Pac. 1097; People v. Lowen, 109 Cal. 381, 42 Pac. 32; People v. Jefferson, 52 Cal. 452. In People v. Barnhart, 59 Cal. 381, where the defendant urged as ground for reversal that the jury found him guilty of burglary in the second degree, when the evidence showed beyond controversy burglary in the first degree, and there was no evidence whatever of second degree burglary, this court said: "But it is a sufficient answer to the objection taken on behalf of the defendant to say that he is not prejudiced by the error complained of. If the jury erred, the error was on the side of the defendant, and he cannot be permitted to urge in this court, as a reason for the reversal of the judgment of the court below, that the determination there was more favorable to him than the evidence warranted. * * * 'The substantial rights of the defendant must have been injuriously affected by the error complained of to warrant our interference.'" "A verdict, contrary to instructions, for a less degree of the offense than the evidence proves, must be received and carried out. A new trial cannot be ordered." 2 Bish. New Cr. Proc. § 642; Jordan v. State, 22 Ga. 545, 559; Barnett v. People, 54 Ill. 325; Com. v. McPike, 3 Cush. 181; Com. v. Walker, 108 Mass. 309; Com. v. Burke, 14 Gray, 100; Com. v. Smith, 151 Mass. 491, 24 N. E. 677; Fagg v. State, 50 Ark. 506, 8 S. W. 829; Allen v. State, 37 Ark. 435; Pratt v. State, 51 Ark. 167, 10 S. W. 233. Many other cases might be cited, but these are deemed sufficient to show that a conviction of a lesser offense (necessarily involved in the indictment) than called for by the evidence is not cause for granting a new trial, or for reversal on appeal where such motion for new trial has been refused by the trial court. The verdict of guilty of manslaughter is the equivalent of a verdict of not guilty of the charge of murder, and he cannot be again tried upon that charge. People v. Gordon, 99 Cal. 227, 33 Pac. 901; People v. Apgar, 35 Cal. 389; People v. Gilmore, 4 Cal. 376. The defendant having been properly convicted of the crime of manslaughter, the granting of the motion for a new trial upon the grounds stated therein was erroneous, and the order should be reversed, and the court below directed to pronounce judgment against the defendant upon the verdict.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and the court below directed to pronounce judgment against the defendant upon the verdict.

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115 Cal. 394

## TURNER v. HEARST. (S. F. 335.)

(Supreme Court of California. Dec. 18, 1896.)

APPEAL—BILL OF EXCEPTIONS—LIBEL—EVIDENCE—DAMAGES—MENTAL SUFFERING—MALICE—RETRACTION.

1. A bill of exceptions, to be considered, must be settled by the judge who made the rulings excepted to; and where one judge settles the pleadings in a case, and a different one conducts the trial, to entitle a party to review the rulings of both, two bills of exceptions should be taken.

2. In an action by a practicing lawyer to recover damages for libel, where the article published was libelous per se, evidence offered by plaintiff to show his standing in his profession, and the extent of his practice, is admissible, to be considered on the question of general damages.

3. The mental suffering which may be considered as an element of damages in an action for libel must be such as the plaintiff naturally experiences as the direct, immediate, and proximate effect of the libel on his mind and feelings; and repetitions of the libel by others than the defendant, or comments made thereon, cannot be shown to enhance such damages.

4. Where defendant, the publisher of a newspaper, in an action for libel pleaded in extenuation and mitigation that plaintiff's name was used in the article complained of through a mistake of the reporter who prepared it, and offered evidence to prove the competency of the reporter, it was error to permit the plaintiff to show the subsequent discharge of the reporter by defendant, and the reason therefor.

5. On the question of malice it is competent for plaintiff to show that, in the publication of the libelous article in his newspaper, defendant relied entirely on a report taken from another paper, without verifying such report.

6. A defendant may give evidence of an apology or retraction in mitigation of damages, to be considered by the jury, though such apology or retraction was not made until after the commencement of the action, and not at the earliest opportunity thereafter.

7. No legal duty rests on the proprietor of a newspaper publishing a libelous article to make a retraction on learning that the statements made in the article are untrue.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by John W. Turner against William R. Hearst for libel. Judgment for plaintiff, from which, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Garret W. McEnerney, for appellant. Clement, Cannon, Kline & Stradley, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying defendant a new trial. The action was for damages for libel. Defendant, in his newspaper, the San Francisco Examiner, on the 7th day of December, 1893, published what purported to be an account of difficulties existing between Lotta, an actress, and Turner, the plaintiff. In this account it was stated that Lotta had caused Turner's arrest upon a criminal charge, and that "the case was compromised, together with the settlement of several thousand dollars in notes given by the Plumas county lawyer to the actress." On the trial it appeared, and was undisputed, that the article in question was printed and published in the Examiner. It further appeared that the matters in the article set forth were true, saving that the charges by Lotta were directed against one John H. Thomas, and not against John W. Turner; that Turner was entirely innocent of any wrongdoing, and had in fact been the legal adviser of Lotta in her troubles with the said Thomas. The error in the Examiner's publication occurred in the following manner: The issue of the San Francisco Post of the day preceding the Examiner publication had contained an accurate statement of the facts. In this it was announced that John W. Turner had commenced an action against Lotta to recover moneys due for legal services rendered by him as her attorney in certain litigation which Lotta had with John H. Thomas; and in the narration of the causes which led to the litigation it was stated that Lotta had made serious charges against Thomas, to the effect that he had swindled her by false and fraudulent pretenses, and later had caused the arrest of Thomas in New York upon a criminal charge. The city editor of the Examiner gave to one of his reporters the article from the Evening Post, with instructions to "boil it down" for publication in the next issue. The reporter, in doing this late at night, and under a press of work, mistook the name John W. Turner for John H. Thomas, and made it appear, and it was so published, that the wrongful acts and criminal offenses mentioned had been committed by this plaintiff. Defendant, for answer, and by way of extenuation and mitigation, pleaded these facts, and pleaded also a reparation and apology, published in the paper upon the 4th day of February, 1894, in which a correct version of the matter is given, and the account closes with the following: "It will thus be seen that we have unintentionally done Mr. Turner a great injustice, but one which is likely to happen with the most carefully guarded attention to the news columns of a busy morning paper. Such mistakes are always to be regretted, as is this, and call for ample and prompt explanations, which we are always prepared to make. In this case we should have been pleased to have set the matter—Mr. Turner and our own mistake—right at an earlier day, had the matter been sooner called to our attention." Certain denials of the answer were, upon plaintiff's motion, stricken out. The ruling and decision on motion to strike out were made by the Honorable C. W. Slack. The trial was had before the Honorable W. R. Daingerfield. The bill of exceptions on appeal from the judgment, which was also the statement used upon motion for a new trial, was presented to and settled by Judge Daingerfield.

Objection is here made to reviewing the order of Judge Slack in striking out portions of the defendant's answer, upon the ground that the bill containing the exception to this ruling and decision should have been presented to and settled by Judge Slack, who made the order. The objection is well taken. It is the duty of a litigant desiring to have a ruling or decision reviewed to present the bill of exceptions, embodying the matters excepted to, to the judge who made the ruling or decision, for settlement by him. Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903. That judge alone can know the facts upon which he exercised his judgment, and therefore he alone, under our system, can properly settle the bill. Appellant could have presented his bill of exceptions to Judge Slack either at the time of the ruling (Code Civ. Proc. § 649), or after the judgment (Id. § 650; Tregambo v. Mining Co., 57 Cal. 501); but, whichever course he elected to pursue, it was still the judge who made the ruling who should have settled the bill. Under such circumstances, appellant may have two or more bills settled and properly presented for the consideration of this court.

It was not error for the court to allow proof of the extent of plaintiff's practice. Plaintiff was a lawyer, engaged in the practice of his profession. The words of the publication being admittedly libelous per se, and affecting plaintiff's standing in his profession, it was proper for the jury, in estimating the general damages to which plaintiff was thus entitled, to know his position and standing in society, and the nature and extent of his professional practice. General damages, in an action where the words are libelous per se, are such as compensate for the natural and probable consequences of the libel; and certainly a natural and probable consequence of such a charge against a lawyer would be to injure him in his professional standing and practice.

It is the rule in this state that mental suffering is an element of general damages in an action for libel. Childers v. Publishing Co., 105 Cal. 284, 38 Pac. 903; Taylor v. Hearst, 107 Cal. 269, 40 Pac. 392. But the mental suffering is the suffering which plaintiff naturally experiences as the direct, immediate, and proximate effect upon his mind and feelings of the libel. In the case at bar, plaintiff was allowed, over objection, to give evidence of what clients had said to him about the publication, and what the reporters of the papers in Eureka, Humboldt county, had said to him about the publication, and what persons on the street said about it. He testified that he heard a remark "that, if that was the kind of a man I was, I wouldn't get much business in Eureka"; and another remark to the effect that "unquestionably it must be true, or the Examiner would not have risked such a publication." Respondent contends that this evidence was admissible—First, to show the mental suffering of the plaintiff; or, second, to show that the libelous words were understood, by those who read them, to refer to the plaintiff. But upon the first proposition it is well settled that the damages must be the direct result of the defendant's libel, and not of any mere repetition of it by others. It is a safe rule to declare that the compensation for injury to feelings should be limited to the natural effect of the libelous publication, as it comes to the knowledge of the plaintiff. It would be pernicious to permit evidence of this kind for the purpose of showing increased suffering. The evidence itself could not be met. There would be no way of testing the sincerity of the remarks, or of determining whether they were prompted in fact by the publication, or sprang from secret hostility or malice towards the plaintiff, in which case the aggravation to plaintiff's feelings would in no sense be chargeable upon defendant. As is said in Burt v. Newspaper Co., 154 Mass. 238, 28 N. E. 1: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

Upon the second proposition,—that the evidence was admissible to prove that the libel was understood to refer to plaintiff,—it is sufficient to point out that there was no issue of this nature in the pleadings. That portion of defendant's answer seeking to join such issue had been eliminated, and, for reasons above given, the order is not here subject to review. Plaintiff cannot be allowed to have an issue raised by a pleading stricken out upon his own motion, and then justify the admission of evidence upon the ground that it is addressed to such an issue.

Defendant made proof of the competency of the reporter who committed the error, so full and satisfactory that further evidence upon the point was stopped by the court. To offset this, evidence was admitted on plaintiff's side to show why and when the reporter had left defendant's employment. Defendant having proved that he was not negligent nor careless of the rights of others in the employment of the reporter, evidence of his discharge from employment subsequent to the libelous publication was erroneously admitted. It was, in its nature, similar to proof of precaution taken after an accident. Sappenfield v. Railroad Co., 91 Cal. 62, 27 Pac. 590. The evidence could only have been admitted in disproof of his competency. It cannot be said that it worked defendant no injury.

As going to the question of malice, it is a general rule that the publication, and all the circumstances attending and surrounding it, may be given in evidence. It was, therefore, not error for the court to permit plaintiff to prove that the defendant, in publishing the article, relied entirely upon the publication in the Evening Post for his information, and did not verify the Post report. It would be evidence touching the question of negligence, or of careless disregard of the rights of others, notwithstanding the fact that in this instance the article published in the Post was correct. Gross negligence or carelessness of the rights of others is frequently equivalent in law to an intentional or malicious disregard of those rights. Whether or not the method adopted by the Examiner amounted to such disregard was a matter for the jury, under proper instruction by the court.

Defendant, after the commencement of the suit, made an offer to plaintiff to publish a retraction and apology, but this offer was conditioned upon a dismissal by plaintiff of his suit. Plaintiff having refused the offer, defendant, in the next Sunday edition of his paper, four days thereafter, published the retraction above quoted. This retraction having been published after action commenced, the court was inclined to hold upon the trial that proof of it was not admissible in evidence. Finally, however, counsel stipulated that it might be admitted and considered by the jury, and it was admitted, as well as the rebutting evidence of plaintiff concerning the conditional offer of publication above adverted to. In some jurisdictions, exemplary damages for libel are not permitted, and the recovery is strictly limited to compensatory damages. In some states, statute law has provided that a defendant who has made a retraction before the commencement of the action, or as soon thereafter as may be, may plead and prove the same in mitigation of damages. Such is the general effect of Lord Campbell's act (St. 6 & 7 Vict. 843). In the absence of any statutory provision upon the question, some courts have held that a public apology or retraction, made after the commencement of the action, cannot be proved in mitigation of damages; but the better and more liberal rule we take to be the one declared in Newell, Defam. § 84, that, aside from statutes, a defendant may give evidence of an apology or a retraction, in mitigation of damages, even though such apology or retraction was not made at the earliest opportunity after the commencement of the action. Smith v. Harrison, 1 Fost. & F. 565. A tardy or reluctant or half-hearted withdrawal, or one which seems to have been made rather to escape liability than to repair the wrong, will avail a defendant little. Upon the other hand, when it is fully, promptly, and adequately made, it undoubtedly tends to decrease the amount of damages which, without it, plaintiff would have sustained, and must afford evidence upon the question of express malice, the presence of which alone justifies punitive damages.

Appellant complains of certain instructions given by the court upon the question of apology and retraction. One of these instructions is as follows: "When a newspaper is led into publishing unknowingly an untrue statement concerning an individual, it should not only retract when the truth is made known, but compensate the injured party for the injury already done. On being informed that the publication is false, the proprietors ought to publish a retraction promptly, fully, and sincere, if the publication is false, and ought to give as much prominence and publicity to the retraction as was given to the libelous matter." Of this instruction appellant says that it lays down to the jury, as a proposition of law, that it was the duty of defendant to publish a retraction; that no such duty was imposed upon him by law; that defendant was liable for compensatory damages for the publication of the libel, and, if there was express malice at the time of the publication, he was likewise subject to a judgment for punitive damages, but that there is no law for the proposition that any legal duty rested upon him to make a retraction. We think that this instruction, as well as others criticised by appellant, are justly open to complaint. There is unquestionably a moral duty upon every person to repair, so far as he may, the effect of a wrong done, whether that wrong was intentionally or unintentionally committed; but, if it can be said that there was a legal duty imposed upon the defendant to make retraction and apology, it would follow that, in any action for libel where retraction or apology had not been made, plaintiff would be entitled to an instruction to the effect that defendant, in failing to make such retraction, had failed to perform a legal duty. It was defendant's right to publish a retraction, and to have proof of that publication presented to the jury for their consideration in mitigation of damages. The defendant having availed himself of this, and having sought, in mitigation of damages, to prove the publication of an adequate retraction, it was proper for the court to instruct the jury that, when a defendant relies upon such retraction in mitigation of damages, to avail him it should appear that it was fully, fairly, and promptly made, and is such as an impartial person would consider reasonable and satisfactory under the circumstances of the case. The question of the sufficiency or insufficiency is peculiarly a question of fact, and therefore peculiarly for the determination of the jury.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; McFARLAND, J.

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115 Cal. 382

## WARREN v. CHANDOS et al. (S. F. 450.)

(Supreme Court of California. Dec. 18, 1896.)

STREET IMPROVEMENTS—CONTRACT FOR GRADING—SUBSEQUENT CHANGE OF GRADE—INVALID ASSESSMENTS—NECESSITY FOR APPEAL TO BOARD OF SUPERVISORS.

1. Under Laws 1889, p. 157 (Street Improvement Act), declaring that before an improvement can be ordered a resolution of intention, describing the work, must be adopted and published, and that before awarding any contract a notice shall be given inviting proposals for the work, which shall be let to the lowest responsible bidder, after which the adjoining owners may elect to do the work themselves, etc., the act of the board of supervisors in so changing the official line, after a contract for grading to such line has been entered into between the superintendent of streets and the successful bidder, as to lessen the amount and the cost of the work, renders the contract inoperative, and invalidates the assessment.

2. The contract being inoperative, the assessment could not become valid by the failure of the property owners to appeal to the board of supervisors for a correction thereof.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by one Warren against Chandos and others on an assessment for grading a street. From a judgment for plaintiff, defendants appeal. Reversed.

Naphtaly, Friedenrich & Ackerman, for appellants. J. C. Bates, for appellee.

HARRISON, J. Action upon a street assessment. A contract for grading Kansas street, in San Francisco, for several blocks, to the official line and grade, was awarded to plaintiff's assignor, at the rate of 31 cents per cubic yard, and was entered into between him and the superintendent of streets September 22, 1891. After he had commenced work under the contract, viz. June 15, 1892, an order was passed by the board of supervisors changing the grade of that portion of Kansas street embraced in the contract, by which the same was lowered several feet. The grading to be done under this contract was a fill, so that by the change of grade the cost of doing the work and the assessment therefor were lessened. No further order or proceeding was had by the board of supervisors in reference to said grading, and the work therefor was completed by the contractor and his assignee to the official grade, as established by the order of June 15, 1892; and thereafter, June 16, 1893, the superintendent of streets made an assessment therefor, upon which the present action was brought. The plaintiff had judgment, and the defendants have appealed.

An underlying principle of the street improvement act is that the owners of the lands which are to be assessed for the expense of the improvement shall be informed in reference thereto before any order for the improvement can be made, and that they may themselves do the work that may be ordered. By section 3 of the act[1] they have an absolute veto for six months upon the work proposed by the city council; and section 5 provides that, after the contract has been awarded to the lowest bidder, the owners of three-fourths of the frontage may elect to take the work, and enter into a contract to do it at the price at which it has been awarded, and thus incur only the actual expense of the work. This necessarily presumes that they can know after the award, and before the contract is entered into with the successful bidder, the amount of work which is to be done, and have an opportunity to estimate its cost, in order to determine whether they will elect to do the work at the price at which it is awarded. In Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, it was said: "The statute gives to the owners of the land to be assessed the right to take the contract at the price at which it was awarded to the successful bidder. This implies that the owners shall be definitely informed of the work which is to be done, and of the amount for which the assessment is to be made, in order that they may intelligently consider whether it will be to their advantage to take the contract." The rights of the owners in this respect are carefully protected in the statute. Before the improvement can be ordered, a resolution of intention "describing the work" must be adopted by the city council, and must then be posted and published, before jurisdiction to order it is acquired. Before the contract can be awarded, notice, "with specifications" inviting proposals for doing the work ordered, must also be posted and published, and the contract therefor is to be awarded to the lowest responsible bidder. The privilege is then given to the owners to do the work themselves at the price at which it was awarded, and thus be relieved from all burden except its actual cost. But if, after the contract has been awarded and entered into with the successful bidder, the character of the improvement can be changed, or the amount of work necessary for its completion increased or diminished, they are not only deprived of the benefit of a competition between bidders before the award, but they are also deprived of an opportunity to determine whether it would be to their advantage to enter into the contract themselves. In the present case it appears that the amount of work required for grading the street to the official line, which was fixed after the contract was awarded, was thereby reduced to such an extent as to materially affect the cost of the improvement. Whether the amount of the assessment was thereby increased or diminished is immaterial. The grading was awarded at a price per cubic yard, and the assessment was necessarily smaller by reason of the change of grade; but, if proposals had been asked for grading the street to the line as changed, the contract might have resulted in a still smaller assessment. The price per cubic yard for filling the street would depend greatly upon the distance from which the material was brought, and the facility with which it could be obtained; and the cost per cubic yard might have been less for the diminished quantity required under the change of grade than when the original proposals were made, and it may be that the contract for that reason has yielded a greater profit, and resulted in a larger assessment, than would have been made if the work had originally been limited to that grade. The power of the supervisors to change the amount of work to be done under the contract after it had been entered into, and have an assessment based upon the contract so changed constitute a lien upon the lands fronting upon the work, cannot depend upon whether the cost of the work is increased or diminished. Proceedings for the improvement of streets are in invitum, and purely statutory, and afford no opportunity for invoking any of the principles of equity. The validity of the assessment depends upon the exercise of a statutory power, and the party seeking the right to enforce it must show that the power has been strictly pursued. In Bolton v. Gilleran, supra, it was held that a contract which gave to the superintendent of streets the power to increase or diminish the cost of the improvement, after the contract had been entered into, by requiring a greater or less amount of material for its completion, as he should determine, rendered the assessment invalid. The same result must follow a change by the board of supervisors of the amount of work to be done under the contract, and will render an assessment therefor invalid. It would not be contended that after the contract had been entered into the supervisors would have the power to directly agree with the contractor that his contract should be satis- work required, or with a different material fied by a performance of only a portion of the from that named in the contract, and what cannot be done directly cannot be affected by the indirect method of changing the line to which the street shall be graded. When the contract was entered into it provided, in substance, that Kansas street should be filled in to a line 10 feet above base, but the effect of the ordinance changing the official grade of the street was that the contract should be satisfied by filling it in to a line only 5 feet above base. It is sufficient to say that the board never acquired jurisdiction to order this improvement of the street, for the reason that such improvement was never described in the resolution of intention, nor was a contract for this improvement ever entered into.

It was not necessary for the defendants to appeal to the board of supervisors for a correction of the assessment. The board of supervisors had no authority, in the first instance, to order the street graded to any other line than the official line; and, after that line had been changed, had no authority to require the contractor to grade the street to any other line than to the line of the official grade, as thus changed; and there was no "error" which could have been corrected on appeal. Dougherty v. Hitchcock, 35 Cal. 512; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; Manning v. Den, 90 Cal. 610, 27 Pac. 435. By changing the line of the official grade, the jurisdiction to make the improvement which had been acquired under the original resolution of intention, or to proceed therewith, was lost, and the contract for doing the work ceased to be operative. The board of supervisors and the superintendent of streets are each only an agent of the municipality, with limited and defined powers; and the power conferred upon the municipality to improve its streets at the expense of the adjacent owners, although exercised through these agents, is, in effect, exercised by the municipality itself. The superintendent of streets is the ministerial officer to enter into the contract with the person to whom it is awarded, but the contract is entered into by him on behalf of the city, and the bond for its performance is to be executed to the city. The board of supervisors is the legislative body of the city, and is vested with a supervisory power over all improvements of streets and contracts therefor; and in the exercise of its legislative discretion and consideration for the public welfare it may at any time rescind a previous order for the improvement of a street, or order the street to be vacated, or its grade or width to be changed. The fact that a contract for the improvement of the street had been entered into would not deprive it of this power. The contractor might have a right of action against the city for whatever damage he should sustain from being in this way prevented from carrying out his contract, as in the case of any other breach of contract; but, after the contract had been thereby made of no effect, he would not have the right to proceed with its performance, and make the expense a charge upon the adjacent lands. Warren v. Riddell, 106 Cal. 352, 39 Pac. 781, is inapplicable. In that case the line of the official grade had not been changed, or the terms of the contract varied; and, as the work was not completed to the line fixed in the contract, the board of supervisors could have directed its completion if an appeal had been taken. The judgment is reversed, and the superior court is directed to enter judgment upon the findings in favor of the defendants.

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[1] Laws 1889, p. 157.

We concur: HENSHAW, J.; VAN FLEET, J.

115 Cal. 357

## SHADE v. SISSON MILL & LUMBER CO.

(Sac. 15.)

(Supreme Court of California. Dec. 17, 1896.)

APPEAL—WAIVER OF OBJECTIONS—BRIEFS—ESTOPPEL—ACCOUNT STATED—PLEADING—COMPLAINT—UNCERTAINTY.

1. Where exceptions are taken to the giving of an instruction and the refusal of another directly the converse of the first, it is not necessary to discuss both exceptions in the briefs.

2. An employé, by acquiescence in the itemized monthly statements rendered him by his employer, in which he is credited with less monthly salary than he should have received, and by which he is requested to advise the employer of any error therein, is estopped to claim salary in excess of that for which he was given credit. Harrison, J., dissenting.

3. A complaint in the common-law form for services rendered, which therefore fails to show whether plaintiff relies on a specific contract, or on an implied contract for the reasonable value of the services, is insufficient when attacked by special demurrer for uncertainty.

In bank. Appeal from superior court, Siskiyou county; Edward Sweeny, Judge.

Action by R. A. Shade against the Sisson Mill & Lumber Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Gillis & Tapscott, for appellant. L. F. Coburn, for respondent.

BEATTY, C. J. It was more than a year after the entry of judgment in this case when the notice of appeal from the judgment and from the order overruling the motion of defendant for a new trial was given. The appeal from the judgment has therefore been dismissed, and only the appeal from the order remains to be considered. The nature of the action is fully disclosed by the second paragraph of the complaint, which reads as follows: "That the said defendant herein is indebted to the plaintiff in the sum of one thousand five hundred and ninety-seven and twenty one-hundredths dollars ($1,597.20), on account of work, labor, and services rendered and performed within two years last past by plaintiff for defendant, as foreman of defendant's mill at Sisson, county of Siskiyou, state of California, at defendant's special instance and request." The answer denies any indebtedness, and alleges payment of all salary due, except $3.38, tender of which is pleaded. The verdict of the jury was for the plaintiff for $450, and judgment accordingly. It appears from the statement of the evidence that the defendant (a corporation) has been engaged since the year 1889 in the operation of a sawmill, and that the plaintiff, in April of that year, entered its service. He was at first employed in a superior position in the lumber yard to sort and pile the lumber, and continued in that position until the mill closed down, in December, 1890, when he was put in charge of a planing machine for a short time. Early in January, 1891, he was made foreman of the mill, and was occupying that position in July, 1891, when he received an offer of the superintendency of an electric light company, at $125 per month. The salary he had been receiving from the defendant was $100 per month. For the purpose of retaining him in the service of the mill company, the superintendent made him an offer in some form to increase his salary, with the result that the offer of the light company was declined, and the plaintiff remained at the mill. What the terms of the defendant's offer were, and whether its conditions were observed by the plaintiff, are the facts in controversy. The plaintiff testified, in substance, that he was offered $150 per month with board, or $170 per month without board, to commence from the month of January, 1891, the time he became foreman of the mill. But he admits that the offer was coupled with some condition, to the effect that he should assist the superintendent in the performance of his duties, or, in other words, that he should become an assistant or vice superintendent. He also admits that he did not perform the duties of assistant superintendent, but excuses his failure upon grounds which are disputed, and as to which the evidence is conflicting. The superintendent of the mill denies that he made any more definite offer than that he would do as well by the plaintiff as the electric light company, and claims that this offer was made subject to the condition that the plaintiff should go into the office of the company, familiarize himself with the books and business, take upon himself a share of the duties of the superintendent, and qualify himself to fill that position when necessary. Whatever the agreement may have been, the plaintiff remained at the mill, and continued until January, 1893, in the active discharge of the duties of foreman. On a few occasions he went into the office, and, as he claims, made a bona fide offer and attempt to familiarize himself with the business of the company, in order to qualify himself to act as superintendent, and to assist in performing the duties of that position. But he says an excuse was always found for sending him out of the office, and he was made to feel that he was not wanted there, and accordingly ceased attending except when he was sent for. The superintendent, on the other hand, claims that the plaintiff strangely and unaccountably absented himself from the office, and stubbornly declined, in spite of remonstrances and expostulations, to assume the duties upon the performance of which any increase of his salary absolutely depended.

In view of this sharp conflict in the evidence as to what the contract with the plaintiff was, and as to whether he performed it upon his part, it is important to note the custom of the defendant, during the whole period of plaintiff's employment, to deliver to each of its employés at the end of the month a statement of his account, of which the following is a sample:

Sisson, Cal., February, 1892.

Mr. R. A. Shade, in account with Sisson Mill and Lumber Co. Please examine and advise us immediately if any errors are found.

| | | |
|---|---|---|
| Cr. | | |
| Jan. 1, by balance.......... | $569 46 | |
| " 31, " salary Jan. ...... | 100 00 | |
| | | $669 46 |
| Dr. | | |
| Jan. 23, to cash ............. | $20 00 | |
| Jan. 16, to check (Shreve & Co.) ...................... | 25 00 | |
| Jan. 26, to check (G. O. Brown) | 22 00 | |
| | | 67 00 |
| | | $602 46 |

It was admitted by the plaintiff that he received such a statement every month from July, 1891, to January, 1893, inclusive, as he had received them prior to that time; but he claims that shortly after June, 1891, he called the attention of the superintendent and bookkeeper of defendant to the fact that the statements did not show correctly the rate of his salary, and requested that the books and statement should be made to conform to their agreement. But he says the superintendent then, and subsequently, when he again spoke of the matter, put him off with some excuse, and he allowed it to go on in that way, feeling confident that it would be made right when it came to a settlement. The superintendent denies that he ever heard of any claim on the part of plaintiff that he was to have more than $100 per month until after his discharge, in January, 1893; and the bookkeeper says he never heard of plaintiff's claim until July, 1892, at which time, in a casual conversation, which occurred while they were on a fishing excursion to McLeod river, plaintiff made some general statement to the effect that he was to be allowed an additional salary for his past services.

Such being the conflicting state of the evidence upon these material points, the court, at the request of the plaintiff, gave the jury the following instructions: "If there has been any mistake, omission, accident, fraud, or undue advantage by which the balance of an account is incorrectly stated, it will not be conclusive between the parties, but it may be opened and re-examined, even though previously acquiesced in. I therefore charge you that if you find that monthly statements were rendered by defendant to plaintiff, which were by him retained without objection, that this is but a circumstance for you to consider, and which may be explained by evidence satisfactory to yourselves, and that said retention does not necessarily bind the plaintiff." And the court refused to give the following instruction, requested by the defendant: "If the jury believe from the evidence that the plaintiff was working for defendant by the month, and that defendant credited to plaintiff in satisfaction of plaintiff's wages a certain sum monthly, and those credits appeared as such on itemized monthly statements furnished to said plaintiff by said defendant, and that plaintiff accepted those statements without objection, then said plaintiff will be bound thereby, and it will be presumed that the monthly statements were made between said parties in accordance therewith." These rulings were duly excepted to by defendant, and specified as errors of law in the statement on motion for a new trial. But in the brief of appellant's counsel filed in this court he discusses only the ruling of the court refusing to give the instruction last above quoted (and another of similar purport), from which respondent's counsel infers that he has waived or abandoned his exception to the giving of the instructions requested by him, and thereby necessarily abandoned the exception which is discussed in the brief. But this is straining the doctrine of waiver too far. In discussing the refusal of the one instruction, the whole argument upon the giving of the other is necessarily involved; and it would have been mere useless repetition to have applied it to the converse of the proposition. Clearly, the appellant is entitled to a decision upon these exceptions, and, in our opinion, the rulings are clearly erroneous.

The question involved is not, as counsel assumes, a mere question of acquiescence in a stated account, or the extent to which a creditor is bound by failure to object within a reasonable time to a written statement of account by the debtor. It is, on the contrary, a question of estoppel, arising out of the action of the defendant, based, presumably, upon the silence of the plaintiff when he ought to have spoken,—a question, in other words, whether the plaintiff is not bound by that conclusive presumption which obtains "whenever a party has by his own declaration, act, or omission intentionally and deliberately led another to believe a particular thing true, and to act upon such belief." Code Civ. Proc. § 1962, subd. 3. When a statement of account of past transactions is delivered to a debtor or creditor, his retaining it without objection is, as to such past transactions, merely an item of evidence, more or less conclusive, according to circumstances. But when one person is employed in the service of another by the month, under an express contract for a fixed salary or wage, or under an implied contract for the reasonable value of his services, and the employer delivers to the employé at the end of each successive month a statement of his account, showing the time he has worked and the rate of wages or salary allowed, and especially when upon the face of the account is indorsed an express request that the employé will examine it, and give immediate notice of any error, the failure to make any objection to the account within a reasonable time must be regarded as a deliberate admission that the rate of compensation stated in the account is the rate expressly agreed upon, or that it is the true value of the services, and that the employment is to be continued upon the same terms until there is some new agreement. In such case the employer must be deemed to have acted upon the tacit admission of the correctness of the account, for otherwise he will have been deprived of his option to terminate the employment upon notice that more is expected than he has offered to pay. This proposition is equally true, and the presumption would be equally conclusive, in case of an account delivered periodically by the employé to the employer. If he claimed by his account a salary of $150 per month, the employer, after months of silent acquiescence, would not be heard to assert that the actual agreement was for only $100, or that the services were reasonably worth no more than that amount. The reason in either case for holding master or servant bound by his tacit admission is that he has thereby deliberately led the other to believe the stated rate of compensation to be the true one, and to act upon it. The application of the principle of estoppel to an account stated is discussed in the case of Janin v. Bank, 92 Cal. 14, 27 Pac. 1100; and the only reason it was not enforced against the plaintiff in that case was that it clearly appeared that the bank had neither acted nor omitted to act in consequence of Janin's apparent acquiescence in the correctness of the account stated. The case of McClain v. Schofield (Sup.) 26 N. Y. Supp. 700, is direct authority on the proposition here involved. In this case there was, as above stated, evidence upon which the jury might have found that plaintiff did object to the accounts rendered; but there was conflicting evidence, and the instructions under consideration were based upon the assumption that no objection was made. The jury were instructed, in effect, that the plaintiff was not bound even if he never made any objection; and this, for the reasons stated, was an error, and a vital one, necessitating a reversal of the order.

In view of the necessity of a new trial, and the possibility of another appeal, it is proper to notice some of the remaining assignments of error.

The ruling of the court upon the demurrer to the complaint cannot be reviewed upon this appeal from the order denying a new trial; but, if the plaintiff should again recover a judgment, the question of the sufficiency of the complaint might be raised on the next appeal, and therefore it is not improper to notice the point presented by the briefs.

The demurrer to the complaint was not a general demurrer for want of facts, but a special demurrer, upon the grounds of ambiguity and uncertainty, in this: "It cannot be told therefrom whether plaintiff relies upon a specific contract or upon an implied contract for the reasonable value of the services alleged." The authorities cited by the respondent to sustain the order of the superior court overruling the demurrer do not go to the extent of holding that a complaint, such as this, is good against a special demurrer for uncertainty or ambiguity. In the case of Pavisich v. Bean, 48 Cal. 364, there does not appear to have been even a general demurrer, and the complaint alleged a stipulated compensation. In Whitton v. Sullivan, 96 Cal. 480, 31 Pac. 1115, there was a special demurrer on the ground of uncertainty; but the complaint alleged the reasonable value of the services, and the question of its insufficiency is not alluded to in the opinion of the court. Of the cases referred to in Pavisich v. Bean, that of Wilkins v. Stidger, 22 Cal. 232, is the first in which a complaint, such as this, was held to state a cause of action according to the rules of our Code. But in that case there was not even a general demurrer, and the decision seems at last to have been rested upon the ground that, in the absence of a demurrer, the deficiencies of the complaint were cured by the verdict. In Abadie v. Carillo, 32 Cal. 172, there appears to have been only a general demurrer for want of facts. The complaint was held good. Sanderson and Rhodes concurring only because they felt bound by the decision in Wilkins v. Stidger. In Merritt v. Glidden, 39 Cal. 564, it is plainly intimated that, while such a complaint (one following the common-law forms) is good against a general demurrer, it is not good against a special demurrer, upon the ground that it is unintelligible or uncertain.

At the trial, the plaintiff relied principally upon the express agreement to which he testified; but, in view of the ambiguity of the complaint, the defendant was entitled to cross-examine the plaintiff and his witnesses as to the nature of his employment when the mill was idle, and when it was running, the length of time it was idle, etc., with a view to determining the reasonable value of his services. This was a matter necessarily in issue under the pleadings. The court erroneously sustained some objections to cross-examination on these points, but the error was rendered harmless by the persistence of counsel for defendant, who, in spite of the rulings, managed to bring the whole matter out by varying the form of his questions. And, considering the fact that the reasonable value of plaintiff's services was from first to last a contested issue in the case, it was error to exclude direct evidence offered by defendant as to the wages paid to other men in the same and similar positions when the mill was idle and when it was running.

There was some evidence admitted over objections on both sides not strictly material, but none that could have prejudiced the party objecting. On the whole, with the slight exceptions noted above, the whole case seems to have been very fully and fairly laid before the jury. The order denying a new trial is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.; VAN FLEET, J.

HARRISON, J. I dissent. The transactions between the plaintiff and the defendant do not, in my opinion, disclose any of the elements of an estoppel; nor do I think that the receipt and retention by a laborer, without objection, of a statement of account rendered him by his employer, is governed by different rules from those which control a similar transaction between other parties. No reason is urged in support of such a proposition, other than that of estoppel, and no authority is cited to sustain it. In McClain v. Schofield (Sup.) 26 N. Y. Supp. 700, the plaintiffs were commission merchants, and sold goods manufactured by the defendants, for which they had received a commission of 3 per cent. Subsequently the plaintiffs were informed by the defendant that for the future they would pay a commission of only 2 per cent., and assented thereto. The statements thereafter rendered by the defendants were made upon this basis, and the plaintiffs, without objection thereto, accepted payment of the amount thus shown. The basis of the rule which renders such transactions between other parties the equivalent of an account stated is that the acceptance, without objecting thereto within a reasonable time, is to be regarded as an implied admission that it is correct, but, like all admissions upon which no action has been had by the other party, is subject to explanation, and, if shown to have been made erroneously or under a mistake, is not binding upon the party making it. The application of the rule itself was originally limited to transactions between merchants, and in some jurisdictions is still so limited (Anding v. Levy, 57 Miss. 51), and was afterwards extended to statements made to their customers by all dealers in merchandise. It is only within modern days that it has been extended to persons in other relations. In Lockwood v. Thorne, 18 N. Y. 285, one of the leading cases in this country on this subject, it was said: "An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish prima facie the accuracy of the items without other proof: and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. The force of the admission, and the strength of the evidence which will be necessary to overcome it, will depend upon the circumstances of the case. But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principles of an estoppel in pais, or of an obligatory agreement between the parties, as, for instance, where, upon a settlement, mutual compromises are made." And in Brown v. Kimmel, 67 Mo. 430, it was said: "It will readily be perceived, on an examination of the numerous cases reported on this subject, that they have been decided on the peculiar circumstances attending each case, and most generally in proceedings in equity. In no case has such implied admission been held to be an estoppel, but simply a prima facie case, throwing the burden of contradiction or explanation on the adverse party." See, also, Wiggins v. Burkham, 10 Wall. 129; Brewing Co. v. Friar, 99 Mich. 190, 58 N. W. 52; Hutchinson v. Bank, 48 Barb. 302. Being only evidence from which an agreement may be inferred, it can be treated as the equivalent of an agreement only when the transaction is of such a nature as to authorize such inference; and since, as evidence, its effect is always varied by the circumstances under which the statement was given and received, and by the character of the transaction to which it refers, as well as the parties between whom it was made, it cannot be said, as matter of law, that the mere receipt and retention by the plaintiff of the statements rendered him by the defendant bound him by their contents.

The evidence before the jury concerning the terms of the original hiring of the plaintiff was conflicting; but, if the jury were satisfied from this evidence that the defendant had agreed to pay the plaintiff the wages as claimed by him, that agreement would be the basis of his right of recovery, and he would not be "bound" by any subsequent statements of the defendant as to the amount in which it claimed to be indebted to him therefor after such wages were earned. His failure to make objection thereto would not preclude him from explaining the circumstances under which he received the statements, and leaving to the jury to determine whether they were such as to constitute an express admission of their correctness. Of course, if the circumstances connected with the receipt of the statements are such as to create an estoppel in pais in behalf of the employer, a different rule would prevail; not by reason, however, of the implied admission of the correctness of the statement, but by reason of the fact that the employer had acted thereon, and would be injured if the admission could be repudiated. The burden of showing this fact, however, would rest upon the employer, and must be established affirmatively, and not left to conjecture. In Janin v. Bank, 92 Cal. 14, 27 Pac. 1100, it was said in reference thereto: "The burden of proof to show that the bank sustained damage or injury by the negligence [that is, the failure to make objection] of plaintiff was upon the defendant, and this it was required to show by evidence having some reasonable tendency to establish such fact." There is nothing in the present record tending to show that the defendant acted, or failed to act, in respect to any matter, by reason of the omission of the plaintiff to object to the correctness of the statements; and there is nothing more than conjecture that, if he had objected thereto, the defendant would have sought to terminate the employment; and there is certainly no foundation for such a presumption.

An order overruling a demurrer to a complaint, on the ground of ambiguity, does not constitute reversible error, if after such order the cause is tried upon its merits, and it does not appear that the defendant was prevented from making whatever defense he had to the cause of action shown by the plaintiff's evidence. Code Civ. Proc. § 475.

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115 Cal. 388

## LANGE v. SCHOETTLER. (S. F. 402.)

(Supreme Court of California. Dec. 18, 1896.)

DEATH BY WRONGFUL ACT—EXEMPLARY DAMAGES—EVIDENCE—EXTENT OF INJURIES—ATTORNEY AND CLIENT—AUTHORITY TO BRING SUIT.

1. Under Code Civ. Proc. § 377, providing that, in actions for death by wrongful act, such damages may be given as, under the circumstances of the case, may be just, exemplary damages are not recoverable.

2. In actions for death by wrongful act, declarations of deceased in regard to his sufferings are admissible to show the extent of his injuries.

3. A witness may be asked whether he did not threaten to kill one of the parties to the action, to show bias.

4. Error in excluding such question is not cured by subsequent evidence that the witness was unfriendly.

5. In an action for death by wrongful act, evidence that deceased had intended to sue defendant is inadmissible.

6. No issue on the question whether the attorney was authorized by his client to commence suit can be taken before the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Henry Lange against Frederick Schoettler. There was a judgment for plaintiff, and defendant appeals. Reversed.

Carroll Cook and F. H. Richardson, for appellant. Oliver Ellsworth and W. F. Williamson, for respondent.

TEMPLE, J. This action was brought to recover damages for the death of plaintiff's son, which it is charged was caused by the wrongful act of the defendant.

The first point, although apparently based upon the alleged insufficiency of the evidence, is that the jury was erroneously instructed that they could allow exemplary damages if the act causing death was wanton, cruel, and malicious. I think this instruction erroneous, and that it was probably given under some misapprehension as to our statutes upon the subject. It has been uniformly ruled that the action provided for in section 376, Code Civ. Proc., is a new action, and not the action which the deceased might have brought for the wrong had he survived. Only such damages can be recovered as the statute authorizes, and, in the absence of an express provision authorizing a different rule, the only damage allowed is the probable value of the life to those in whose behalf the action is brought. Of course, this cannot include any grievance personal to the deceased, or any damage allowed in the interest of the people as punishment. The relatives, or the representative in their behalf, can recover the value of that which they have lost through the wrongful act of the defendant, and nothing more. It is true, in the case of a mother or a wife the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or husband, but it has been always held that this was in strict accordance with the rule that only the pecuniary value of the life to the relations could be recovered. The probable comfort, society, and protection of the deceased had some pecuniary value. The rule for computing damages in section 377 is expressly made applicable, and no doubt it was thus left in the judgment of the jury because all the elements upon which the estimate of pecuniary loss was to be based were problematical. The comfort, society, and protection, as well as the support which is to be estimated, is only something which might have been. The age, character, disposition, and health of the deceased were all to be taken into consideration. Everything is uncertain and indefinite. Therefore, it is left to the jury to say what they deem just; and if they have not made their estimate upon a wrong basis, and have not acted under the influence of passion or prejudice, their judgment is final. The statute of 1862 (St. 1862, p. 447) expressly allowed the jury to given exemplary damages, and this provision was carried into the first edition of the Codes. It authorized such damages, pecuniary and exemplary, as the jury should deem just. In 1874, section 377 was amended by striking out the words "pecuniary and exemplary." The purpose of this amendment must have been to take away the right to exemplary damages, and to make the rule accord with the general rule elsewhere.

The decisions upon this matter are cited and discussed in Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303. In that case, while holding that, in the case of a wife or mother suing under the statute, the jury may take into consideration the loss of "the comfort, society, and protection of the deceased," yet the remark of Mr. Justice Wills, that "the subject-matter of the statute is compensation for injury by reason of the deceased not being alive," is quoted with approval, and it is declared that the recovery can only be for the pecuniary injury to the relatives. In the same case an instruction was given that the jury must not allow exemplary damages, but could consider the sorrow, grief, etc., of the mother. The instruction was held erroneous solely because it allowed damages for the grief occasioned by the death, and because such injury is not a pecuniary loss. This case seems directly in point. To the same effect is Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603. In that case it was held that the damages were so excessive that the verdict must have been the effect of passion and prejudice, and that the court erred in instructing the jury that "the jury is not limited to the actual pecuniary injury sustained by her by reason of the death of her child." It is again held that, under our statute, the damages are limited to the probable value of the life of the deceased to the relatives. The same matter was again under consideration in Pepper v. Southern Pac. Co., 105 Cal. 389, 38 Pac. 974. In that case it was again held that the jury were confined to the probable pecuniary value of the life of the deceased to the relatives. No case has been cited, under a statute such as ours, in which exemplary damages have ever been claimed. The nearest to it are those cases in which it has been contended that a recovery could be had for the pain and suffering caused the deceased. The ruling has uniformly been against such a claim. The grievance to be redressed is that of the relatives, not of the deceased.

Several rulings made during the trial are complained of. They are generally unimportant, and, if erroneous, are not likely to be repeated on a new trial. A few may be briefly noticed.

The statements made by the deceased in regard to his sufferings were properly admitted. They indicated his bodily condition, and were part of the symptoms by which his case was to be judged, and by which it was ascertained to what extent he was injured. His declarations are taken because although they may be feigned, still it is the best we can do. Whether feigned or not must be left to the jury.

I think the question asked of the witness H. Lange, on cross-examination, as to whether he had not threatened to kill the defendant, should have been allowed. The injury caused by the ruling was not cured by the proof elsewhere that the witness was unfriendly. The degree of hostility was important.

I also think it was error to allow plaintiff to prove that the deceased intended to sue the defendant. It was immaterial, but might prejudice the defendant by showing that the deceased believed that he had a just cause of action against the defendant for the assault.

If a suit has been brought by an attorney without authority from his client, there is a mode in which the defendant can take advantage of the fact, and have the cause dismissed. The presumption is that the suit was authorized, and no issue can be made upon that point before a jury.

The judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

5 Cal. Unrep. 557

## LIVINGSTON et al. v. WIDBER, Treasurer.

(S. F. 370.)

(Supreme Court of California. Dec. 28, 1896.)

MANDAMUS—DEFENSE.

Where, pending an appeal by a city treasurer from an order directing him to pay certain coupons out of certain moneys paid in under protest, the action by the property owners, who paid in the money, to recover the same, is determined against them, the defense, to the issuance of the writ, of the pendency of such action, is unavailable.

In bank. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Proceeding by one Livingston and others against one Widber, treasurer, etc., for a writ of mandate. There was a judgment for petitioners, and defendant appeals. Affirmed.

Harry T. Creswell, for appellant. E. B. & George H. Mastick and Freeman & Bates, for respondents.

PER CURIAM. The plaintiffs sought by this proceeding a writ of mandate commanding the defendant, as treasurer of the city and county of San Francisco, to pay certain coupons of the Dupont street bonds. The defendant pleaded as a defense to the proceeding that the moneys in his hands belonging to the Dupont street fund had been paid in under protest, and that the parties paying the same had instituted an action, entitled "Davis v. The City and County of San Francisco," which was then pending in this court, and undetermined, for the recovery of the moneys so paid, and that for this reason he was entitled to retain the same until the determination of that action. The superior court, however, rendered judgment awarding the writ, from which he appealed. Since the appeal was taken, the action of Davis v. City and County of San Francisco, has been determined by this court against the plaintiff therein (46 Pac. 863), by which the defense alleged in the present action has become unavailing. The judgment is affirmed.

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115 Cal. 437

## GOGGIN v. D. M. OSBORNE & CO. (S. F. 503.)

(Supreme Court of California. Dec. 29, 1896.)

MASTER AND SERVANT — PERSONAL INJURY — DEFECTIVE APPARATUS—QUESTIONS FOR JURY.

1. In an action for personal injuries, where it appears that an elevator had been undergoing repairs; that afterwards defendant, employer, told plaintiff that the elevator was repaired, and directed him to load some machinery on it, and take it to a lower floor; that in adjusting a load it was necessary for employés to enter the elevator; and that while plaintiff was so employed the stay ropes broke,—it is a question for the jury whether plaintiff knew that the elevator was dangerous at the time and for the purpose in which he was using it.

2. It was a question for the jury whether defendant had exercised reasonable care to make the elevator safe for the purposes in which plaintiff was required to use it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by James H. Goggin against D. M. Osborne & Co. for personal injuries. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Wilson & Wilson, for appellant. Sullivan & Sullivan, for respondent.

BRITT, C. Plaintiff had a verdict and judgment in this action for damages on account of personal injuries suffered by him while in the employ of defendant, a corporation, which injuries he alleged to be the consequence of defendant's negligence. The immediate occasion of such injuries was the fall of a platform freight elevator or hoist used by defendant for transporting goods between the several floors of its warehouse, plaintiff being precipitated with the same from the third story to the basement of the building. It is insisted for reversal that plaintiff is clearly shown by the evidence to have been guilty of contributory negligence; that he knew the elevator to be dangerous to passengers, and that a rule of the establishment forbade employés to use it except for the carriage of freight; that, having such knowledge, he should have descended by a stairway, but was in fact using the elevator for his greater convenience in that particular when the accident occurred. Negligence of plaintiff was not pleaded in the answer, and he contends that it is, therefore, unavailable as a defense. We do not find it necessary to consider the question of pleading. There was evidence that the elevator was often out of order, and that for two days next preceding the accident by which plaintiff was injured it had been undergoing repairs; that when these were completed defendant's local manager—the same person who had promulgated the rule above mentioned—told plaintiff that the elevator was "fixed," and directed him to load certain machinery on the same at the third or uppermost floor of the building, and descend to a "deck" between floors, and take thence other freight; that the common—and plaintiff testified the only—way of reaching the deck was by means of the elevator when this was in use; that in adjusting the load it was usual and necessary for employés to go upon the elevator; that plaintiff did so on this occasion, and, while he was thus on the same in obedience to said directions of the manager, the sustaining ropes broke, and it fell. One Beghul, who saw the accident, testified that the elevator broke down while the loading was in process; the testimony of plaintiff himself in this regard (if the point be material) is not entirely clear; but, though it is apparent that he intended to descend on the elevator, there is nothing in his testimony or in his complaint inconsistent with said statement of Beghul. There was also evidence that any regulation against using the hoist to ride on was frequently disregarded by the defendant's servants of all grades of employment, from the said manager down. Granting, now, the contention of appellant that the evidence shows without material conflict that the hoist, to the knowledge of plaintiff, had been dangerous for use as a passenger elevator, and he had received warning against making such use of it, yet in view of the statement of the manager, after the last repairs, that it had been "fixed," his orders to plaintiff relative to moving the freight, the fact that to use the elevator at all plaintiff must get on the same, and the other matters which we have briefly stated, it seems to us very clear that it became a question for the jury whether plaintiff knew that the apparatus was dangerous at the time and for the purpose in which he was employing it when it broke, and so assumed the risks consequent upon such use; and, what is much the same proposition, it cannot be said as matter of law that a person of ordinary prudence would have refused to use the elevator in the manner plaintiff did. Fernandes v. Railway Co., 52 Cal. 45; Whalen v. Railroad Co., 92 Cal. 669, 28 Pac. 833; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; Davis v. Pacific Power Co., 107 Cal. 575, 40 Pac. 950.

The further point is made that defendant was not negligent, because, counsel say, immediately before the accident it caused all repairs to be made on the elevator which were deemed necessary by an expert. This view does not seem wholly consistent with the argument that the elevator was dangerous, and known on all hands to be so. But the inquiry in this behalf was whether defendant had used reasonable care to make the elevator safe for the purposes in which plaintiff was required to employ it; and here also was a case made for the consideration of the jury. It was in evidence that the hoist was of a class of "rather poor elevators," and that there were defects in the same, known to the manager, which may have contributed to the accident, and which were not repaired at all. The expert himself testified that the elevator as repaired by him was unsafe for passengers, and that he so informed the manager. We recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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115 Cal. 441

### SPAULDING v. WESSON et al. (S. F. 41.)

(Supreme Court of California. Dec. 29, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CREATION OF LIEN—WANT OF JURISDICTION.

1. Under a street-improvement act which gave the board of supervisors authority to order the improvement of public streets only, an order of the board for the grading of a street which was for the greater part held in private ownership, was ineffectual to create a lien on any of the abutting lands, though some of the owners, prior to the order, had dedicated to the public the street in front of their premises.

2. Where a municipal corporation had no jurisdiction to make an order for the improvement of a street, because at the time it was for the greater part held in private ownership, such jurisdiction could not be established by a subsequent dedication of the street to public use.

In bank. Appeal from the superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by one Spaulding against one Wesson and others to recover a street assessment. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

J. C. Bates, for appellants. W. H. H. Hart (D. H. Whittemore, of counsel), for respondent.

HARRISON, J. Action to recover a street assessment upon certain land in San Francisco. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

One of the defenses to the suit is that at the time the resolution ordering the work was adopted by the board of supervisors the street therein described had never been dedicated to public use, and was not a public street, but was held in private ownership. The resolution ordering the work to be done was passed August 13, 1877, and provided for grading Union street from Larkin street to the westerly line of Franklin street. The court found that at that date the board of supervisors had acquired jurisdiction to order said work, and the whole of it, to be done. This finding is attacked by the appellant upon the ground that it is not supported by the evidence. Union street, between Larkin and Franklin streets, is situated in that portion of San Francisco which is embraced within what is known as the "Laguna Survey." In 1848, Leavenworth, then alcalde of the town of San Francisco, made grants of several 100-vara lots in the vicinity of the lagoon, and the tract covered by these grants has since been called the "Laguna Survey." The lots thus granted were contiguous to each other, without any intervening streets. Upon the map which was made under the Van Ness ordinance, and validated in 1858 (St. 1858, p. 56), various streets, including this portion of Union street, were projected through the land covered by this survey; but it was held in Scott v. Dyer, 54 Cal. 430, that by the Leavenworth grants the grantees became the absolute owners of the lands granted, and that no portion of these lands could be appropriated to the use of the public as a street, except upon making compensation therefor.

At the trial of the present case evidence was offered to the effect that the defendant Wesson became vested in 1872 with the title to the 100-vara lot No. 15 that had been granted by Leavenworth in 1848. This 100-vara lot embraced the premises of the defendant described in the complaint, and also a portion of Union street fronting thereon. Wesson testified that he remained in possession of the property until the grading was completed, and did not in any way part with his title to the land until he made a conveyance to the city in 1891 of that portion of Union street which was embraced in his 100-vara lot; and it was admitted on behalf of the plaintiff that at the time the above order for the improvement of Union street was made certain individuals were vested with the title to portions of the street which were embraced within grants in the Laguna survey made by Leavenworth. It was also shown that until the time when the work of grading the street was begun under the contract entered into by virtue of the order, Union street was closed by fences running across it at several points. The street-improvement act under which these proceedings were had gave to the board of supervisors authority to order the improvement of only public streets, and when it was shown that the greater part of Union street between Larkin and Franklin was held in private ownership, and had not been dedicated to public use, it was clear that the order for its grading, and all the proceedings taken thereunder, were without authority, and were ineffectual to create a lien upon the adjacent lands. Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47, involved an action upon the same assessment as the present, to foreclose a lien upon a lot directly across the street from the lot described in the complaint herein, and upon evidence substantially the same as that presented in the present case it was held that the plaintiff had no right of recovery.

Evidence was introduced on behalf of the plaintiff for the purpose of showing that by reason of certain conveyances in which the lot described in the complaint had been bounded by Union street, that portion of the street had been dedicated as a public street; but, even if it be conceded that these conveyances had that effect, it would not render the assessment valid. A dedication of the street in front of this lot by the owners would not have the effect to dedicate other portions of the street which were held by different owners. The improvement of the street from Larkin to Franklin street was an entirety, and, unless the board of supervisors had jurisdiction to order the grading of the whole of that portion of the street, no portion of the expense could be made a lien upon the defendants' lot. The entire cost of the grading was by the act to be assessed upon the entire frontage, and each lot at a rate per front foot sufficient to cover the total expense of the work. There was no authority to charge the defendants' lot with the burden of any portion of the expense of grading private property adjacent thereto which lay within the lines of the street, and an assessment which included such charges would be invalid. Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339.

There was also evidence tending to show that Wesson and other property owners knew of the grading of the street while it was being done, and made no objections thereto; and also that after the grading was completed fences were placed along the sides of the street, and it was thrown open to public use; but, as these acts were subsequent to the time when the order for the grading was passed by the board of supervisors, they cannot be considered. Unless there was jurisdiction in the municipality to make the improvement at the time the order was passed, such jurisdiction could not be established by a subsequent dedication of the street. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

115 Cal. 512

## FRICK et al. v. CITY OF LOS ANGELES.

(L. A. 135.)

(Supreme Court of California. Dec. 31, 1896.)

MUNICIPAL CORPORATIONS — CONTRACTS WITH — FORMAL REQUISITES—CHARTER.

1. Los Angeles City Charter (St. 1889, p. 506) § 207, requiring contracts with the city to be in writing and signed by the mayor or some other person authorized thereto in behalf of the city, does not violate Const. art. 11, § 6, which declares that such charters "shall be subject to and controlled by general laws," merely because it prescribes certain forms in addition to the essentials provided by the Code for contracts in general.

2. Equity will not declare a city bound by a contract not executed in accordance with the requirements of the charter, when the other party has suffered no damage except the conjectural loss of profits.

3. The charter of Los Angeles is a "statute," within Civ. Code, § 1622, providing that all contracts may be oral except when required by statute to be in writing.

"Commissioners' decision." Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William A. Frick and others against the city of Los Angeles to recover damages for breach of contract. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

R. J. Adcock and Clarence A. Miller, for appellants. W. E. Dunn and Albert Crutcher, for respondent.

BRITT, C. Plaintiffs claim damages in this action for the alleged prevention of performance on their part of the stipulations contained in a certain paper writing, which they say is a contract between themselves and the defendant for the construction of a public sewer. It is declared by section 207 of the city charter (printed with the Statutes of 1889, at page 506) that "the city of Los Angeles shall not be, and is not, bound by any contract, or in any way liable thereon, unless the same is made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and be, signed by the mayor or some other person authorized thereto, in behalf of the city." It is not in terms alleged in the complaint that the city entered into a contract with plaintiffs expressed by said paper writing, but the pleader set forth the proceedings taken by the parties looking to the creation of such a contract. It thus appears that plaintiffs signed the instrument, and that the council—in which is vested the legislative power of the city—took the several steps required of it by the above-quoted portion of said section 207 in order to impart validity to such instrument as a municipal contract, and ordered the mayor to sign the same on behalf of the city; but it is not shown that it ever was so signed. The court sustained a demurrer to the complaint and dismissed the action.

Plaintiffs' main contention is that the provision of the charter requiring contracts of the city to be in writing and signed by the mayor, or some other person authorized thereto, in behalf of the city, is in conflict with the general law of the state concerning the manner of creating contracts, and therefore void under the clause of the constitution (article 11, § 6) declaring that such charters "shall be subject to and controlled by general laws." Numerous sections of the Civil Code are supposed to be thus contravened,—as section 1550, declaring the essentials of a contract, capable parties, their consent, etc.; section 1582, allowing acceptance of a proposal to be communicated in any reasonable and usual mode; section 1622, providing that all contracts may be oral except such as are by statute required to be in writing; and the like. Without examining all the propositions on which plaintiffs found their somewhat elaborate argument, we may admit that the charter provision under view required some ceremony for the formation of a contract and the manifestation of the city's consent thereto, in addition to the essentials of like obligations described and declared in the general law devoted to the subject of contracts. So has the law of such corporations time out of mind. Such formalities are fixed by the charter as the particular method by which the municipal officers must accomplish the object of bringing the city into a contract, but do not on that account add to or take from the constituents of a valid contract declared by the general law. Section 223 of the charter declares void any indebtedness (with certain exceptions) contracted by the city in excess of $2,000,000. The Code imposes no such limitation on the freedom of contracts. Yet we suppose there is no conflict between the charter and the Code in this particular. Section 62 requires the sureties on the bonds of city officers to be owners of real estate in the city or county of Los Angeles. No such restriction on the right to become a surety is contained in the Code sections relating to the competence of parties to contracts, or in those which treat specially of the law of suretyship. But it will hardly be contended that on this account the qualification required of such sureties is void. As to the provision of section 1622, Civ. Code, that all contracts may be oral except when required by statute to be in writing, if we concede that it has relevancy to the controversy here, we are yet clearly of opinion that the charter, as an instrument of government, and in its political provisions, is a "statute," within the meaning of that section. It is undoubtedly a law, though of local operation. The constitution declares it to be the organic law of the city. Article 11, § 8. It is of course a written law, and for very many purposes the terms "statute" and "written law" are used indifferently. See And. Law Dict. tit. "Statute"; 1 Bl. Comm. 85, 475.

It is urged that, "in equity," the instrument must be regarded as though the mayor had signed it. Nothing appears in the complaint tending to bring the case within any principle on which equity aids or ignores the defective execution of an instrument. The charter provided the mode in which the city could become bound, and certainly equity will not decree that it shall be bound in some other way in favor of parties who have suffered no detriment except the conjectural loss of profits they might have made by performance of the contract if it had become obligatory on the city. Pavement Co. v. Broderick (Cal.) 45 Pac. 863; Gas Co. v. Toberman, 61 Cal. 200; Zottman v. San Francisco, 20 Cal. 96. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 558)

## BARNHART v. EDWARDS et al. (Sac. 150.)

(Supreme Court of California. Dec. 28, 1896.)

MORTGAGE—PAROL EVIDENCE—PAYMENT OF TAXES—FORECLOSURE—ASSIGNMENT OF ERRORS—CONVERSION BY PLEDGEE.

1. Where a conveyance was made as security for certain money advanced, parol evidence is inadmissible to show that, by agreement with the attorney of the grantor, the effect of the instrument was changed so as to also secure future advances.

2. An instrument by which land was conveyed to secure advances which provided for the repayment of all taxes upon the lands conveyed did not invalidate the agreement under Const. art. 13, § 5, providing that contracts for payment of taxes upon the "money loaned" should be void.

3. An instrument conveyed certain lands to secure, among other matters, a loan of $2,500, secured by a pledge of certain wheat. *Held*, in an action to foreclose the lien, that, as the note was expressly named as one of the debts secured, it was incumbent on defendant, if he would avoid liability therefor, to plead the facts by virtue of which the land had been exonerated from this liability.

4. An assignment that the court erred in finding that a certain sum was due from defendant to plaintiff is not a specification of the "particulars" in which the evidence is insufficient to sustain the finding.

5. Where wheat pledged is taken from the possession of the pledgee in attachment against the pledgor, and the litigation in relation thereto is conducted by the attorneys of the pledgor,

the pledgee cannot be charged with conversion when the attachment is sustained.

6. Certain land was transferred to plaintiff to secure a loan. At the time of the transfer, it was under a lease which the lessee subsequently assigned to plaintiff. *Held*, by thus getting possession, plaintiff became the mortgagee in possession, and was liable to defendants only for the income and profits received from the land.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Barnhart against J. T. Davis, Edwards' administrator, and others. Judgment for plaintiff. Defendant Davis appeals. Modified.

P. J. Hazen and Nicol & Orr, for appellant. Jas. A. Louttit and Minor & Ashley, for respondent.

HARRISON, J. E. C. Vancil, the intestate of the defendant Edwards, executed to the plaintiff, April 23, 1879, a conveyance of certain lands in the county of San Joaquin, as a security for the payment to him of certain sums of money. The transaction was evidenced by a conveyance absolute in form, and a separate defeasance in the nature of an agreement for the sale of said land to the grantor for the considerations therein named. These considerations consisted, however, entirely of moneys paid out or expended by the plaintiff, and the conveyance of the lands to the plaintiff was intended only as a security for their repayment. The present action is in the nature of a foreclosure, and was brought to obtain judgment against the estate of the grantor for the amount of such payments alleged to be still unpaid, and for the sale of the land in satisfaction thereof. The defendant Mordecai A. Vancil is the son of E. C. Vancil, but is also known by the name of John T. Davis, and under that name has appealed from the judgment rendered in favor of the plaintiff, and also from an order denying his motion for a new trial. The appeal from the judgment was heretofore dismissed upon the motion of the respondent (111 Cal. 428, 44 Pac. 160), leaving only the appeal from the order to be considered. The grounds upon which the appellant urges a reversal of the order are that the court erred in holding that certain advances made to him by the plaintiff were secured by the mortgage, and also that certain items were chargeable against the plaintiff in his account with the mortgagee, and should have been deducted from the advances made by him for which the security was given.

1. The advances of the plaintiff which the appellant contends are not secured by the mortgage consist of four items, viz.: The sum of $100, paid to Hughes, April 25, 1879, at the request of Davis, upon the claim that it was owed by him; $250, paid to Davis, June 7, 1880, for which he gave the plaintiff the note of E. C. Vancil; $100, paid to Davis on his note, April 22, 1881; and $291.60, paid for a note of Davis, purchased from Long, August 2, 1881. The sums of money for whose repayment the security was given, as expressed in the instrument of defeasance, are the following: The $2,300 named in the deed of conveyance as its consideration, and which was used in paying certain debts against Davis in the city of Stockton; a note for $2,500 that had been executed by Davis to the plaintiff, and for which certain wheat had been pledged as security; the costs and expenses, including attorney's fees, incurred, and that might be incurred, in certain litigation concerning said wheat; and all taxes that the plaintiff should pay on the land. It is very clear that any moneys that might be thereafter paid to Davis, or advanced by the plaintiff for his benefit, are not included in these items, or in the purpose for which the security, as expressed in the instrument, was given. It was, however, contended by the plaintiff that there was a parol agreement between the parties to the transaction that it should be security for such advances as the plaintiff might thereafter make to Davis; and, against the objection of defendants, evidence was introduced for the purpose of sustaining this contention. That such evidence was improperly admitted is evident from the provisions of section 2,922, Civ. Code, as well as from the general rule that parties to a written instrument are presumed to have incorporated therein all the terms of their agreement, and that its contents cannot be varied by parol. But, irrespective of this rule, we are of the opinion that the plaintiff failed to show that it was intended by the parties that these advances should be secured by the instrument. Judge Budd, by whom the instrument was drawn, testified that, as far as he could remember, he embodied therein all the agreements of the parties as they were stated to him, and that the instruments were read and explained to them before they were signed; and he was unable to say that they gave him any instruction that the mortgage was to be security for subsequent advances to Davis. Davis himself was not present at Budd's office when the instruments were drawn, and the plaintiff testified that he helped dictate the deed and heard the agreement read after it was prepared, and that no dissatisfaction was expressed; and he does not testify that it was agreed, or that it was the intention of the parties, that it should be a security for such advances. The effect of the instrument could not be changed by any subsequent parol declaration by Vancil's attorney of the object of the instrument, or by the fact that the plaintiff made the advances upon his assurance that they should be thus secured.

2. The agreement for the repayment of all taxes upon the land described in the instrument of defeasance does not fall within the purview of section 5 of article 13 of the constitution. This provision does not invalidate an agreement by the mortgagor to pay the taxes upon the "land" mortgaged, but is lim-

ited to the taxes upon the "money loaned," or the "mortgage, deed of trust or other lien." By section 4 of the same article the mortgage is, for the purposes of assessment and taxation, to be treated as an interest in the property affected thereby, but only such value as there may be to the property so affected after deducting the value of the security is to be taxed to the owner of the property; the value of the security is to be assessed and taxed to its owner. It does not appear that any of the taxes paid by the plaintiff were upon the security, or other than those which were assessed upon the land after deducting the value of the security. If the defendant would claim the right to rely upon the provisions of section 5, it was incumbent upon him to show the existence of the circumstances under which the provision may be invoked.

3. At the time of the execution of the mortgage, the wheat that had been given in pledge for the payment of the $2,500 note had been attached in an action against Davis, and taken from the possession of the plaintiff. This wheat belonged to Vancil, and had been pledged by Davis to secure his own note; but by the instrument of April 23, 1879, Vancil ratified the transfer by Davis to the plaintiff. Davis also testified that all the business done by him since 1876 had been done by him under his name of Davis, but for Vancil; and it was also shown that, prior to the commencement of the present action, Vancil had conveyed to Davis all real and personal property owned by him in the state. Prior to the execution of the instruments of April 23, 1879, the plaintiff had brought a suit in replevin for the wheat, and judgment in that action was thereafter rendered against him, and the wheat sold in satisfaction of the judgment in the suit against Davis, wherein it had been attached. It is contended by the appellant that it was the duty of the plaintiff to defend the possession of the wheat, and that, by reason of his failure so to do, the court should have charged him with its conversion, or with its value above the amount for which it was pledged to him. No such issue is, however, presented by the answers of the defendants; and it does not appear from the record that any proposition of this nature was submitted to the court below. In his assignments of errors of law, the plaintiff has specified that the court erred "in charging defendant and the premises mortgaged with the $2,500 secured by pledge of the wheat sued for in the case of Barnhart v. Fulkerth [29 Pac. 50]"; but, as this note was expressly named in the mortgage as one of the debts secured by it, it was incumbent upon the appellant, if he would avoid liability therefor, to set forth in his answer the facts by virtue of which he would claim that the land had been exonerated from this liability. The further assignment that the court erred in finding that the sum of $7,668.12 is due from the defendant to plaintiff cannot be considered as a specification of the "particulars" in which the evidence is insufficient to sustain this finding. But, disregarding the absence of an issue upon this proposition, we are of the opinion that it sufficiently appears from the record that the court did not err in refusing to charge the plaintiff with the loss of this wheat. After the plaintiff had introduced evidence of the amount yet unpaid upon the obligations for which the security was given, if the defendants would reduce this amount it was incumbent upon them, whether authorized by the pleadings or not, to offer evidence sufficient in law to be available for such reduction, from which the court could determine the amount by which the reduction should be made. The defendants offered in evidence the findings by the court in the replevin suit of the plaintiff, that, prior to the attachment in the suit against Davis, the sheriff had tendered to the plaintiff the sum of $2,600, and the plaintiff testified that he received $2,500 from that suit. In the findings herein, he is charged with $2,540, as of November 19, 1892; and it seems to be admitted in the briefs of counsel that this was for the tender made by the sheriff when the wheat was taken. There is, however, no evidence in the record of the value of the wheat, or of the amount for which it was sold by the sheriff. Unless it had some value beyond the amount for which the plaintiff has been charged in his account, there is nothing with which he should have been charged, and it was for the defendants to show that it had such value. The plaintiff cannot be charged with a conversion of the wheat. It was taken from his possession by the arm of the law, and the record fails to show any affirmative act of his by which it was lost to the defendants. On the contrary, it appears that the litigation was conducted by the attorneys of Davis, who was the agent of Vancil, and acting for him, and by whose advice the plaintiff declined to take the money when tendered him. The defendant cannot invoke in this action, as conclusive upon the plaintiff, any findings made by the court in the replevin suit, in which he was not a party.

4. In October, 1876, the land conveyed to the plaintiff was leased to Hughes for the term of five years, at a rent of $1,500 per annum; and in September, 1880, Hughes made an assignment of this lease to the plaintiff. It is contended by the appellant that, by reason thereof, the plaintiff, as assignee of the land, became liable for the rent thereby reserved for the succeeding year, and should be charged with this amount in his account. As has been said with reference to the wheat transaction, this was a defense which must be affirmatively established by the defendants in order to render it available; and the record fails to show that the court erred in not holding that it was established. Although there was testimony that Hughes did, in fact, make an assignment of the lease to the plaintiff, yet at that date the plaintiff was the legal holder of the title to the land, and was,

in fact, the landlord of Hughes; and the transaction was intended to be, and did in reality constitute, a surrender of the term by which the plaintiff, as landlord, was restored to the possession of the leased premises. The plaintiff testified in reference to this transaction: "Hughes could not carry on the ranch. He throwed it up, and, at Davis' request, I carried it on. Hughes assigned the lease to me, and I took a new lease at the same time." By thus getting possession of the land, the plaintiff became a mortgagee in possession, and was liable to the defendants for only such income and profit as he may have received from the land. He testified that he never collected any rent from Hughes, and it appears that he has fully accounted for all the income and profits derived from the land during the time he was in possession.

The superior court is directed to deduct from the amount which it has found due to the plaintiff, as set out in finding 7, the items of $100, paid to Hughes, April 25, 1879; $250, paid to Davis, cash, on note June 7, 1880; $100, paid to Davis, cash, on note April 22, 1881; and $291.60, paid for note to Long, August 2, 1881, with whatever interest has been allowed by reason of said items, and to make a corresponding amendment of its conclusions of law. The order denying a new trial will thereupon be affirmed. Judgment will then be entered in accordance with the findings as thus corrected.

We concur: VAN FLEET, J.; McFARLAND, J.

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115 Cal. 454

## HANKINS et al. v. OTTINGER et al. (S. F. 382.)

(Supreme Court of California. Dec. 31, 1896.)

CONTRACTS—WAGERS—PREMIUMS ON HORSE RACES—ENTRANCE MONEY.

1. Competing for premiums offered by an association on horse races is not competing for bets or wagers, and an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses, and to divide the same equally, is valid.

2. The payment of entrance money to an association as a fee for the privilege of competing in a horse race in which a premium is offered by the association, does not make the transaction a wager as between the competitors.

Department 1. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action for breach of contract. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Davis & Hill, for appellants. Rothchild & Ach, for respondents.

VAN FLEET, J. It is contended that the contract sued on was without consideration, in that it was a mere wagering venture, which was void as against public policy, and not enforceable in a court of law. The contract, as alleged and found, was substantially this: The plaintiffs and the defendants, both owning race horses, and having them entered in certain stake races about to be given by the Pacific Coast Blood Horse Association and the California Jockey Club, made the agreement between themselves that they would pool all premiums and stake moneys offered by said associations on said races, which should be awarded to either or any of their said horses, and divide the same equally,—one-half to the plaintiffs and one-half to the defendants. It was found that one of the defendants' horses was awarded a purse so offered, amounting to $5,480, which defendants now refuse to divide. At common law a wager made in respect to matters not affecting the feelings, interests, or character of third persons, or the public peace, or good morals or public policy, was valid, and its payment could be enforced; but if it was of a kind to affect the interests or character of third persons, or was in relation to a matter which militated against good morals or sound public policy, it was void, and no action in affirmance of such a contract could be maintained. Whether betting on horse races was of a character to fall within the latter class at common law is a matter about which there is elsewhere some contrariety in the adjudged cases. But, so far as this state is concerned, the question has been directly settled in the case of Gridley v. Dorn, 57 Cal. 78, where it was held that such contracts are void, as contravening good morals, and cannot be enforced by the courts. It is well settled, however, that a bet or wager, such as comes within the rule of public policy and good morals invoked in that case and by the appellants here, is where the parties competing themselves each put up or bet a certain sum or valuable thing, which is to be taken by the winner and forfeited by the loser on the turn of the event. Alvord v. Smith, 63 Ind. 58; Harris v. White, 81 N. Y. 532. Such a contract will not be affirmed by the courts, but the parties will be left for redress to their own code of ethics. But the contract presented for consideration was not such a contract. It related solely to purses or stake moneys to be paid by the associations offering them, and covered nothing which the parties themselves might see fit to hazard. There was no wager or bet of their own money to be lost by one and taken by the other, but only that of a third party offered for their competition. This did not constitute the transaction a wager. "There is a clear distinction," say the supreme court of judicature of Indiana in Alvord v. Smith, supra, "between a wager or bet and a premium or reward. In a wager or a bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event. The two need not be confounded." That was a case where the winner of a purse offered by a trotting association on a race sued to recover the amount upon the association refusing to pay; the defense of the latter being that the purse was a mere wager, which did not constitute a valid consideration for their promise. It was held that the winner could recover. The distinction between a bet or wager and a premium or purse is thus given in Harris v. White, supra: "A bet or wager is ordinarily an agreement between two or more that a sum of money, or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put upon the chance. There is in that this element that does not enter into a modern purse, prize, or premium, viz.: that each party to the former gets a chance of gain from others, and takes a risk of loss of his own to them. 'Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity.' People v. Sergeant, 8 Cow. 139. A purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and, if he abide by his offer, that he must lose it, and give it over to some of those contending for it, is reasonably certain." It is betting or wagering on the event of races which is regarded by the law as immoral, and which it undertakes to discourage by refusing its countenance in the way of legal redress to enforce such compacts. Trials of speed between horses, commonly denominated "horse races," are not in themselves, and apart from the improper purposes they may be made to subserve, discountenanced by the law. Nor is the giving of purses or premiums by associations or individuals, not themselves competing, for the purpose of encouraging such contests, regarded as contrary to good morals or forbidden. Were these things unlawful, our state and district agricultural societies, which are fostered and encouraged by the laws of the state, would be compelled to forego one of their most popular and attractive features. The offering of a purse or premium for the fastest race horse is not distinguishable in principle, however it may be otherwise regarded, from the giving of a premium for the best qualities in other respects in the horse, as for draught or breeding purposes, or for the best breed of bulls or cows or other domestic animals. In the one case it encourages the breeding of the animal for his qualities of speed; in the other, it brings out the best draught horse or brood mare, or the most desirable breed of cattle, sheep, or hogs. And competing for such premiums or offerings, whatever may be their designation, is not competing for a bet or wager. As suggested in Alvord v. Smith, supra: "Under out statutes (1 Rev. St. 1876, p. 48) encouraging agriculture and authorizing public fairs, premiums are offered for the best draught horse, saddle horses, trotting horses; the best stock for this or that purpose. These premiums are certainly not wagers. As well might we call an insurance policy a wager, because it is to be paid on an uncertain event, as to call a premium a wager, because we do not know who will be entitled to it until the event happens. We see no difference, indeed, in principle between a premium offered by an authorized corporation and one offered by a private partnership. Neither are wagers, nor are they unlawful." In the present case the evidence shows that the amount found to have been won by defendants was all money offered by the associations. The fact that the latter added to the $5,000 purse the amount of the entrance money, to be divided between the first, second, and third horses in the race, did not tend to impart to the transaction the character of a wager between the competitors. This entrance money had been paid to the associations by the various persons desiring to compete in the race, respectively, not as a wager or bet, which might be withdrawn before the event, but as a fee for the privilege of entering in the race, which became and was the property of the association as much as was the principal purse of $5,000. It constituted, in no proper sense, a bet or wager between the parties.

The objection that the evidence does not sustain the finding that defendants were partners in the transaction is untenable. Under the evidence, the court was fully justified in finding the existence of that relationship; and also that Ottinger was authorized to enter into the agreement in behalf of the partnership. The order denying a new trial is affirmed.

We concur: HARRISON, J.; McFARLAND, J.

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115 Cal. 487

## HOWLAND v. OAKLAND CONSOLIDATED ST. RY. CO. et al.

(S. F. 468.)

(Supreme Court of California. Dec. 31, 1896.)

WITNESSES—CROSS-EXAMINATION—CURING ERROR BY INSTRUCTION—TRIAL—COMMENT ON WEIGHT OF EVIDENCE—OPINION EVIDENCE.

1. Where the condition of the brakes on defendant's car at the time of the accident was in issue, it was prejudicial error to permit plaintiff to ask a witness for defendant, on cross-examination, whether he had not been told that T., the motorman in charge of the car, "had testified [on a former trial] that these brakes were out of order," since it brought to the attention of the jury, and assumed as a fact, without other proof, that T. had so testified.

2. Such error was not cured by a subsequent instruction to disregard as evidence any statements of counsel as to what testimony was given on the former trial.

3. In an action for personal injuries, it was improper for plaintiff's attorney to question him, on direct examination, in regard to injuries received in another accident occurring shortly before the trial, on the plea of explaining an apparent nervousness in plaintiff's manner.

4. It is error, in denying a motion to strike out certain testimony, to suggest that it may "stand for what it is worth."

5. A particular objection to evidence, not specified in the court below, cannot be urged on appeal.

6. Where the opinion of an expert is asked on facts not detailed in the question itself, but appearing in the testimony of another, to which the expert is referred, it must appear that he heard such testimony.

7. A nonexpert witness, who was on the platform of a horse car at the time of the collision, may state whether, had the driver of the car been at his post, the car could have been stopped in time to have avoided the accident.

Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by F. P. Howland against the Oakland Consolidated Street-Railway Company and another. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant railway company appeals. Reversed.

Chickering, Thomas & Gregory and Fitzgerald & Abbott, for appellant. Coogan & Foote and F. E. Whitney, for respondent.

VAN FLEET, J. The action was to recover damages resulting to plaintiff from loss of the aid and services of his wife, and the comfort of her society, and incidental medical expenses incurred, by reason of personal injuries suffered by the wife through the negligence of the defendants. Plaintiff had judgment against both defendants, and the Oakland Consolidated Street-Railway Company appeals therefrom, and from an order denying its motion for a new trial, assigning as erroneous certain rulings in the admission of evidence and in the giving of an instruction, and that the damages are excessive. Several of these rulings we regard as so obviously and prejudicially erroneous as to demand a new trial.

1. The injuries were the result of a collision between an electric motor car, in charge of the servants of appellant, and a horse car of its co-defendant, at a point where their roads cross; the wife, a passenger on the car of appellant, being thrown therefrom by the shock, and hurt. One of the controverted questions in the case, growing out of the issue of appellant's negligence, was as to the condition of its car at the time of the accident; the claim of the plaintiff being that it had negligently permitted the brakes on the car to become so far out of repair that they were inadequate to stop or check its speed in time to avoid the collision. Charles Cunningham, a witness on behalf of this defendant (appellant), had testified on his direct examination that at the date of the accident he was a car repairer for said defendant, and that the brakes on the car were in good condition on the day of the accident. On cross-examination, after some questions, intended to elicit the fact that the witness knew the car or brake was in bad order, he was asked: "Q. Well, you knew it was, didn't you? Don't you know that you were dragged out of bed, and brought in from the car house out there, in a suit of overalls, after Mr. Tyler had testified that this car was not in good condition, fifteen months afterwards?" The Tyler referred to in the question was not a witness in this case, but it had appeared incidentally that he was the motorman in charge of appellant's car at the time of the accident, and had given testimony in another action, previously tried, brought by this plaintiff and his wife, jointly, against the same defendants, to recover damages suffered by the wife from the personal injuries received in the same accident. The question was objected to on several grounds; among others, as incompetent, as containing an improper assumption of fact, —"that there is no evidence of a statement by Tyler in the former case in this case." The court ruled: "There is nothing in this question as to what Mr. Tyler's testimony was. He may answer the question." The witness having answered that he did not know whether Mr. Tyler had testified in the former case before he did or not, because he did not hear his testimony, this question was asked: "I understand you didn't. But didn't the superintendent of the road tell you that Mr. Tyler had testified that these brakes were out of order, and that you were to come and testify that they were in good condition?" This question was also objected to, as bringing before the jury a statement of a third party, not under oath. The objection was likewise overruled, and the witness answered. Appellant, having reserved an exception to these rulings, now urges that they were erroneous, and that the objectionable matter embraced in the questions which was thus permitted to find its way into the case was of a character to greatly prejudice the appellant's case with the jury.

The questions were clearly improper for any purpose. Neither Tyler nor his testimony in the previous case had been mentioned by the witness, and the questions were, therefore, not intended nor were they admissible, as cross-examination of anything stated by the witness; while they involved not only an attempt to impeach the witness upon a collateral issue, which was in itself improper, but what was, under the circumstances of the case, a more serious objection, they brought to the attention of the jury, and assumed as facts, things not in proof bearing upon one of the most material issues, and of a character highly calculated to improperly affect their consideration. As suggested by appellant, the jury could hardly have failed to get the impression from these questions that Tyler had testified in the former case that the brakes were out of order; and, as the jury had been made aware of the fact that Tyler was the motorman in charge of the car at the time of the accident, they would naturally suppose that he of all others ought to know what the condition of the brakes was. It is true that the trial judge said, in answer to the first objection, that the question did not disclose what Tyler's testimony had been, but in this suggestion he was manifestly in error. Respondent in fact makes no serious effort to evade the objection that the questions were improper, but he contends that, if any impression was made thereby upon the jury, it must have been removed by the comments of the judge made at the time of the ruling and afterwards in his instructions. But while, under some circumstances, errors of this character are susceptible of being thus obviated, we do not think that anything said by the judge in the present instance was justly calculated to wholly remove from the minds of the jury the evil effect of these questions. The jury were told, in effect, that they should not consider as evidence any statements of counsel as to what testimony was given on the previous trial, and that the evidence was not admitted for that purpose; but they were not instructed that there was no competent evidence before them of what the evidence on that trial was; and, as the judge admitted these questions, and several others containing the same objectionable suggestions, over defendant's exception, without clearly defining the purpose for which they were admitted, the jury, notwithstanding what was said by the court, may well have been left with the impression that the matter objected to was competently before them for consideration. In such a case we think the just and safe rule is that followed in People v. Ah Len, 92 Cal. 282, 28 Pac. 286, where it was held that the only certain way of avoiding an error of similar character, where it does not clearly appear that it was rendered harmless, is by granting a new trial.

2. During plaintiff's examination by his counsel as a witness in his own behalf this occurred: "Q. Mr. Howland, you appear to be somewhat nervous this afternoon. Have you recently suffered an accident? A. Well, I struck a collision up here in the tunnel about a month ago. Q. You were on the train that collided at the mouth of the tunnel?" (To which question counsel for the Oakland Consolidated Street-Railway Company objected on the ground that it was incompetent, irrelevant, and immaterial; which objection was by the court overruled and an exception duly taken by said defendant.) Counsel for Plaintiff: I want to show the witness is suffering from an injury not connected with this case. Counsel for Defendant: That is all? It is immaterial where he obtained the accident. Counsel for Plaintiff: Let us see. Let the court pass upon it. Q. You were running as a postal clerk about a month or so ago, were you not? A. Yes, sir. Q. The postal car is next to the engine, isn't it? A. Yes, sir. Q. Were you on either of the trains which collided at the mouth of the tunnel near Altamont, in this county, about a month ago? (The same objection was made to this and overruled.) A. Yes, sir. The Court: Of course, gentlemen of the jury, you will understand the question is not admitted as in any wise affecting the rights of either of these defendants, but simply in explanation of the manner of the witness upon the stand, if there has been anything peculiar in his manner. I don't know whether there has. Counsel for Plaintiff: You were on that train? A. Yes, sir. Q. Did you receive any injury? (This question was objected to for like reasons, and overruled.) A. Yes, sir. Q. Been treated for it since? Some spinal trouble, isn't it? (This was also objected to and overruled.) Counsel for Defendant: I do not know the object of this. There has been nothing peculiar in Mr. Howland's manner, that I have discovered. I do not see the idea of proving that this gentleman has been in another accident. The Court: I think it has gone far enough. Counsel for Plaintiff: Certainly, and I have stopped. The Court: I understood the purpose in asking this question is to explain to the jury the witness appears to be nervous. The jury have a right, in attaching certain weight to the testimony of witnesses, to determine what weight they should give it; to take into consideration his manner and appearance." We have stated the matter thus fully the better to show its objectionable character. This whole examination was improper, as bringing specially and prominently into the case a fact in itself wholly irrelevant to the issues, which, in view of the nature of the action, was well calculated to excite the sympathy of the jury in behalf of plaintiff in his misfortune, and possibly induce a verdict in excess of that warranted by any proper evidence in the case. Conceding that the plaintiff was entitled to explain the cause of anything unusual in his manner or conduct on the stand, the course pursued was wholly unwarranted, and should not have been allowed. At most, a statement in general terms of the cause of his apparent nervousness, if that fact was manifest, was all plaintiff was entitled to make on his direct examination. A party has no right for any such purpose to virtually cross-examine his own witness, and bring in irrelevant matters. Moreover, it would seem from the suggestions of the court that there was no occasion for any inquiry upon the subject.

3. It was likewise improper for the judge, in denying plaintiff's motion to strike out certain testimony of appellant's witness Mulverhill, to suggest that the testimony might "stand for what it is worth." Although evi-

dently not so intended, the expression was liable to be taken by the jury as an intimation that in the opinion of the court the evidence was of little consequence. If proper to remain for the consideration of the jury, the evidence was to be weighed solely by the latter.

4. The particular objection now urged to the hypothetical question put to Dr. Stratton was not specified in the court below, and cannot be here considered for the first time. Howland v. Railway Co., 110 Cal. 513, 42 Pac. 983. Had it been made, it should have been sustained. Where the opinion of an expert is asked upon facts not detailed in the question itself, but the witness is referred to the testimony of another for such facts, it should appear that the witness had heard the testimony.

5. We think the court should have allowed the question asked of the witness Perry as to whether, had the driver of the horse car been at his post, the car could have been stopped to avoid the collision. The witness was on the platform of that car at the time, and saw the situation, and the question was one upon which any man of mature and ordinary judgment was competent to express an opinion. Rog. Exp. Test. (2d Ed.) § 3. An ordinary horse car is not run or controlled by any such intricate force or mechanism as an electric, steam, or cable car, and the question, therefore, did not fall within the rule of Howland v. Railway Co., supra, as involving the skill or experience of an expert.

The remaining exceptions need no particular notice. The instruction complained of has been shown to have been unobjectionable as given, by an amendment to the statement filed since the argument; and the objection to the verdict as excessive may not again arise. The judgment and order are reversed.

We concur: HARRISON, J.; McFARLAND, J.

115 Cal. 464

## WRIGHT v. DEL NORTE COUNTY.
(S. F. 310.)

(Supreme Court of California. Dec. 31, 1896.)

COURTS—EQUITABLE JURISDICTION.

An action to recover for alleged services rendered by the plaintiff as a member of the county board of education, where the amount claimed is not within the jurisdiction of the superior court, presents no equitable issues bringing it within the general jurisdiction of the court "in all cases in equity."

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; Jas. E. Murphy, Judge.

Action by S. G. Wright against Del Norte county. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

A. J. Bledsoe, for appellant. L. F. Cooper, Atty. Gen. Fitzgerald, and Henry E. Carter, Deputy, for respondent.

BRITT, C. Action to recover of the county of Del Norte the sum of $215, claimed as compensation for alleged services rendered by plaintiff as a member of the county board of education. The superior court held that it had no jurisdiction of the cause of action, and on this ground sustained a demurrer to the complaint. The sum involved being less than $300, the only head of jurisdiction exercisable by the superior court, to which plaintiff assigns the right of that court to entertain the action, is its original jurisdiction "in all cases in equity,"—it being said that the cause is "in the nature of a suit in equity." We have been unable to discover that it possesses any qualities of such a suit. Whether mandamus lies to compel the county board of supervisors to allow the claim, or whether an action thereon may be maintained in the justice's court, are questions not necessary to be now considered, and upon which, in the absence of fuller argument, we think no opinion should be expressed. The superior court has no jurisdiction of the present action, and the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

115 Cal. 445

## Ex parte DAVIS. (Cr. 243.)

(Supreme Court of California. Dec. 29, 1896.)

JUDICIAL NOTICE—COMPLAINT—CITY ORDINANCES —MUNICIPAL COURT.

In prosecutions before municipal courts for violation of municipal ordinances, the ordinance violated need not be pleaded, as municipal courts take judicial notice of them.

In bank. Application on the part of L. H. Davis for a writ of habeas corpus. Petitioner remanded.

Geo. P. Burke and Sullivan & Sullivan, for petitioner. David F. Maher, for respondent.

PER CURIAM. The petitioner was convicted in the recorder's court of the city of Watsonville upon a complaint charging him with keeping open a saloon in said city for the sale of intoxicating drinks, between the hours of 12 o'clock at night, and 5 o'clock the following morning, "All of which [so the complaint charges] is contrary to the form of the ordinance in such cases made and provided, and against the peace and dignity of the people of the state of California." It is claimed that the imprisonment of petitioner in pursuance of said conviction is unlawful, because the complaint charges no offense, and that it charges no offense because it does not plead the ordinance by title, date of passage, or in any manner except in the general terms above quoted. The argument in support of this position is that the ordinances of municipal corporations are private statutes; that courts do not take judicial notice of private statutes;

and, consequently, that they must be pleaded and proved like other material facts.

It is true, as a general proposition, with reference to proceedings in the courts of superior or general jurisdiction, that municipal ordinances are regarded as private statutes, and must be pleaded and proved. In this state, however, even in the superior courts, it is sufficient to refer to them by title and date of passage, whereupon the court must take judicial notice of them. Pen. Code, § 963. But when the proceeding is in a municipal court, instituted for the express purpose of enforcing the municipal ordinances, and vested with full jurisdiction for that purpose, the rule ought to be, and is, different. In such case the ordinances are the peculiar law of that forum, and it is bound to take notice of their existence. To such laws it holds the same relation that the superior courts hold to the laws enacted by the legislature, and may notice their provisions because they are among the things which, as to it, are established by law. Code Civ. Proc. § 1875, subd. 2. The following authorities bear out this view: City of Solomon v. Hughes, 24 Kan. 211; City of McPherson v. Nichols (Kan. Sup.) 29 Pac. 679; note to Lanfear v. Mestier, 89 Am. Dec. 668, 669; State v. Leib, 11 Iowa, 407; Town of Laporte City v. Goodfellow, 47 Iowa, 572. These cases show that the practice in municipal courts with respect to municipal ordinances constitutes an exception, and a proper and necessary exception to the rule invoked by the petitioner. The complaint, therefore, was sufficient if there was an ordinance prohibiting the acts charged; and as to that we must presume in this proceeding, which raises only the question of jurisdiction, that there was such an ordinance, of which the recorder's court took judicial notice. Prisoner remanded.

(115 Cal. 430)

## GRAY et al. v. LUCAS et al. (S. F. 458.)[1]

(Supreme Court of California. Dec. 28, 1896.)

STREET ASSESSMENT—VALIDITY—CERTIFICATE OF CITY ENGINEER.

The street improvement act, as amended by St. 1889, p. 167, does not require the certificate of the city engineer to be attached to a street improvement assessment; hence a judgment for defendant on the ground that the certificate was not so attached would not entitle plaintiff to a second assessment, under section 9 of the act, providing that the right to a second assessment exists only when the judgment shows that the prior assessment was defeated by some defect in the assessment.

Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by one Gray and others against one Lucas and others. From an order denying the application of plaintiffs to amend the judgment, they appeal. Affirmed.

Fisher Ames and Jas. W. Cochrane, for appellants. E. B. Mahon, for respondents.

HARRISON, J. The plaintiffs commenced an action in the superior court of the county of Marin against the defendants, to foreclose the lien of an assessment for the improvement of one of the streets in the town of San Rafael. At the trial of the action, upon the issues presented by the answer, a nonsuit was granted, and judgment rendered in favor of the defendants, and entered June 3, 1895. Thereafter, upon an affidavit filed on behalf of the plaintiffs, purporting to set forth the proceedings at the trial, and the nature of the evidence then presented, an application was made to correct and amend the judgment. The grounds for the motion were alleged to be to enable the plaintiffs to apply to the superintendent of streets for a new assessment, and it was stated in their notice of motion that unless it was granted they would be deprived of this right. The affidavit set forth that testimony was introduced at the trial identifying the street assessment sued on in the action, and that when it was offered in evidence the defendants objected to its admission on certain grounds; "that said court thereupon sustained said objection; that thereupon, the testimony being closed, on motion of counsel for defendants said court granted a nonsuit and ordered judgment for defendants." Upon this affidavit the plaintiff made application to the court to correct and amend the judgment by inserting therein the said matter, or its substance, before the recital of the defendants' motion for a nonsuit, and also by inserting therein that the nonsuit was ordered "on the ground that the assessment offered in evidence on behalf of plaintiffs was defective and irregular, and did not comply with the statutory requisites in that behalf, in that the certificate of the town engineer of said town of San Rafael was not attached thereto, and said assessment was therefore inadmissible in evidence, and insufficient to support a judgment in favor of said plaintiffs." The court denied the application of the plaintiffs, and from its order the present appeal has been taken.

Section 9 of the street improvement act provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof, made to or recorded by said superintendent of streets, any person interested therein may at any time within three months after the entry of said final judgment apply to said superintendent of streets for another assessment to be issued in conformity to law," and that thereupon said superintendent shall issue a second assessment. Under this provision of the statute the right to a second assessment does not exist unless it "appear" by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the "assessment," or in the recording thereof, or in some matter connected with the return of the warrant. If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply. The facts, therefore, upon which the judgment is based, must show the grounds upon which the suit was defeated, in order that it may be seen whether there is a right to a second assessment, and the grounds upon which the judgment rests should be embodied either in a finding of facts, or in a bill of exceptions. A mere recital in the judgment that the assessment was offered in evidence, and that, thereupon, judgment was rendered in favor of the defendant, would not satisfy the requirements of the statute, if it also appear that the suit was defeated by reason of some matter disconnected with the assessment. It has been frequently held that a finding of facts is inappropriate when a nonsuit is granted, and in the present case, as the evidence was excluded, there were no facts to be found, and the proper course for the plaintiffs to pursue would have been to have the evidence embodied in a bill of exceptions. The assessment upon which the action was brought is not set forth in the record so that it can be determined upon inspection whether it is in any respect defective, but the grounds of objection thereto set forth in the affidavit made on behalf of the plaintiffs as the basis of their motion, and upon which it was excluded by the court, were that it was "incompetent, irrelevant, and immaterial, in that it did not comply with the statutory requisites in that behalf, as the certificate of the town engineer of the town of San Rafael was not attached to, and did not accompany, said assessment." Unless, therefore, the statute under which it was made required such certificate to form a part of the assessment, the absence of the certificate did not constitute a defect in the assessment, and an insertion of the objection and ruling thereon in the judgment would make it "appear" that the suit was defeated by reason of an erroneous ruling of the court excluding the assessment from evidence, rather than from any infirmity in the assessment itself. Such error should be corrected by an appeal from the judgment.

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[1] For opinion on rehearing, see 47 Pac. 687.

It is provided in section 9 of the statute that, after the superintendent of streets has made an assessment for the amount due for the work performed, with a diagram annexed, and has attached the warrant thereto, "said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets." The nature of this certificate is not defined in the statute, but it is presumably the certificate referred to in section 34, and which is the source from which the superintendent is to ascertain the amount for which the assessment is to be made. Prior to the amendment in 1889, it was only necessary for the city engineer to deliver his certificate to the superintendent, and it would be thereupon filed in the office of the last-named officer. In that year the legislature amended the section (St. 1889, p. 167) by requiring the certificate to be "recorded" in the office of the superintendent of streets. There is no requirement that it shall be attached to the assessment, although, for convenience sake, it may be desirable to do so in order that the several documents may be kept together. Section 12, however, provides that, in an action to foreclose the lien of the assessment, "the said warrant, assessment, certificate and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment, and of the right of the plaintiff to recover in the action." The assessment, warrant, and diagram are by section 8 of the statute required to be attached together, and by section 10 the return, which consists of the affidavit of demand and nonpayment, is required to be "endorsed" upon the warrant, and these papers would naturally be offered as a single document; but, as there is no requirement that the certificate shall be attached to the other instruments, it is not necessary that it accompany them when they are offered in evidence, or that all be offered together. It was held in Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337, that the certificate should be recorded in connection with the record of the assessment, but nothing in that case authorizes the inference that when the original documents are offered in evidence they must all be offered together. It is essential that all be introduced in evidence, in order to entitle the plaintiff to judgment, but the order of their proof is immaterial, and we would be adding to the requirements of the statute if we should hold that they could not be offered separately. The answer of the defendants presented issues which required the plaintiffs to establish the regularity of the proceedings prior to the issuance of the assessment. By the above provision of the statute the necessity of introducing this evidence in detail is obviated, and the warrant, assessment, certificate, and diagram, with the return, are made prima facie evidence of such regularity; but, as in all cases in which substituted proof is made prima facie evidence of other matters, it is essential that all the proof which is required to constitute such prima facie evidence shall be presented to the court.

It was alleged in the complaint that the certificate was duly recorded by the superintendent of streets, in his office, at the time of issuing the assessment, and was delivered to the plaintiffs' assignor after it had been recorded, and, as this averment was not denied in the answer, it must be deemed as an admitted fact. There was therefore under the control of the plaintiffs all the evidence required by the statute to make a prima facie case of their right to recover. If at the trial they failed to produce this evidence, which was essential to entitle them to a recovery, it must be held that that was the reason why the suit was defeated. It is clear, therefore, that, if the entire proceedings before the court were properly in the record, it would not "appear" from the judgment that the suit was defeated by reason of any infirmity of the assessment. The court properly refused to grant the application of the plaintiffs, and its order is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.

115 Cal. 538

## DE MARTIN v. PHELAN et al. (S. F. 352.)

(Supreme Court of California. Jan. 6, 1897.)

FRAUD—MORTGAGOR AND MORTGAGEE—PURCHASE OF EQUITY OF REDEMPTION.

1. There is no such fiduciary relationship between a mortgagee and mortgagor as will render it fraudulent for the mortgagee to purchase the mortgagor's equity of redemption as cheaply as he can.

2. A complaint, alleging that the defendant, who held a mortgage on property of the plaintiff, on which a judgment of foreclosure had been rendered, by threatening to sell the property under the judgment, and by reason of plaintiff being in indigent circumstances, and unable to sell the property or remortgage it, bought plaintiff's equity of redemption for much less than its actual value, and less than he intended to offer for it if necessary to procure it, does not state a cause of action for fraud.

Department 2. Appeal from superior court, city and county of San Francisco; James V. Coffey, Judge.

Action by Francesca L. De Martin against Alice Phelan and others, executors of the will of James Phelan, deceased. Judgment for defendants on demurrer to the complaint, and plaintiff appeals. Affirmed.

Geo. H. Maxwell and R. M. F. Soto, for appellant. Frank J. Sullivan, for respondents.

TEMPLE, J. This appeal is from a judgment upon demurrer to the complaint. The complaint contains averments to the effect that, on the 4th day of November, A. D. 1881, plaintiff owned a certain tract of land, which was then subject to mortgage liens then owned by James Phelan. The amount due on said mortgages was $196,000. The real estate was worth $390,375. The plaintiff and her 13 children were in indigent circumstances, destitute of available means of support, in great need, and unable to secure an additional loan upon said land, or to sell the same, owing to financial stringency then prevailing, and were wholly dependent upon the charity of others. Said Phelan knew of her distressed condition, and also that her equity of redemption was worth at least $45,500. Still, designing to take advantage of her distress and necessities, he first offered her $4,000, and then $10,000, and finally $19,000, for her equity of redemption. The offers were successively made on different days, and in the meantime said Phelan had her property advertised for sale, under execution, on a decree of foreclosure of said mortgages, and had the sale postponed repeatedly, for the purpose of securing her equity of redemption for a sum greatly disproportionate to its value, by taking an oppressive and unfair advantage of her necessities and distress. That on the 4th day of November, 1881, decedent made her the offer of $19,000, and threatened to proceed with the sale unless she accepted it. Compelled by her distress and necessities, she finally did accept said offer, and conveyed her equity to him for said sum. That she did not know that decedent had taken such advantage, or that he knew of her necessities and distress at that time, but that she discovered such fact on the 27th day of December, 1887. It is averred that, when defendant falsely represented that he would sell said property unless she accepted $19,000 for her equity, decedent did not intend to sell said property, but had in fact determined not to sell the same, unless he was unable to procure plaintiff's interest for $45,500; that he fully intended to offer her $45,500 for her equity, if he could not procure it for less; that this intention was concealed from plaintiff, and decedent knowingly and designedly took advantage of her said necessities and distress.

A great many objections are made to this complaint, but I do not deem it essential to consider any of them, except the general objection that it states no cause of action. That the complaint does not state a cause of action is quite obvious. The facts constituting the supposed fraud are: (1) Plaintiff was without available means, and in great financial distress. (2) Decedent had obtained a judgment foreclosing mortgage liens upon her land amounting to $196,000. Her land was worth much more than this, but, owing to a temporary stringency in the money market, she could not borrow more money upon the land, or sell it for more than the mortgage debt. (3) Decedent knew that her equity of redemption was worth $45,500, and was willing to pay her that for it if he could not get it for less, but concealed from her his estimate of its value, and his willingness to pay that sum provided she would not take less. (4) He caused the property to be advertised for sale under the decree, and then caused the sale to be repeatedly postponed, in the meantime making her successive offers for her equity of $4,000, $6,000, $10,000, and $19,000, which last offer she accepted in ignorance that deceased would have given her more had she insisted upon it and induced by her necessities and fears of losing her property in case of a sale under the decree. It is impossible to believe counsel serious in their contention that it constituted fraud or oppression on the part of Phelan to conceal from her the fact that he intended to offer her as much as $45,500 for her equity, if he could not succeed in getting it for less. It would constitute a new departure, both in business and legal ethics. If the obligation to make such disclosures rested upon Phelan, of course the like obligation rested upon the plaintiff to state to Phelan the very least sum her necessities could induce her to accept rather than permit a sale. Negotiations under such conditions would surely be novel. The real point in the case is, I presume, that the relations between mortgagor and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression; and it is maintained that it was oppression on the part of Phelan to get the property for an inadequate price, taking advantage of her necessities.

1. In the first place, the relation between the parties was in no sense fiduciary. At common law the mortgagee, at least after condition broken, was the legal owner, and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure, the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted, the mortgages had been foreclosed, and Phelan had only his decree. It does not appear that a receiver had been appointed, or that proceedings to that end were threatened.

2. The sale, even after the decree was obtained, was not hastened. The negotiations between the parties were protracted and deliberate. Plaintiff was fully aware of the situation, and knew all the essential facts of the case. The sale was adjourned many times, and successive offers were made to her for her equity. She says she was threatened with a sale under the decree if she did not sell. Of course, she knew, without being told, that such sale was inevitable if she did not pay the debt or sell her equity. The financial stringency was not brought on by Phelan. It is not charged that he interfered to prevent her selling to another, or to prevent the obtaining of a loan. I can discover no element of fraud, oppression, or unfairness in the case. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

115 Cal. 529

### LEWIS v. COLGAN, Controller. (Sac. 164.)

(Supreme Court of California. Jan. 5, 1897.)

BOARD OF EXAMINERS — AUTHORITY TO APPOINT EXPERT ASSISTANT—LEGISLATIVE APPROPRIATION—CONSTITUTIONALITY.

1. The state board of examiners, in examining claims against the state, books of public institutions, and of the auditor and treasurer of the state, has the implied power to employ an expert assistant when necessary for the efficient discharge of its duties. 44 Pac. 1081, reversed.

2. The appointment of an expert by the state board of examiners, and an agreement for his compensation, are made with "express authority," within the meaning of Const. art. 4, § 32, which provides that no appropriation shall be made by the legislature for the payment of a claim for extra compensation "under any agreement or contract made without express authority of law." 44 Pac. 1081, reversed.

3. The courts cannot hold unconstitutional an act appropriating money to pay for expenses legitimately incurred, or to be incurred, in the performance of official duty, unless it so appears from the face of the act, and without reference to facts aliunde. 44 Pac. 1081, reversed.

4. It cannot be urged against the constitutionality of an appropriation bill that some of its items were included solely in anticipation of the passage of a pending bill, which was ultimately defeated.

In bank. For opinion in department, see 44 Pac. 1081. Reversed.

Devlin & Devlin, Burham & Miller, and A. E. Bolton, for appellant. R. B. Carpenter, for respondent.

BEATTY, C. J. Mandamus against the defendant, as controller of the state of California, commanding him to draw his warrant in favor of the plaintiff, upon the treasurer of said state, for the sum of $166.66⅔, as salary due plaintiff from the said state for services as expert to and for the state board of examiners, during the month of July, 1895. An alternative writ of mandate issued to defendant, who demurred to the verified petition, and, upon his demurrer being overruled by the court, answered the petition. Plaintiff moved to strike out the fourth paragraph of defendant's answer, and demurred to the residue thereof. The motion to strike out was granted, and the demurrer sustained, and peremptory writ granted. Defendant appeals, and the cause comes up on the record, illustrated by a bill of exceptions. The substance of the verified petition upon which the writ issued is that "on the 28th day of June, 1895, plaintiff was employed by the state board of examiners as expert for said board of examiners, at an annual salary of two thousand dollars, payable monthly, and necessary traveling expenses in the business of said employment"; that he entered upon the discharge of the duties of such employment July 1, 1895, and continued to act as expert, etc., during the month of July, whereby there became due him from the state of California the sum of $166.66⅔. The board of examiners duly audited, allowed, and approved his claim for said sum of money. The controller, upon demand, refused to draw his warrant on the state treasurer in favor of the plaintiff therefor. The more formal portions of the petition are here omitted.

The duty of the defendant to draw his warrant for the payment of this demand depends upon the question whether the board of examiners had express authority to employ petitioner as an expert at the salary claimed. There is no law which in express terms creates the office of expert to the board of examiners, but the act making appropriations for the support of the state government for the forty-seventh and forty-eighth fiscal years (the general appropriation act,—St. 1895, p. 280) contains the following items: "For salary of expert to board of examiners, four thousand dollars. For traveling expenses of board of examiners and expert, two thousand dollars." The validity of the act is not questioned by appellant except as to these items, and the only ground of objection to them is that they are in conflict with certain clauses of the constitution limiting the power of the legislature to make appropriations of the public funds. Various sections of article 4 of the constitution are cited by appellant, and, among others, sections 29–32. Section 29 reads as follows: "The general appropriation bill shall contain no item or items of appropriation other than such as are required to pay the salaries of the state officers, the expenses of the government and the institutions under the exclusive control and management of the state." We concede the contention of appellant that an office cannot be created by the general appropriation bill. But it does not seem that there was here any attempt to create the office of expert, the whole scope of this portion of the act being to make an appropriation for the payment of his salary and expenses,—a perfectly proper appropriation if there existed any authority on the part of the board to appoint or employ him. With reference to sections 30 and 31 it need only be said that they have no application to this case, except in so far as they evince the general purpose of the framers of the constitution to limit the power of the legislature to make appropriations of the public funds. It is in section 32 that the language is contained upon which appellant especially relies to sustain his contention that the appropriation in question is unconstitutional. It reads as follows: "The legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay or to authorize the payment of any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

It seems to be agreed that the question to be decided in this case is the same that would have been presented if the board of examiners had employed an expert without any previous appropriation for his salary, and the legislature had afterwards made an appropriation to pay the compensation stipulated or allowed by the board. In either case the validity of the appropriation would, as above stated, depend upon the question whether the appointment of such expert, and the agreement for his compensation, were expressly authorized within the meaning of section 32, as above quoted. This question is not a new one in this court. In the case of Rankin v. Colgan, 92 Cal. 605, 28 Pac. 673, the act appropriated $250 to pay the petitioner for services in the state treasurer's office during the months of November and December, 1884, under appointment of Gov. Stoneman. The governor had not been authorized, in terms, to make the appointment; but as he was charged with the care of the property of the state, and therefore authorized to protect it, it was presumed in favor of the validity of the act that a proper occasion had arisen, and he had made the appointment in pursuance of his implied power to adopt necessary means for the discharge of his duty to care for the property of the state. The principle recognized in that case, and applied in the decision, is stated in Throop, Pub. Off. § 542, as follows: "The rule respecting such powers is that, in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the powers." This statement of the doctrine is abundantly sustained by the decided cases everywhere, and is so universal and undisputed that we deem it unnecessary to cite authorities. In a case recently decided by this court it was applied to sustain the authority of the harbor commissioners to employ an architect under an act empowering them to erect a certain building (Bateman v. Colgan, 111 Cal. 587, 44 Pac. 238); also, in a still more recent decision of a case involving the power of the board of supervisors of a county to employ an expert (Harris v. Gibbins [Cal.] 46 Pac. 292). The case last cited is very closely analogous to the case in hand, and the decision disposes of one of the principal arguments advanced by the appellant, viz. that, if the board of examiners has the implied power to appoint an expert, the board of supervisors must be conceded the same power,—a consequence which, he contends, is absurd. But in that case it was held that the board of supervisors has such power, because the employment of an expert is, or in many cases may be, necessary in order to enable them to perform the duties imposed upon them by law. If this is so, the argument holds good that the board of examiners must have the same power, because the proper discharge of their duties may involve the employment of an expert. They are a board of audit, and they must examine, not only the great mass of claims against the state, but also the books and accounts of many public institutions, as well as those of the auditor and treasurer of the state. As long ago as 1874 the former supreme court of this state, in the case of Love v. Baehr, 47 Cal. 364, held that the duties devolved upon the board of examining the books of state officers, counting the money in the treasury, etc., required for their discharge the skill of an expert accountant; and the legislature, in various acts in relation to orphan asylums and other benevolent institutions partly supported by the state, has expressly authorized the employment of experts by the board of examiners to examine the books which those institutions are required to keep as a condition of receiving state aid. See St. 1880, p. 13; St. 1883, p. 55; St. 1889, p. 206; St. 1891, p. 428. In these statutes it is true the expenses of the examinations are required to be paid out of the appropriation for the support of the institutions on account of which the expenses are respectively incurred. They show, however, a recognition by the legislature of the necessity of expert assistance to the board of examiners in the examination of books and accounts, and there are many other public institutions aside from these asylums whose books must be examined periodically. It cannot be denied, therefore, that the duties imposed upon the board of examiners, and the corresponding authority conferred upon them by the express terms of the various sections of the Political Code and other statutes defining their duties, are such as may involve the employment of an expert for their due and efficient discharge; and it follows, on the principle of the cases above cited, that they have the implied power to employ one when necessary, independent of the clauses of the appropriation act above recited.

It does not follow from this view that their authority in the matter is unlimited and unrestricted, as appellant assumes it would be. On the contrary, whatever they do is subject to the approval of the legislature. They may employ an expert, but he cannot be paid without an appropriation, and he can be paid no more than the legislature may deem reasonable. He is not an officer with a fixed term of office and a salary ascertained by law, but a mere employé of the board, holding his position at their pleasure, and entitled to such compensation only for the time of his employment as the board may allow and the legislature approve, by the appropriation of money for the payment. And, when the legislature does make an appropriation for such payment, it must be presumed (as held in the Rankin Case) that the facts were found to be such as to render the employment necessary, for this is a question of fact, which must be decided by the legislature, and not a question of law for the courts. The constitution does not deprive the legislature of the power to appropriate money to pay expenses legitimately incurred in the performance of official duty, and the legislature is itself the judge of what expenses have been so incurred, so far, at least, that the courts cannot hold an act appropriating money to pay for such expenses unconstitutional, unless it so appears upon the face of the act, and without reference to facts aliunde. And, if the legislature may make an appropriation to pay for a service after it has been rendered, we see no reason, and none is suggested, for holding that they cannot make an appropriation in advance of a sum sufficient to cover an anticipated expense, as in this case; thus making a fund available for the payment of such sums within the amount of the appropriation as the board of examiners may in their discretion allow as a just and proper charge for necessary services.

But the appellant makes the further objection that these items of the general appropriation bill were included by mistake, or solely in anticipation of the passage of a pending bill empowering the board of examiners to appoint an expert, which was afterwards defeated. These facts were alleged by way of defense in that portion of his answer which was stricken out, erroneously, as he contends. We think the ruling of the superior court on this point was correct. Courts cannot inquire into the motives of legislators. In this case we know that the appropriation bill was duly enacted as a law. If the facts alleged in respect to the other bill are admitted, it is still a matter of mere conjecture what effect the pendency of that bill had; and it cannot be held as matter of law, or proved as matter of fact, that except for its anticipated passage the appropriation bill would have been altered.

Of the decisions of this court especially relied on by appellant to sustain his contention, the case of Modoc Co. v. Spencer, 103 Cal. 498, 37 Pac. 483, is clearly distinguished from this, as was pointed out in Harris v. Gibbins, supra, which, as above shown, directly supports the implied power of the board to employ an expert. Linden v. Case, 46 Cal. 174, merely states the undoubted proposition that unauthorized acts of the board of supervisors are void, but sheds no light on the question as to what acts are unauthorized. In San Joaquin Co. v. Jones, 18 Cal. 327, and Foster v. Coleman, 10 Cal. 279, the acts held illegal were clearly unauthorized; but they have no analogy to the action in question here, and could not by possibility have been necessary for the discharge of any duty devolved upon the board. In Robinson v. Supervisors, 16 Cal. 208, and El Dorado Co. v. Meiss, 100 Cal. 268, 34 Pac. 716, there was an attempt on the part of the respective boards to create offices, and in the latter case an infraction of the express inhibition of section 3 of article 11 of the constitution. In this case there is no creation of an office, but merely the employment of an assistant, whose duties, it is true, are of an important, delicate, and confidential nature, but whose employment, so far as its validity is concerned, cannot be distinguished from that of the governor's messengers, the porters, elevator attendants, and other employés in the service of the state, whose compensation is provided for in the general appropriation bill, although no officer of the state is expressly authorized to employ them. The judgment of the superior court is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; HARRISON, J.

## MILES v. WOODWARD. (S. F. 367.)

(Supreme Court of California. Jan. 6, 1897.)

Modified opinion. For former opinion, see 46 Pac. 1076.

PER CURIAM. The opinion heretofore rendered is modified by striking out the last paragraph of subdivision 2 thereof, commencing with "All that the law does in this regard," and ending with "Report upon ores and quartz."

5 Cal. Unrep. 564

## HEINTZ v. COOPER. (S. F. 479.)

(Supreme Court of California. Dec. 31, 1896.)

SUFFICIENCY OF FINDINGS—PHYSICIAN—COMPENSATION—EXPERT TESTIMONY.

1. A finding, "that the matters and facts alleged in defendant's special defense and cross complaint on file herein, except the allegations of plaintiff's employment, and agreements under such employment, are untrue in substance and in fact," supports a judgment for plaintiff, where the answer and cross complaint both allege that defendant employed plaintiff as a physician and surgeon, for a reward, and that plaintiff undertook the service, whereby defendant was damaged by plaintiff's negligence and incompetency.

2. Where plaintiff sues for services as physician, and defendant, by a cross complaint, seeks damages for alleged negligent treatment, and plaintiff, in answer, alleges that defendant's suffering was aggravated by his own negligence and failure to follow plaintiff's directions, a finding that all the facts alleged in the cross complaint, except that of plaintiff's employment, "are untrue," renders the issue of defendant's negligence immaterial, and a finding as to it is not required.

3. In determining what is a reasonable compensation for surgical and medical services in a given case, the skill and learning of the operator and the character and circumstances of the subject to which he devotes his services must be considered, and the rule that compensation is determined by "the usual price at the time and place of performance" does not necessarily apply.

4. Possible error in the exclusion of evidence, on an issue which could not have affected the judgment, is harmless,

5. Before a witness can testify on the issue of a physician's neglect and unskillful practice, his competency must be shown.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by J. P. E. Heintz against J. B. H. Cooper. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

S. F. Geil and John J. Wyatt, for appellant. W. A. Kearney, for respondent.

HAYNES, C. This action is prosecuted to recover for services rendered by the plaintiff as a physician and surgeon. The complaint contains two counts,—the first upon an account stated, amounting to $1,200, and admitting a payment thereon of $500; and the second count alleged said services to be reasonably worth $2,500, the whole of which remained unpaid except the sum of $500. The defendant denied all the allegations of the complaint, and for a second defense alleged negligence, incompetency, and unskillfulness on the part of the plaintiff, whereby he was made sick, and kept from attending to his business, for more than six months, and compelled to pay $1,000 for nursing and medical attendance. and "is permanently a cripple, to his damage in the sum of $3,000." The same allegations are stated in a cross complaint, in which defendant seeks to recover damages in the sum of $4,000, and to which cross complaint the plaintiff filed an answer. The cause was tried by the court without a jury. The findings were against the plaintiff upon the first cause of action. Upon the second cause of action the court found the reasonable value of plaintiff's services to have been $750, of which sum $500 had been paid. As to the special defense and counter claim pleaded by the defendant, the court found against him. A judgment in favor of the plaintiff for $250 was entered, and defendant appeals therefrom, and from an order denying a new trial.

1. It is contended that the findings do not support the judgment. This contention is based upon the fourth finding, which is as follows: "That the matters and facts alleged in the defendant's special defense and cross complaint, on file herein, except the allegations of plaintiff's employment and agreements under such employment, are untrue in substance and in fact, and offered only as a bare pretense, without any justification or excuse whatever." The answer and cross complaint both allege that defendant employed the plaintiff as a physician and surgeon, for a reward, to set his leg, and dress and heal the same, and that plaintiff undertook to set and dress said leg for said defendant, and then proceeds to allege negligence, want of skill, etc., and damages resulting therefrom. Findings by reference to the pleadings, or parts thereof, have been frequently criticised by this court, and where such findings involve uncertainty as to what facts are found they are uniformly held insufficient; but where "they do show what facts are found, and there is no uncertainty about them," they are sustained. Davis v. Drew, 58 Cal. 157. The finding here in question is clear and certain, and, though the mode "is not to be commended," justice must not be sacrificed to form.

Appellant's contention, that a portion of plaintiff's answer to the cross complaint consisted of an allegation of new matter, and which is presumed to be controverted, raised a distinct issue upon which there is no finding, cannot be sustained as a ground for reversal. The finding that all the facts in the cross complaint alleged, except, etc., "are untrue," covered all the allegations in the cross complaint to which the alleged new matter applied; and such finding, which cut up by the roots the allegation that he suffered great pain in consequence of plaintiff's negligence and incompetency, rendered it wholly immaterial whether the defendant's "pain was caused or increased by his own negligence and his failure to observe plaintiff's directions," as alleged in the answer to the cross complaint. A finding either way upon the question of defendant's negligence could not affect the result, and in such case the fact becomes immaterial, and no finding is required.

2. It is further contended that the evidence is insufficient to support the finding that the plaintiff's services were reasonably worth $750, or any greater sum than $500, which had been paid. The injury to the defendant, treated by the plaintiff, consisted of a compound fracture of the leg and a dislocation of the ankle joint. Both the bones were broken and protruded through the flesh, and six or seven pieces of the bone were removed. Plaintiff's services commenced July 12th, and continued until the 13th of the following October, during which time, the plaintiff testified, he made about 200 visits, and about 70 of these were for the purpose of dressing the wound. The testimony on the part of the plaintiff was that for visits when the wound was dressed $5 to $10 per visit was a reasonable charge, and for other visits $2.50 each, and for reducing a compound fracture of the leg $250 to $500 is a reasonable compensation. This evidence would have justified the court in finding in favor of the plaintiff in a much larger sum. On the part of the defendant the medical testimony was that $500 was a reasonable compensation for all services rendered by the plaintiff, though the testimony on behalf of the plaintiff as to a reasonable compensation for visits and for dressing the wound was not controverted. It appeared, however, that in no case in Monterey county within the knowledge of the medical witnesses had so large fees, in the aggregate, been paid in cases of compound fracture, though in none of the instances mentioned was the character of the fracture or the number of visits stated; and it is now contended, on behalf of appellant, that the prices so paid in those other cases in that county determine what is a reasonable compensation for plaintiff's services in this case, or, as counsel state it, "the usual price at the time and place of performance is the rule." The cases cited in support of this proposition relate to ordinary services, as to which there is a reasonably uniform established rate of compensation, and not to professional services, where the skill and learning of the person, as well as the almost infinite variety in the character and circumstances of the subject upon which he devotes his services, precludes the establishment of any fixed rate of compensation which could be applied to more than a very restricted class of cases and the more common class of services. Besides, defendant's witnesses testified that no medical society existed in Monterey county, and no fee bill or scale of charges had been fixed, but each charged according to his ideas of what was proper.

3. During the examination of the defendant, as a witness in his own behalf, he testified that he had sustained damage by reason of the plaintiff's incompetent and unskillful treatment. His counsel then asked: "What did those damages consist of?" An objection to this question was sustained. Whether there was error in this ruling need not be considered; for, whatever may have been the suffering the plaintiff endured, or whatever his crippled condition, or whatever may have been the expense to which he was put, unless such suffering, condition, and expense were caused by or resulted from the incompetency, negligence, or unskillfulness of the plaintiff, no recovery could be had by the defendant therefor; and, as the court found, upon sufficient evidence, that all the allegations of the defendant's answer and cross complaint in that behalf were untrue, a rehearsal of those matters could not have changed the result, and the error, if it was error, did not prejudice the defendant, and therefore constitutes no ground for a reversal. If, on the other hand, the question was put for the purpose of proving the incompetency or negligence of the plaintiff, the witness was not shown to be competent to testify upon that subject, and upon that ground the ruling was right. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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115 Cal. 448

## VAN HORN v. RICKS WATER CO. (S. F. 339.)

(Supreme Court of California. Dec. 31, 1896.)

RIGHT TO REWARD.

A person who receives compensation from a water company for having reported a pollution of its source of supply, and the offender's identity, in compliance with the company's request for such information, cannot afterwards procure the offender's conviction, and for it claim a reward offered by the company "for the arrest and conviction" of such offenders, since the reward cannot be apportioned, and the acceptance of pay for the detection defeats a recovery for the conviction.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Charles S. Van Horn against the Ricks Water Company to recover a reward. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. W. Turner, for appellant. L. F. Puter, for respondent.

HAYNES, C. Action to recover a reward. The cause was tried by the court without a jury, and at the conclusion of all the evidence the defendant moved for a nonsuit, and said motion was granted, and judgment of dismissal entered against the plaintiff. This appeal is from the judgment, upon the judgment roll and bills of exception, one of which was to the refusal of the court to sustain plaintiff's motion to strike out defendant's second defense, and the other contains all the evidence given upon the trial, and specifies the granting of the nonsuit as an error of law. The defendant is a corporation engaged in supplying the city of Eureka and its inhabitants with water, the source of its supply being Elk river. The complaint alleges that in December, 1893, the defendant, for the purpose of protecting said waters from pollution, posted notices setting out a copy of section 374 of the Penal Code, which provides a penalty for polluting, in any of the ways therein enumerated, the waters of any stream from which water is drawn for the supply of any city, and appended thereto the following: "The undersigned will therefore pay the sum of five hundred dollars as a reward for the arrest and conviction of any persons violating the provisions of the above section by polluting the waters of Elk river in any manner specified therein." The complaint further alleged "that thereafter, to wit, on or about the 2d day of September, 1894, plaintiff detected and observed one Lawrence Padrick in the act of polluting the waters of Elk river by depositing therein, and upon the banks of said stream, fecal matter," and that he caused the arrest and conviction of Padrick therefor. The defendant, by its first defense, put in issue the allegations of the complaint, and for a second defense alleged, in substance, that prior to the alleged act of pollution the plaintiff was the duly appointed and acting agent of the defendant in detecting, observing, and reporting any and all alleged acts of polluting the waters of said river, for which he was to be paid according to the value of the work so done, or the time occupied therein; that, prior to the arrest of said Padrick, he, as such agent and servant, reported to defendant that he had detected said Padrick in the commission of said alleged act of pollution; and that, in pursuance of said agreement, defendant fully paid the plaintiff therefor what the same was reasonably worth. Plaintiff's motion to strike out said second defense was properly denied, for reasons that will appear in the discussion of the question presented by the exception to the nonsuit.

The grounds upon which the motion for nonsuit was based, briefly stated, are the following: (1) That Padrick did not violate section 374 of the Penal Code. (2) That plaintiff was employed by defendant for the purpose of preventing nuisances and reporting to it any that he discovered; that he was to be compensated for such services, and had been fully paid for his services rendered in connection with the alleged nuisance committed by Padrick. And (3) that there is a variance between the pleadings and proofs, the particulars of which need not be stated, as the nonsuit should be sustained upon the second ground. The plaintiff was engaged in getting out railroad ties in the vicinity of Elk river and some of its tributaries, and, some time before the discovery of the alleged nuisance committed by Padrick, he discovered the carcass of a calf in one of said tributaries, and informed defendant of it by letter, and was paid for his services. The defendant then requested the plaintiff to keep a lookout for anything that would pollute the water, and inform the defendant of anything he discovered. There was some conflict in the evidence as to what was said, and as to the extent or scope of the alleged agreement, or whether there was in fact an agreement upon that subject. The plaintiff testified that he said to defendant's superintendent that, if he happened to see anything in the water, he would let him know, but that there was no bargain or agreement that in the future he would report and receive pay for it. He admitted that he was requested by the superintendent to report, and that "he might have said he was willing to pay for it, or something like that." It is not material whether the plaintiff agreed that he would keep a "lookout" for acts or sources of pollution, for a compensation to be paid him. There was at least a request that he would do so, accompanied by an offer of compensation; and the evidence shows that thereafter plaintiff saw a dead horse in one of the streams tributary to Elk river, and informed the defendant of it, and was paid therefor, and after that he informed the defendant, by letter, of the act of said Padrick which gave rise to the present controversy. Said letter was dated September 9th, and is as follows: "Ricks Water Co.—Sir: In compliance with your request, I write to inform you that there exists a nuisance in the water in Clapp Gulch. In fact, there is a person that does his business in the water quite often. If you will come out Monday afternoon, I will show you the place, also the man. * * * If you can't come Monday, write, so I can meet you. At the request of the defendant, its attorney and Mr. Lord went out and met the plaintiff, and investigated the reported nuisance; and plaintiff was paid therefor $2.50, by a check, which stated upon its face that it was "for reporting nuisance." The plaintiff had thus informed defendant of the alleged nuisance, and of the person by whom it was committed, and also that he "saw this man polluting the water." If the plaintiff had prosecuted Padrick without informing defendant of the commission or existence of the nuisance, and after the conviction had written the letter above quoted, informing them of its commission, he could not justly claim both the reward and the compensation for reporting the nuisance; and, if he could not do that, he could not entitle himself to the reward by an arrest and conviction after he had received compensation for detecting and reporting the act. It would not be claimed that if one of the officers of the defendant corporation had detected Padrick in the alleged act of pollution, and had informed the plaintiff of the fact, and the plaintiff, upon such information, had procured Padrick's arrest and conviction, he would be entitled to the reward. The discovery of the act of pollution, and of the evidence showing by whom the act was perpetrated, is therefore necessarily included in the "arrest and conviction"; and as the reward cannot be apportioned, and plaintiff having been compensated for the discovery of the act and of the perpetrator, a recovery of the reward would necessarily include service for which he had been fully paid. In Pool v. City of Boston, 5 Cush. 219, 221, the plaintiff was a watchman, and while on duty he discovered Hollihan setting fire to a building, and it was his duty to give notice to the mayor, or some city officer, that they might prosecute him; but he preferred to prosecute him himself, with the hope of obtaining the reward offered. The court said: "But this will not help him. The principal object of the reward was to obtain the detection of the offender. The conviction was required to ascertain who was the offender. But, to entitle the plaintiff to the reward, he must show that he is so entitled, as well for the detection as for the conviction of the offender. The reward cannot be apportioned. But he is not entitled thereto for either service. He discovered the offender while he was on duty as a watchman, and was bound to give notice, or to cause him to be arrested, and he preferred the latter course; but he could not thereby subject the defendants to a liability to which they would not be subject if he had given notice to one of the city officers." See, also, In re Russell, 51 Conn. 577, and Railway Co. v. Grafton, 51 Ark. 504, 11 Pac. 702. The offer of the reward by the defendant was not intended, and should not be construed, to apply to cases where all the information and means essential to a conviction were in possession of the defendant before the prosecution was commenced by the plaintiff, the plaintiff having full knowledge thereof before he caused such arrest and conviction. As to the essential facts, there was no conflict in the evidence, and the nonsuit was properly granted. The judgment of dismissal should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of dismissal is affirmed.

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115 Cal. 460

### HARDIN v. SIN CLAIRE et al. (S. F. 478.)

(Supreme Court of California. Dec. 31, 1896.)

NUISANCE—OBSTRUCTING PRIVATE WAY—SPECIAL ADMINISTRATORS—ACTION AGAINST ESTATE.

1. An obstruction of a private way is a nuisance, being an obstruction to the free use of the property (Code Civ. Proc. § 731), and it is no defense to an action to enjoin it and for damages, brought under the statute, that a defendant has no interest in the land over which the way is claimed.

2. Special administrators may be sued for an obstruction of a private way which they created or maintain.

3. An action to abate a nuisance and for damages for obstructing a private way may be maintained against the personal representatives of a decedent without first filing a claim against the estate, only claims arising on contract being required to be so filed and rejected before suit brought. Code Civ. Proc. §§ 1493, 1498.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Henry A. Hardin against H. G. Sin Claire and others to abate an obstruction in a private way, and for damages. Judgment for defendants, and plaintiff appeals. Reversed.

James W. Oates, for appellant. Pierson & Mitchell, Garrett McEnerney, and Burnett & Leppo, for respondents.

BELCHER, C. It is alleged in the complaint in this case that the plaintiff had been the owner and in possession of a certain described tract of land in Sonoma county, consisting of 200 acres, continuously for 13 years; that he had also, during the same time, been the owner and in possession of a certain described private way or road leading from his said land over other land to a public road, which private road, during all of said time, he had used and traveled over on foot and on horseback, and with wagons and other vehicles, claiming to own the same openly, notoriously, and adversely to all the world, and without let or hindrance from any one; that on or about December 25, 1894, the defendant H. G. Sin Claire and James G. Fair obstructed the said road so that plaintiff could not pass or repass over the same; that Fair died on December 27, 1894, and shortly thereafter the other defendants, Goodfellow, Angus, Breese, and Corothers, were appointed special administrators of his estate, with power to act for said estate, and to defend actions for and on behalf thereof, and ever since have been acting as such; that ever since their appointment they and said Sin Claire have maintained the said obstruction, and prevented plaintiff from using the said road, to his damage, etc. The prayer is for judgment that the obstruction be abated, and that defendants be enjoined from further interfering with plaintiff's free use of the road, and for damages in the sum of $1,400. The defendants jointly answered the complaint by a general denial. When the cause came on for trial the plaintiff offered evidence to prove the allegations of his complaint, and the defendants objected to the admission of any evidence on his behalf, upon the ground that the complaint failed to state any cause of action against defendants, or any of them, because: (1) Four of the defendants are special administrators of the estate of a deceased person, duly appointed, qualified, and acting, and that a suit of the nature of the one at bar cannot be maintained against the special administrators of an estate. (2) That the defendant Sin Claire has no interest in the land over which the right of way is claimed by the plaintiff, either as owner, lessee, or tenant, and the court has no jurisdiction to hear or receive any evidence whatever against him. (3) The suit being in part to recover damages, it can only be maintained against the personal representatives of the deceased person after the claim has been properly presented to them and rejected, as provided by law. The court sustained the objections, and the defendants then moved to dismiss the action, which motion was granted, and judgment entered in their favor for costs. The plaintiff duly excepted to all the rulings of the court, and has appealed from the judgment upon a bill of exceptions.

The court clearly erred in its rulings. So far as defendant Sin Claire is concerned, it does not appear whether he was or was not an owner, lessee, or tenant of the land over which plaintiff claimed a right of way, and whether he was or not is entirely immaterial. If plaintiff owned a right of way, and it was obstructed as alleged, the obstruction was a nuisance, and any person creating or assisting to create and maintain the nuisance was liable to be sued for its abatement and for damages. Code Civ. Proc. § 731.

As to the other defendants: They certainly had no right to maintain and keep up an obstruction to a private way, to the detriment of the owner thereof, notwithstanding it was placed there by the decedent of whose estate they were special administrators. It cannot be that, under such circumstances, they can maintain a nuisance as long as they remain special administrators, and that the injured party can maintain no action to abate or enjoin it. In our opinion this action was properly brought against them, and plaintiff, upon proving the facts alleged in his complaint to be true, would have been entitled to a judgment against them enjoining or abating the nuisance, and for such damages as they by their wrongful acts had caused him to suffer.

The statute in regard to claims against estates provides that "all claims arising upon contracts" must be properly presented and rejected before suit can be brought to recover on them. Code Civ. Proc. §§ 1493, 1498. This is not such a case, but an action to recover damages for wrongful acts. No presentation was therefore necessary. Whether, if judgment for damages were rendered against these defendants, the estate could be made to pay the same, is a question which does not arise here, but is for the probate court to solve in the first instance.

The judgment should be reversed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

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(115 Cal. 517)

## VERDELLI v. GRAY'S HARBOR COMMERCIAL CO. (S. F. 492.)[1]

(Supreme Court of California. Jan. 4, 1897.)

MASTER AND SERVANT—PERSONAL INJURY—GENERAL VERDICT—SEVERAL ISSUES—EVIDENCE—INSTRUCTIONS.

1. When one who is known to be an inexperienced person is put to work upon dangerous machinery, the employer is bound to give him such instructions as will cause him to fully understand the danger attending the employment, and the necessity for care.

2. In an action for personal injuries, where there was evidence from which the jury could have found defendant chargeable with negligence on one of the several grounds alleged, a general verdict for plaintiff will not be set aside.

3. In an action for personal injuries, defendant cannot ask plaintiff whether he did not make to his attorney, at the time he consulted him, and before the attorney had communicated with defendant, a statement as to the cause of the accident different from that which he made upon the stand; such communication being privileged within Code Civ. Proc. § 1881.

4. Where a question is excluded because not proper cross-examination, and the party proposes to repeat the question, "and ask it as a matter of expert testimony," he must first make the witness his own.

5. On the issue of whether an employé had been properly instructed in the use of a specific machine, it cannot be shown that other employés had been instructed in regard to the use of the machine.

6. In an action for personal injuries resulting to an inexperienced operator, it is proper to charge that, "if the superintendent or foreman of defendant was negligent in putting plaintiff to work without proper instruction, such negligence is, in law, that of defendant, and defendant is liable for it."

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Andrew Verdelli against the Gray's Harbor Commercial Company for personal injuries in the course of employment. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Walter P. Stradley and Wm. M. Cannon, for respondent.

PER CURIAM. The plaintiff was employed by the defendant in its box factory, and on October 5, 1893, was operating a planing machine called a "pony planer." While so engaged, his hand was caught in the knives of the machine, and was so injured that it had to be, and was, amputated. He brought this action to recover damages for his injuries and obtained a verdict for $7,500, on which judgment was entered. Upon motion for new trial, the judgment was reduced to $5,000, and the motion denied. From the judgment as modified, and the order refusing a new trial, the defendant has appealed.

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[1] For opinion on rehearing, see 47 Pac. 778.

The facts alleged in the complaint may be briefly stated as follows: The plaintiff was a minor; and was employed by the defendant in its box factory. He was inexperienced in, and ignorant of the dangers attending, the operation of planing machines; and the defendant, knowing this, failed to warn him of the danger attending the operation of the machine by which he was injured, or sufficiently, or at all, to instruct him how to operate it. The foreman of defendant, well knowing that plaintiff was a minor and inexperienced in the operation of planing machines, ordered him to operate one of its machines, the knives of which were not covered by the blower which was usually attached to said machine for the purpose of carrying off the shavings and protecting the operator. The said foreman ordered plaintiff to plane a lot of lumber with said machine, which lumber was, as said foreman well knew, too heavy to be, with safety to plaintiff, run through the machine; and the operation thereof, under these circumstances, was extremely hazardous to him. While operating said machine in pursuance of this order, plaintiff, being unaware of the danger, attempted to push a large plank through it, but the plank was too heavy for the machine, whereupon, without any fault on his part, he was, by reason of the jerking of said plank, thrown over upon the machine, so that his hand became entangled in its knives, and was so cut that it had to be amputated. The answer denies that the purpose of the so-called blower was to protect the operator from the knives of the machine; denies that the lumber the plaintiff was planing at the time of his injury was too large for the machine; denies that the plaintiff was inexperienced, etc.; and sets up that the plaintiff was perfectly familiar with the machine, had often operated it before he was hurt, and that his injury was wholly due to his own carelessness. Appellant contends that the verdict was not justified by the evidence, and that the court erred in several of its rulings upon the admission of evidence, and in giving and refusing certain instructions to the jury.

1. Plaintiff was 18 years and 5 days old when he was injured, and had been in the employ of defendant about 17 months. He testified, in substance, that he had never operated a planing machine until about 2 months before he was hurt, and during that time he had worked on it only off and on, not regularly. Sometimes he would go on maybe once a week, or two or three times a week, and assist on it for an hour or two a day. And during that time he had planed only light stuff,—"tea stock" and "orange stock," as it is called,—but never heavy stuff such as he was planing at the time of the accident. He had never been instructed by the foreman of defendant or by any of its agents or employés, how to operate the planer, or warned of the danger to which he might be exposed in operating it. And as to how the accident happened he testified as follows: "Just before I went to work, I was standing at the planer, and I looked up at the fan that gives suction to the blower, and while I was looking up the foreman came along, and told me to never mind the blower, to go ahead with my work; that it was not necessary to run the blower for that machine alone. The foreman was Mr. Pye. I was working under his orders those two days. I went to work, and was working on some stuff—some molding or other—which was eighteen inches wide, and was one and one-fourth inches thick. So I set my planer to one and one-sixteenth, to take off one-sixteenth. I got two pieces through, and I set my gauge down to one inch. I took one piece, which was alongside there, to run it through, and to plane it down to one inch; and, while I was in the attempt of getting it through, it did not go through, and I kept shoving, pushing on it, to force it through. I had it pretty near the end, and I got down on my right hand to force it through; and the board gave way all at once, like a jerk, and I lost my balance, and threw my hand up to save myself, up on the bonnet. I was hanging over the bonnet to keep myself from going over. I kept forcing my hand to raise myself, but my hand continued slipping off the bonnet, so I made an attempt to throw the belt over with my left hand, and I think that my foot gave way, and I slipped, also. My hand went into the knives, and that is the last I recollect. I pulled my hand from the knives, and found it cut off." It was also proved by expert witnesses, who were well acquainted with the pony planer by which plaintiff was injured, that it was designed to do very light work,—to plane small stuff,—and that, if a board such as plaintiff was handling should be put in it, the belts should be tightened, and to plane it down one-sixteenth it should be run through twice, taking off one thirty-second of an inch at one time.

The law applicable to cases of this kind has been many times declared by this court. In Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, it is said: "It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment; and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employé is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate, unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care." And the court quoted with approval the following language of the supreme court of Wisconsin, as reported in Jones v. Mining Co., 66 Wis. 277, 28 N. W. 210: "We think that it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character, or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." And in Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535, it is said: "The law is settled beyond controversy that it is the duty of an employer to furnish a suitable and safe place for his employé to work, and suitable and safe appliances and machinery for him to work with; and this duty cannot be delegated to another, so as to exonerate the employer from liability to an employé who is injured in consequence of the omission to properly perform the act or duty, whether that other is a superior officer, agent, or servant, or a subordinate or inferior agent or servant. In either case, in respect to such act or duty, the person who undertakes or omits to perform it is the representative of the employer, and not a mere fellow servant with the one who is injured. And when it is claimed that the injured employé was himself guilty of such negligence as to bar him from recovering damages for his injuries, it must appear that he not only knew, or had the means of knowledge, of the unsafeness of the place, appliances, or machinery, but also that he knew, or ought to have known, of the danger to which he was himself personally exposed." And see, also, Ryan v. Storage Co., 112 Cal. 244, 44 Pac. 471, and Foley v. Horseshoe Co. (Cal.) 47 Pac. 42. The issues raised by the answer were questions of fact for the jury, and, while the evidence was quite voluminous, and in some respects conflicting, it appears from the verdict that the jury must have believed the statements of plaintiff to be true. The judgment cannot, therefore, be reversed for want of evidence to justify and support the verdict.

2. The point is made that the claim of negligence relied upon in support of the verdict is not the claim set up in the complaint. It is alleged and claimed that defendant was guilty of negligence in several respects, and, among others, those above set out. And, as we have seen, there was evidence to support the allegations referred to. The rule is that when the verdict is a general one, and there is sufficient evidence to justify the verdict on one of the issues, the verdict will not be set aside. Crosett v. Whelan, 44 Cal. 200. This point cannot, therefore, be sustained.

3. As to the alleged errors in law:

When plaintiff was on the stand as a witness, he was asked, on cross-examination, "How soon after the accident happened was it before you consulted Mr. Stradley [his attorney] in relation to it?" This question was objected to as incompetent, irrelevant, and immaterial, and counsel for defendant then stated: "I propose to ask him if he did not make to Mr. Stradley at the time he consulted him, before we were communicated with by his attorney, a different statement as to the cause of the accident than that which he now makes upon the stand. The Court: You cannot do that. The objection is sustained." This ruling was excepted to, and is assigned as error. It is the policy of the law to encourage confidence between client and attorney, and to protect confidential communications between them from forced disclosure. It was a rule of the common law, and is declared by our statute, that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." Code Civ. Proc., § 1881. It is also a general and almost universally accepted rule that a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose. Whart. Ev. (3d Ed.) §§ 576-583; 7 Am. & Eng. Enc. Law, p. 104.

When plaintiff's witness Johnson was on the stand he was asked, on cross-examination, a hypothetical question as to the condition of the planer at the time plaintiff was injured. The question was objected to, and the objection sustained. Counsel for defendant then stated: "I will repeat the question, and ask it as a matter of expert testimony. On cross-examination I will examine you as an expert." The court ruled that it was no part of the cross-examination, but stated that counsel might make the witness his own witness, which he declined to do. In these rulings we see no material error.

Defendant sought to prove by one of its witnesses that it had a system of taking boys in, and gradually promoting them to higher places. An objection to this evidence was sustained, and the court said, "You may show what was done in respect to this boy's case." This ruling was proper. It does not follow, because other boys had passed through the shop and operated its machinery successfully, that plaintiff had received sufficient instruction to enable him to operate safely the machine in question.

The defendant's witness Pye was asked to state in what way the plaintiff learned to run the saw with which they were cutting up wood. He replied that plaintiff was assistant to the man who ran the cut-off saw; that he held the end of a board, and, any time the sawyer cut off a piece, he advanced it in his hand, adding, "which qualifies him to run a saw of that kind." This last clause of the answer was properly stricken out on motion of plaintiff. He was not injured by the cut-off saw, and there was no connection between that and the pony planer. He might have been qualified to run the saw, and not the planer. Besides, it was only an expression of opinion.

Defendant's witness Griffin was 19 years old, and had been working in its box factory about 2 years. He was running the pony planer, and had been working on it about 6 months. He testified as to the kind of work he had done on the planer, and how he did it, and was then asked what work he was doing when he first went into defendant's mill. This question was objected to as incompetent, irrelevant, and immaterial, and defendant's attorney then stated that he wanted to show that the witness went through the same experience that the plaintiff went through; that he was put in charge of the pony planer, and learned to operate it just as the plaintiff did. Thereupon the attorney asked the witness, "When you took charge of the pony planer, or when you came to the pony planer, what machine had you been working at?" To this question plaintiff's attorney interposed the same objection, adding, "unless it is proposed to show that he is an expert." Defendant's attorney at once stated, "I propose to show it," but the court sustained the objection. We see no error in these rulings. It was immaterial what work the witness was doing when he first went into defendant's mill, or what machine he had been working at before he took charge of the pony planer. Besides, the testimony sought to be elicited by the questions objected to was fully brought out in the cross-examination of the witness. Several other questions were propounded to one of defendant's witnesses, and excluded on objection of plaintiff. We fail to see any material error in the rulings complained of, and therefore pass them by without further notice.

In accordance with the theory that the claim of negligence relied upon by the plaintiff was not the claim set up in the complaint, defendant requested the court to instruct the jury, in effect, that the plaintiff must prove the particular negligence alleged in his complaint, or he could not recover; that though the jury should be satisfied that the defendant was negligent in some respects, and that the injury to plaintiff was because of such negligence, still the verdict must be for defendant, if the negligence proved was not charged in the complaint; that the plaintiff can only recover upon the cause of action stated in the complaint, and not otherwise. The court refused to give the instruction as requested, but, in lieu thereof, gave the following: "The plaintiff must prove the allegations contained in his complaint, and, if he has failed to do this, the verdict must be for the defendant." The defendant could not have been prejudiced by this action of the court, for two reasons: (1) The instruction given, though brief, was in effect the same as that refused; and (2) there was evidence, as has been before stated, tending to show that defendant had been guilty of negligence as alleged in the complaint, and that by reason of such negligence plaintiff was injured. The court instructed the jury very fully and fairly, and at the close of the written instructions said: "Counsel in the case have so thoroughly covered the law, as I understand it, upon this subject, that I have only to state a word to you in conclusion. If the superintendent or foreman of the defendant was negligent in putting the plaintiff to work without proper instruction, such negligence is, in law, that of the defendant, and the defendant is liable for it." This instruction is criticised by counsel for defendant, but it states the law substantially as it is declared in the cases above cited, and must be upheld. The judgment and order appealed from must be affirmed, and it is so ordered.

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115 Cal. 481

## BURKE v. McCOWEN. (S. F. 302.)

(Supreme Court of California. Dec. 31, 1896.)

BOUNDARIES—PLAT IMPLIES A SURVEY—EVIDENCE.

A map or plat of a town site or addition implies that it is based on a survey made on the ground; and one claiming under a deed describing lots by reference to such plat may show the existence of stakes indicating the lines as marked by the surveyor.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action in ejectment by A. A. Burke against George McCowen. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Seawell & Pemberton, for appellant. J. A. Cooper, for respondent.

HAYNES, C. This is an action in ejectment. The cause was tried by the court without a jury, and findings and judgment were in favor of the defendant. The plaintiff appeals from the judgment and an order denying a new trial. The plaintiff owns lots 2 and 8 in block F of Ukiah North addition, and the defendant owns lots 1 and 10 adjoining plaintiff's lots on the south. The only question of fact was as to the location of the line dividing the lots of the respective parties, the plaintiff claiming that the defendant was in possession of 10 feet belonging to his lots. Both parties claim under conveyances made by the North Pacific Land & Improvement Company, by whom the said addition was surveyed and platted. Lots 1 and 10 were conveyed by said company to the defendant November 21, 1890, by the following description: "Lots numbers one and ten in block F in Ukiah North addition, as the same are laid down and delineated on the map of Ukiah North addition, filed in the office of the county recorder of the county of Mendocino, state of California, on the 18th day of September, 1889." Lots 2 and 8 were conveyed by the same grantor to the plaintiff, September 14, 1893, by the following description: "Being lots numbers two (2) and eight (8) in block F, as the same are laid down and delineated upon the map of Ukiah North addition, filed in the office of the county recorder in the county of Mendocino, state of California, on the 8th day of May, 1893." Neither of these deeds contained any statement as to the size of the lots otherwise than by reference to these maps, nor were the sizes of the lots marked upon the lots on the maps, nor any reference marked upon the maps tending to indicate their size other than the following: On the first of these maps there was the following note, "Note. All full-size lots are 50x145 feet;" and upon the second map it was noted, "Scale, 200 feet, 1 inch." The first of these maps was made by "Geo. P. Aston, surveyor and C. E., Los Guilicus, Cal."; and the second map was made by S. H. Rice. Mr. Rice testified that his map, as to block F and other blocks in that vicinity, was a copy of the first map, and that no intentional changes were made in that part, nor did he make any survey of block F or other blocks in that vicinity. That his map was intended to show a boulevard that he had laid out, and some changes were made necessary thereby in other parts of the addition. Applying the scale to what appeared to be full-sized lots on the original map, plaintiff's lots appeared to be 63 feet in width.

Upon the trial the defendant offered evidence tending to show that the original survey was marked upon the ground by stakes on the south line of an alley extending from Pine street, on the east, to Bush street, on the west, which alley is the north line of plaintiff's lots, and that stakes corresponding to these, placed 50 feet south, were also found and existed, and that these stakes marked the line between his lots and those of the plaintiff, and that in block E, the next block west of F, an alley was made on the same line with that in block F, marked by stakes on its southerly line, and that the lots on the south side of the alley in block E were marked by stakes corresponding and on a line with said stakes in block F, 50 feet south of the alley; that these stakes were such as were used to mark lots and blocks; that they were seen a few months after the original survey was made, and appeared to have been in the ground for a time corresponding to that survey. To this evidence the plaintiff objected. His objection was overruled, and the evidence received, and, at the conclusion of the evidence in the case, plaintiff moved to strike out all the evidence in relation to the fact of a survey, and of the existence of the stakes marking it, and this motion was denied. The correctness of these rulings is the only question in the case.

The point of plaintiff's contention is that on neither of the deeds or maps is any reference made to any survey or stakes. He concedes that if the deeds had called for certain lots, "as surveyed by a certain surveyor, or laid out in a certain survey, parol evidence to identify that survey and the lines thereof would be admissible; and, the map being made a part of the deed, the same result would follow if intelligible reference were made thereon to any certain survey." It may be conceded that in neither of the deeds or maps is any express reference made to any survey or stakes. The evidence of the surveyor who made the second map shows, however, that, as to that part which includes block F, the second map was not based upon any survey made by him, but was copied from the first map (which was referred to in defendant's deed) without any intentional change, and that he was never authorized to survey or plat block F or the blocks adjacent thereto. The first map, therefore, need only be considered.

The making and filing of the plat or map of the "Ukiah North Addition" implies that said addition had been surveyed, and that the map or plat thereof filed September 18, 1889, was based upon said survey, and that such survey was marked upon the ground, so that the streets, blocks, and lots could be identified; for, without such survey and marking being resorted to, neither block F, nor the lots 2 and 8, claimed by the plaintiff, could be identified, and his deed would be held void for that reason, and that would defeat his action. We are not without authority in saying that the map or plat of this addition implies a previous survey and marking upon the ground. In McDaniel v. Mace, 47 Iowa, 510, in speaking of town plats, the court gave the following concise definition: "A plat is a subdivision of land into lots, streets, and alleys, marked upon the earth, and represented on paper." So, in Banker v. Caldwell, 3 Minn. 103, (Gil. 461), it was said: "A map is but a transcript of the region which it portrays, narrowed in compass, so as to facilitate an understanding of the original. It may be said to be an abstract of the original." In Jackson v. Freer, 17 Johns. 29, 31, it was said: "The map was intended to represent the relative situations and localities of the lots, as regarded each other. The actual survey was the practical location; and, although the patents do not specially refer to the field book and the actual survey of the lots, they virtually referred to them by referring to the map. It was composed from the survey, and the lots acquired their individuality from the survey also. Without, therefore, any express reference to the field book or survey, the reference to the map was a reference to its accompaniments,—the field book and survey." To the same effect is Jackson v. Cole, 16 Johns. 261, where it was said: "This is not construing the patent by anything dehors the grant, but by facts and provisions, although not expressed, necessarily implied." We find nothing in our own Reports, nor in cases cited by appellant, which, viewed in the light of the facts involved, conflict with the authorities above quoted. That where the survey, as made and marked upon the ground, conflicts with the plat, the former must prevail, is well settled. Whiting v. Gardner, 80 Cal. 78, 22 Pac. 71, and cases there cited.

No question is made as to the sufficiency of the evidence to justify the findings if the evidence relating to a survey marked by the stakes was properly received, and upon that point we entertain no doubt. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(120 Cal. 502)

## KELLEY v. OWENS et al. (S. F. 437.)[1]

(Supreme Court of California. Jan. 7, 1897.)

RESCISSION—ACTION BY VENDOR—DUTY TO RESTORE CONSIDERATION—INSUFFICIENCY OF OFFER.

Under the general rule (which is not changed by Civ. Code, §§ 3406-3408, providing for actions to rescind contracts), that, before a vendor can sue to rescind an executed contract for the sale of land on the ground of fraud, he must restore, or offer to restore, the consideration received, where such consideration consisted of stock in a corporation transferred to plaintiff, an offer to restore, made for the first time in the complaint, with a deposit of the certificates with the clerk unindorsed, and their subsequent indorsement after the hearing, under the order of the court, before the entry of judgment, and after the stock had been sold for nonpayment of assessments, will not support a judgment of rescission.

Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Mrs. A. S. Kelley against William Owens, executor of H. K. Owens, deceased, and others, for rescission of a contract. Judgment for plaintiff, and defendants appeal. Reversed.

E. M. Gibson and Wells Whitmore, for appellants. D. M. Delmas (Frank C. Cleary, of counsel), for respondent.

McFARLAND, J. On the 14th day of June, 1884, the plaintiff made a conveyance by deed of the land described in the complaint to H. K. Owens. The consideration of said conveyance was 55,240 shares of the capital stock of a certain corporation called the Pacific Coast Steel & Iron Manufacturing Company. The certificates of said shares were in the name of the said Owens, and he delivered them to the plaintiff, who had new certificates issued to herself for said shares. Shortly after the conveyance of said land to said Owens, he conveyed the same by deed to his wife, Helen M. Owens. This action was commenced against the said H. K. Owens and his wife, the said Helen, for a rescission of the said exchange of properties, and a reconveyance of said land to the plaintiff. During the pendency of the action the said H. K. Owens died, and his executor, William Owens, was substituted for him as a party defendant. The alleged ground for the rescission and reconveyance is a fraudulent misrepresentation by the said H. K. Owens to the plaintiff as to certain facts upon which the value of said shares of stock depended. The court below found that the said representations were false, and rendered judgment in favor of the plaintiff, rescinding and setting aside the contract between the parties as to said exchange of properties, and adjudging that the legal title be reconveyed to the plaintiff. From the judgment, and from the order denying a new trial, the defendants appealed.

It is contended by appellants that the finding of the court of fraudulent misrepresentation as to said stock is not supported by the evidence, and also that the court committed a great many errors in the admission and exclusion of evidence against their objections, and to which rulings due exceptions were taken; but it is not necessary for us to inquire into and determine these questions, because, in our opinion, the judgment must be reversed upon another ground. There is no averment in the complaint that, before the commencement of the action, the plaintiff restored or offered to restore to defendants the said stock; nor is there any averment that plaintiff was unable to restore said stock, or any excuse given why she did not restore the same, or offer to do so. Indeed, there is no averment that she gave any notice to defendants that she rescinded the said contract. Neither is there any clear averment that said stock was of no value; and the court found that it was of value, not exceeding $2,000. All that appears upon the subject of restoration of said stock, or an offer to restore the same, is as follows: In the second amended complaint, upon which the case was tried, it is averred that in the original complaint an offer was made to deliver the certificates of stock to the said H. K. Owens, who was then living, and the court found that such offer was made in the original complaint, and that the certificates were deposited with the clerk of the court, "not already indorsed, but to be hereafter properly indorsed under order of court," and that since the death of said Owens plaintiff "has been ready and willing, and has offered, and is now ready, willing, and offers to return and deliver said certificates to defendant William Owens, executor of the last will and testament of H. K. Owens, deceased, indorsed in any manner that may be by the court directed, and that may be necessary to revest the title and property in said certificates in the estate of said deceased." And the court finds that "upon the plaintiff tendering the certificates of stock for the 55,240 shares of said capital stock of the Pacific Coast Steel & Iron Manufacturing Company, received by her from said H. K. Owens, to the defendant William Owens, executor of the last will and testament of H. K. Owens, deceased, properly indorsed by plaintiff," then a decree should be entered for the reconveyance of said property, etc.; and the decree recites that, the plaintiff having left said certificates in the custody of the clerk for said defendant, "properly indorsed by plaintiff," therefore it is decreed, etc. And so it appears that the said certificates of stock never were indorsed by the plaintiff so as to transfer the right of property therein to the defendants, or give defendants an opportunity to receive the same, until after the findings and immediately before the entry of the decree. And it further appears that, long before this time, and while the certificates still stood in the name of the plaintiff unindorsed, the shares of stock represented by them were sold for assessments, and thus passed entirely out of the control of the plaintiff. Under these facts we do not see how the judgment in this case can be affirmed.

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[1] Rehearing granted.

It is undoubtedly the general rule that there can be no rescission of an executed contract, upon the ground of fraudulent misrepresentation, without restoration, before suit, by the party seeking to rescind, of everything of value which he had received from the other party under the contract, or a bona fide offer to restore. This rule is expressly declared in the Civil Code, and has always been rigidly enforced in this state from a very early date in our judicial history. In Gifford v. Carvill, 29 Cal. 589, the suit was upon certain promissory notes given for the purchase money of certain shares of stock in a mining corporation, and the defense was that the defendant was induced to make the purchase by the false and fraudulent representations of the plaintiff as to the value of the mine owned by said corporation. Judgment was rendered in the lower court for the plaintiff, but it was reversed upon the ground that the defendant had not restored the shares of stock to plaintiff, or offered to do so at the proper time. The court said: "There is no averment in the answer, and no proof or finding of the court that defendant notified the plaintiff of his intention to rescind the contract on the ground of fraud, or that he offered to return the stock. On the contrary, it appears that this defect was made one of the grounds for a new trial, and the court required the defendant to deposit the stock with the clerk for the benefit of the defendant as a condition of denying the motion." This court, in its opinion, delivered by Sawyer, J., approved the language used in Herrin v. Libbey, 36 Me. 357, as follows: "The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reasonable time, to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud." It also approved the language of the court in Burton v. Stewart, 3 Wend. 239, as follows: "Had they intended to treat the contract as void on the grounds of fraud, it was their duty, when they discovered that the mare was not such as the party had represented her to be, to have returned her to plaintiff. When prosecuted on the note, and the cause brought to trial, it was too late to repudiate the contract." The court below (in Gifford v. Carvill), upon denying the new trial, had ordered the defendant to deposit the stock for the use of plaintiff, but this court said: "If it was of some value, and on that ground it was necessary for the defendant to return it, then it was too late, after verdict and judgment, to offer it for the first time, on the requirement of the court as a condition of denying a new trial." In Collins v. Townsend, 58 Cal. 608, the court repeats the language used in Gifford v. Carvill, supra. In that case the suit was also upon a promissory note given for the purchase of stock in a corporation, and the defense was fraudulent representation as to the value of the stock. The stock itself had been pledged to the plaintiff as security for the note, but a judgment for plaintiff was reversed because, before suit, the defendant had given no notice of any rescission of the contract. The court say: "But a return of the property is only one mode of putting the parties in statu quo. If the vendor has retained possession of the property sold, as security or otherwise, the purchaser may indicate his intention to rescind, and notify the seller that he abandons all right or claim to the property. If he fails to do this under such circumstances, he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it. As we have seen, the person desiring to rescind the contract because of fraud must restore—so far as his action can do this—the parties to their former condition within a reasonable time." In Herman v. Haffenegger, 54 Cal. 161, the court referred approvingly to the above authorities, and say: "It nowhere appears that any offer to return was made previous to action brought. * * * The plaintiff had received of defendant something of value, and we do not find in the testimony any return or offer to return to defendant that which plaintiff had received of him. The plaintiff, indeed, as the testimony shows, did not then own what he had so received. He could not maintain the action until he had so returned, or offered to do so. This was a condition precedent to his maintenance of the action. And, as he did not comply with this request, the nonsuit was properly granted. Gifford v. Carvill, 29 Cal. 579." In Bohall v. Diller, 41 Cal. 533, the court announced the same doctrine, and said: "When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract. A rescission of a contract, in order to be effectual, must be a rescission in toto. The plaintiff has failed to allege a repayment or tender of the amount paid by the defendant at the execution of the contract. He therefore cannot proceed to recover the possession of the premises on the ground of a rescission of the contract." In Hammond v. Wallace, 85 Cal. 531, 24 Pac. 837, the foregoing cases are referred to approvingly, and the court say: "Moreover, there is neither averment nor proof that plaintiff ever made any attempt to rescind or make any tender of or offer to return anything of value received from defendant previous to the filing of the complaint, or any tender at all. The only averment upon the subject is that plaintiff is 'willing and able to return to the defendant all the moneys which she paid to him on the purchase of the property, and all the moneys which she has lawfully or legitimately paid out or expended on account of the purchase of said property, and now offers to do so.' This is not sufficient." In Loaiza v. Superior Court, 85 Cal. 31, 32, 24 Pac. 707, the court announces the same doctrine, cites the authorities above mentioned, and declares what is necessary to constitute a rescission, or to authorize the court to adjudge a decision, in accordance with the above authorities, although in that case it was held that the offer to restore was sufficient. In Vineyard Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386, the court reiterates the doctrine of the above cases, and says: "He who would rescind a contract must put the other party in as good a situation as he was before; otherwise, he cannot do it. Chit. Cont. 276. And his complaint, framed with this object, must state facts showing that he has performed, or offered to perform, on his part, every act necessary to thus place the defendant." The foregoing are only a few of the cases in which this court has repeatedly declared the doctrine as above stated.

Counsel for respondent, in his very able briefs, endeavors to avoid the applicability of the rule above stated to the case at bar by contending that there is a distinction between an action upon a rescission and a bill in equity to rescind, and that the case at bar is of the latter class. No doubt such a distinction is to be found in some of the authorities, although no case decided by this court recognizing the distinction has been called to our attention. But in such a case the purpose of the action, no matter what it may be called, is always to effect the rescission of a contract and put the parties, as nearly as may be, in statu quo. Strictly speaking, a contract can be rescinded only by one or both of the parties to it; but when one of the parties, having the right to do so, has rescinded in the way prescribed by the law, and the other denies the right or the fact, the former is usually forced to invoke in some way the aid of a court to secure the fruits and benefits of the rescission. It is evident, however, that he cannot, in a plain case, escape the consequences of a failure to himself take the proper steps to rescind by simply casting his complaint in the mold of a bill in equity to rescind. There are exceptional cases where restoration or an offer to restore before suit brought is not necessary, as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties, or where the plaintiff has merely received the individual promissory note of the defendant, or where the contract is absolutely void, or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may, by a final decree, fully adjust the equities between the parties; and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate. The substance of the distinction will be found to be based, not upon the form of the action, but upon the difference between the cases which are within the rule, and those which, owing to peculiar facts, are exceptions to the rule. And the real facts and rights arising thereon cannot be kept out of sight by the device of a particular form of action. Sections 3406–3408, Civ. Code, do not establish any new rule upon the subject.

But, under any view, the judgment here under consideration cannot stand. In the first place, the case at bar is as clearly within the rule requiring restoration before suit as any case that could be well imagined. To give notice of the rescission, and restore the stock within reasonable time after discovery of the alleged fraud, was a plain duty of easy performance. There is no excuse for not doing so averred in the complaint, and no valid excuse shown by the evidence. Moreover, there was no valid offer to restore the stock after suit brought. It was not placed in a position and condition to be taken by appellants. Placing the certificates issued to respondent in the hands of the clerk, without assignment, was of no avail. They were not assigned until immediately before the judgment, ten years after the contract, and nine years after the commencement of the action; and then there was no assignment of the shares of stock, for respondent did not then own any stock, and the certificates assigned were mere worthless paper. Therefore, the judgment cannot be maintained even upon respondent's theory of the nature of the action, for the conduct of respondent has made it impossible for the court to decree a rescission that would do equity between the parties. The decree does not even attempt to give appellants a money compensation for the stock, although that would have been unwarrantable, because upon rescission a party is entitled to receive back the thing which he gave, and not the mere amount of money which some one else may consider its value, unless, without the fault of the rescinding party, the thing cannot be restored.

We see no merits in the point that leaving the unassigned certificates of stock with the clerk to await the requirements of the final decree, if it should happen to be favorable to respondent, threw upon appellants the burden of paying assessments upon or otherwise taking care of said stock, or in the point that, because Owens made a deed of the land to his wife under the circumstances stated in the complaint, respondent was relieved of the duty of restoring or offering to restore the stock, or of making any demand, or giving any notice whatever of intention to rescind, upon or to either the husband or the wife. Indeed, the argument of respondent and the decree of the court go upon the theory that such restoration was at some time necessary. The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

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(115 Cal. 544)

## DWYER v. PARKER, County Auditor.

(S. F. 345.)

(Supreme Court of California. Jan. 6, 1897.)

CONSTITUTIONAL LAW—STATUTES REGULATING COMPENSATION OF COUNTY AND TOWNSHIP OFFICERS—CLASSIFICATION OF COUNTIES.

1. Const. art. 11, § 5, providing that for the purpose of regulating the compensation of all county and township officers, in proportion to the duties they perform, the legislature "may classify the counties by population," when construed with article 1, § 22, declaring that "the provisions of this constitution are mandatory and prohibitory, unless, by express words, they are declared to be otherwise," requires an act regulating the fees of such officers to be based on such a classification.

2. The act of March 28, 1895 (St. 1895, p. 267), "to establish the fees of county and township and other officers," etc., in so far as it attempts to fix or limit the compensation of county or township officers, and to give to district attorneys supervisory powers over the bills of justices and constables, being applicable alike to all officers in the state, and not based on the classification of counties, is unconstitutional, and such compensation is governed by the county government act of 1893; but the provisions fixing the fees to be charged by officers for services are not thereby affected, and are valid.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action for mandate by William Dwyer against W. F. Parker, county auditor, to require the issuance of a warrant in favor of plaintiff, for fees as a justice of the peace. Judgment for defendant, and plaintiff appeals. Reversed.

D. W. Burchard (Rodgers & Paterson and Reed & Nusbaumer, of counsel), for appellant. B. A. Herrington and H. L. Partridge, for respondent.

HENSHAW, J. The action is in mandate. Plaintiff seeks to compel defendant, auditor of Santa Clara county, to draw his warrant upon the county treasurer in favor of plaintiff in the sum of $141 for fees as justice of the peace, to which it is alleged plaintiff is legally entitled. By stipulation, the parties agreed upon all matters of fact, and here present as their controversy the single legal question of the constitutionality or unconstitutionality of an act of the legislature, entitled "An act to establish the fees of county and township and other officers, and of jurors and witnesses, within this state." St. 1895, p. 267. This act of 1895 proceeded under the constitutional mandate to declare the fees which the various county and township officers throughout the state shall charge and collect for the performance of official duties; but, as to justices of the peace and constables, it attempted to do something more than this. It not only established the fees which justices of the peace might charge and collect, but it limited the amount of the fees collected which they were allowed to retain, by providing as follows: "Justices of the peace may for their own use collect the following fees, and no others: * * * For all services in a criminal action or proceeding, whether on examination or trial, three dollars; provided, however, that no more than the sum of seventy-five dollars in any one month shall be allowed out of the county treasury in misdemeanor cases to any one justice." St. 1895, p. 272. The act likewise provided: "That the board of supervisors may reject all bills presented to the county by justices of the peace and constables for fees in criminal cases in all cases or proceedings in which the district attorney has not, in writing, approved the issuance of the warrant of arrest." There is also a proviso applying to constables: "That no mileage shall be charged for a warrant of arrest or criminal process served outside of his township, except such service be approved in writing by the district attorney."

It is claimed by counsel for appellant that each of these provisions is unconstitutional; that they are inseparable parts of the whole act, which must therefore itself be declared invalid. While certain of these provisions have plainly no reference to justices of the peace, or to their fees, yet, as the case of Haley v. Parker (S. F. 344) 47 Pac. 1097, which involves the question of the legality of this act, and of its provisions regarding constables, has been submitted with the case now under review, under stipulation that the determination of one shall govern the other, the terms and provisions of the act of 1895 may all be considered in this opinion. In 1893, the legislature passed the so-called "County Government Act," and by and in that act, as the constitution commands (article 11, § 5), classified counties by population, and under that classification regulated the compensation of all county and township officers in proportion to their duties. As to justices of the peace in counties of the fourth class, to which Santa Clara county belongs, it provided that justices of the peace should have "such fees as are now or may hereafter be allowed by law; provided that no justice of the peace shall be paid more than two thousand dollars in any one year for services in criminal cases; provided further, that he shall retain for his own use and benefit all fees collected by him in civil cases. All other fees collected by such justice of the peace, after deducting the civil fees and the amount hereby allowed for his own services, shall be paid over to the county treasurer of said county." And, as to constables, "that they should have such fees as are now or may hereafter be allowed by law." It is thus apparent that the county government act of 1893, and the act of 1895, to establish the fees of county and township officers, both undertake to fix the compensation of justices of the peace and of constables, and that there is a conflict between their provisions in this regard. The constitution has provided that the legislature shall regulate the compensation of all county and township officers in proportion to the duties which they perform, "and for this purpose may classify the counties by population." Const. art. 11, § 5. When this language is considered with that of article 1, § 22, of the same instrument, which declares that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," the conviction is irresistible that the constitution has prescribed a single mode which must be adopted and followed in fixing the compensation of officers, and that mode is to adjust the compensation in accordance with their respective duties under classification of counties by population made for this purpose. To hold that the provision concerning classification of counties is permissive merely would be to deny to section 22 of article 1 its plain effect in a case calling for its application, and would likewise be to give to the language itself no possible force or efficacy. It was not necessary to confer upon the legislature this power to classify, by way of permission. The legislature would have had that power in any event, unless it had been expressly withheld; and the conclusion, therefore, may not be escaped that the mode designated by the constitution is mandatory, and is the one and only method contemplated by the constitution for fixing the compensation of the officers therein mentioned. The framers of the constitution demanded the classification of counties by population for the purpose of regulating the compensation of the officers thereof. After the making of such classification, the compensation can be adjusted by a reference to one or more of such classes, as the varying exigencies of the occasion may require.

The legislature is forbidden to pass any local or special law affecting the fees or salary of any officer. Const. art. 4, § 29. By the act of 1895 the legislature, mindful of this constitutional provision, passed a general law applicable to all county and township officers, declaring the amount of fees which they were entitled to charge and collect from the citizen for the performance of the specified duty; but, in the instances above enumerated, it attempted to go further than this, and to fix or to regulate the compensation of certain officers, without reference to the classes and to the classification made in the county government act of 1893. This it was beyond the power of the legislature to do, and the provisions of the act which undertake to accomplish this result are illegal and invalid. But it does not necessarily follow from this that the whole act is void. If the court can see and say that the act, in the form in which it is left with the obnoxious portions excised, is still such an act as it may be presumed that the legislature would have passed had it known that certain provisions were void, the remainder, under well-settled rules of statutory construction, may stand. With the act under consideration no difficulty is experienced in saying that after eliminating the objectionable provisions fixing compensation, as being in conflict with the constitution and the county government act of 1893, there still remains a full and complete fee bill, establishing the fees which all county and township officers are entitled to charge and collect. It would follow therefrom, in accordance with the harmonious plan indicated by the constitution, that the compensation of the offiers in question is regulated by the act of 1893. So far as that compensation is governed by the fees which they may retain, that also is embraced within the act of 1893. So far as that compensation is dependent upon the fees which may be charged and collected, those fees are fully provided for and established by the act of 1895.

It is admitted by all parties to the controversy that the provisions relative to the supervisory powers of the district attorney over the fees and bills of the justices and constables are obnoxious to the constitution and void. Const. art. 1, § 11; Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092; County of Orange v. Harris, 97 Cal. 602, 32 Pac. 594; Smith v. Strother, 68 Cal. 196, 8 Pac. 852. But without discussion upon that matter, it is also quite apparent that these provisions are for the regulation of the compensation of officers, and therefore are open to the same objection above considered. Moreover, as the law now stands, it is made the duty of the justice of the peace to issue a warrant upon any legal criminal complaint, and it is likewise made the duty of the constable promptly to serve such warrant. If it is the design of the legislature to give to the district attorney the control of criminal prosecutions and procedure which is indicated by the provisions of this act, a slight examination of the laws suggests the propriety, if not the necessity, of a general remodeling of them in these particulars, to make the changes harmonious. So drastic a departure should scarcely find its sole expression in a provisional clause of a fee bill.

The appellant's claim for $141 rests upon the contention that his compensation is regulated by the county government act, and this contention, as has been seen, is sound. The judgment must therefore be reversed, and the cause remanded, with directions to the trial court to enter judgment for appellant as prayed for. Ordered accordingly.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.

115 Cal. 551

## REID v. GROEZINGER, Justice of the Peace.
(S. F. 401.)

(Supreme Court of California. Jan. 7, 1897.)

County Officers—Compensation—Consolidated City and County—Constitutional Law.

1. Act March 28, 1895, "to establish the fees of county, township, and other officers," etc., applies to the city and county of San Francisco. Miller v. Curry (Cal.) 45 Pac. 877, followed.

2. Act March 28, 1895, "to establish the fees of county, township, and other officers," etc., is unconstitutional in so far as it fixes the fees which justices of the peace may charge and collect, and retain to their own use, as an attempt to regulate the compensation of county or township officers, without reference to the classification of counties made in the county government act of 1893, and required by Const. art. 11, § 5. Dwyer v. Parker, 47 Pac. 372, followed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Proceedings in mandate by J. S. Reid against G. C. Groezinger, a justice of the peace, to compel the entry of a default judgment. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Charles Wesley Reed, for appellant. Harry T. Creswell, City Atty., for respondent.

HENSHAW, J. Petitioner tendered to respondent, a justice of the peace of the city and county of San Francisco, the sum of two dollars, and demanded that the justice accept the same as the legal fee for the entry of a judgment, and that he thereupon enter a default judgment in an action commenced in his court. Upon the refusal of the justice, proceedings in mandate were commenced. A general demurrer to the petition having been sustained, this appeal is taken.

Appellant contends that the legal fee for the service demanded is two dollars, under an act entitled "An act to establish the fees of county, township, and other officers, and of juries and witnesses in this state," approved March 28, 1895, and that this act is applicable to the city and county of San Francisco. This contention is sound. Miller v. Curry (Cal.) 45 Pac. 877. The tender in this case was made to the justice personally, under appellant's claim that the act of 1895 supersedes all other acts, fixes the fees which justices of the peace may charge and collect, and further provides that they shall retain these fees to their own use. This claim is disposed of by the case of Dwyer v. Parker (S. F. 345; decided after the appeal herein was taken) 47 Pac. 372. It is not necessary to decide whether, in the mode of collecting fees, justices of the peace of San Francisco are governed by the provisions of "An act to regulate fees in the city and county of San Francisco" (St. 1865–66, p. 67), or by section 91 of the Code of Civil Procedure, or by the provisions of the act of 1893, providing a manner of paying fees in cities and cities and counties of the class to which San Francisco belongs. St. 1893, p. 127. None of these acts contemplates or permits the reception by the justice personally of the fee in question, and he is not compelled, in the performance of his duties, to recognize a tender such as that here made. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

5 Cal. Unrep. 568

## JOHNSTON v. COUNTY OF LOS ANGELES. (L. A. 217.)

(Supreme Court of California. Jan. 8, 1897.)

Constables—Compensation.

The compensation of a constable is regulated by the provisions of the county government act (St. 1893, p. 390); and the provision limiting the amount of compensation he shall receive is valid.

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. H. Johnston against the county of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Jones & Newby and Jos. F. Chambers, for appellant. J. A. Donnell, Dist. Atty., and F. R. Willis, for respondent.

PER CURIAM. In Dwyer v. Parker (S. F. 345; decided January 6, 1897) 47 Pac. 372, it was held that the provisions of the "Act to establish the fees of county and township, and other officers, and jurors and witnesses, within this state" (St. 1895, p. 267), so far as the same attempt to fix the compensation of the officers therein named, are unconstitutional. The compensation of the appellant, as constable of Los Angeles township, is fixed by subdivision 14 of section 164 of the county government act of 1893 (St. 1893, p. 390). By the provisions of that section he is not authorized to receive any greater amount than is admitted in his complaint herein has been received by him for the services for which his present claim is made. We have no doubt of the constitutional power of the legislature to limit the amount of compensation which any officer shall receive for the performance of the duties of his office. The judgment is affirmed.

115 Cal. 466

## CARLSON v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR. (S. F. 476.)

(Supreme Court of California. Dec. 31, 1896.)

MUTUAL BENEFIT LIFE INSURANCE—CONSTRUCTION OF CONTRACT—DEATH OF MEMBER WHILE IN DEFAULT—REINSTATEMENT—WAIVER.

1. Under a contract of mutual benefit life insurance, by which the association agreed to pay to the beneficiary named the amount of the certificate, on the death of the member while in good standing on the books of the association, and providing that, on a failure of the member to pay the monthly assessments by the last day of each month, he should stand suspended, but might become reinstated by a payment of all assessments due within 60 days thereafter, the association is not liable on the death of the member while delinquent on the books, and he cannot be reinstated after his death, though the 60 days have not expired.

2. Under such a contract, the levy of the usual assessments against the member during the 60 days following his default is required to enable him to exercise his right to become reinstated, and is not a waiver by the association of default.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by Mary Carlson against the Supreme Council, American Legion of Honor, to recover on a certificate of life insurance. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. W. Langan, for appellant. Walter D. Mansfield, for respondent.

SEARLS, C. Mary Carlson, the appellant, brings this action to recover from the defendant (the Supreme Council, American Legion of Honor, a corporation organized under the laws of the state of Massachusetts, and doing business in the state of California) the sum of $2,000 upon a benefit certificate issued August 5, 1892, to Edward Carlson, the husband of plaintiff, reciting him to be a member of a subordinate council of defendant, known as "Livermore Council, No. 1,070." The cause was submitted to the court upon an agreed statement of facts, and judgment was entered in favor of defendant. From this judgment plaintiff appeals, and the case comes up on the judgment roll.

The certificate (No. 165,746) issued to Edward Carlson, recites that he is a companion of the American Legion of Honor, has applied for three-degree membership to Livermore Council, No. 1,070, American Legion of Honor, instituted and located at Livermore, in the state of California, and passed the requisite medical examination, and has been duly initiated in said council, etc. It then proceeds to recite that the certificate is issued as evidence of the facts in it contained, and as a statement of the contract existing between the companion and the Supreme Council, American Legion of Honor, which contract, so far as important here, is as follows: "In consideration of the full compliance with all the by-laws, of the Supreme Council American Legion of Honor, now existing or hereafter adopted, and the conditions herein contained, the Supreme Council, American Legion of Honor, hereby agrees to pay Mary Carlson, wife, $2,000 (two thousand dollars), upon satisfactory proof of the death, while in good standing upon the books of the supreme council, of the companion herein named, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations following: * * * Second. That said companion shall have paid all assessments called to the benefit fund within the time and in the manner required by the by-laws of the supreme council in force at the time of the issuance of this certificate, or as the same may be hereafter amended. * * * Fifth. That this benefit certificate is issued by the supreme council, and accepted by the companion herein named, for himself and his beneficiary, upon the express condition and agreement that, in case of any false or fraudulent statement or misrepresentation, or violation of any covenants herein contained, the same shall be void." The certificate is under the seal of the supreme council, and is duly signed by the supreme commander and supreme secretary under date of August 5, 1892.

The objects of defendant, as provided in its certificate of incorporation, are, among other things, "to establish a benefit fund from which, on satisfactory evidence of the death of a member of the order who has complied with all its lawful requirements, a sum not exceeding $5,000 shall be paid to the family, orphans, or dependents as the member may direct." The by-laws of defendant, or a portion of them, are set out in the agreed statement. We state the substance of such of them as are deemed necessary. Defendant has a benefit fund from which death and relief benefits are paid. This fund is recruited by assessments levied upon the members of subordinate councils. All assessments and dues to subordinate councils are collected by collectors, who are officers of the subordinate councils, but are appointed by the supreme commander of defendant, and are amenable to the supreme council. It is the duty of the collector to receive from members all assessments due the supreme council, and on or before the 10th of each month to remit to the supreme treasurer all assessments paid him during the previous month; also, to remit all payments made by members for reinstatement and to report to his subordinate council. He also has certain duties to perform in relation to collecting dues of the subordinate council, which do not go to defendant, but are for the maintenance of such subordinate body.

Assessments: Assessments are divided into two groups, viz.: (1) Those due for two years after admission, etc. (2) Those becoming due thereafter. As to the first class, applicants of the age of Edward Carlson when he became a member were and are required to pay at admission to the collector one assessment of 80 cents, and, upon a benefit certificate of $2,000, for 24 months thereafter one like assessment of 80 cents on the 1st day of each month, and an additional one of like amount on the 15th day of each alternate month during said period of 24 months, "and any member failing to pay the assessments so required of him on or before the day limited for the payment of the same shall stand suspended from the order, and all his rights and benefits therein and his or her certificate shall be void." As to the second group of assessments, defendant has an executive committee, whose duty it is, on the 1st of each month, to determine how many assessments will be needed to pay debts already accrued and which may be anticipated for the month. Notice thereof is to be given to each council and to each collector, "and, for each succeeding month after the expiration of said twenty-four months, such member shall, on or before the last day of each calendar month, pay to the collector of his council, and without notice, all assessments which may have been called by the executive committee and are payable by him during said month, and in default thereof he shall stand suspended from membership in the order, and all benefits therein and his benefit certificate shall be void." A suspended member may be reinstated within 60 days after suspension by paying to the collector the full amount of arrears for dues, fines, and all assessments called on or before the date of reinstatement. Failing to do so, he must make written application for reinstatement, and be re-examined and furnish a favorable certificate from the medical examiner, etc. Members can only be reinstated as above, and any reinstatement of a suspended member by any council in any other manner is void. The by-laws of defendant and the by-laws of the subordinate council do not require collectors to notify members as to the payment of assessments or quarterly dues, except that a by-law of the latter requires such collector to notify members thereof when their quarterly dues are three months in arrears. These last-named dues are one dollar per quarter, payable quarterly in advance, on the 1st day of January, April, July, and October. The collector of Livermore Council was in the habit of giving to all the members of said council written notice each month of the assessments levied by the defendant against them. These notices were given without the knowledge or direction of defendant.

We may summarize the agreed statement by saying that, from the date of Edward Carlson's admission to the order, viz. from July 20, 1892, to November 1, 1894, a large number of assessments were levied against him, some of which were paid when due, but on four occasions, at least, he failed to pay such assessments when due, and was suspended on the books of Livermore Council and on the books of defendant. In each instance he paid such assessments within 60 days, as provided by the by-laws, and was reinstated. On the 1st of November, 1894, assessments Nos. 319, 320, and 321, of 80 cents each, were duly levied by defendant, and were due and payable by said Carlson on or before November 30, 1894. Carlson was notified in writing by the collector as follows, which notice he received by mail: "Livermore Council, No. 1,070, A. L. of H., Livermore, Cal., Nov. 1, 1894. To Ed. Carlson. Companion: You are hereby notified that assessments Nos. 319, 320, and 321, amounting to $2.40, having been called under this date, must be paid to the collector on or before November 30, 1894. Due on account of dues to December 31, 1894, $1. A. G. Beazell, Collector." These three assessments were never paid, and ever since the last day of November, 1894, said Edward Carlson stood, and now stands, on the books of Livermore Council, and on the books of defendant, suspended from membership, and has not since been in good standing on the books of defendant. On the 1st day of December, 1894, three additional assessments were levied, of which, on said date, Carlson was notified in writing as above, except as to dates. This last notice specified that the assessments must be paid "on or before December 30, 1894." These assessments were never paid. The quarterly dues of $1, specified in both the notices of November and December, were paid by Carlson to one Lenhart, but were not paid by him to the collector until after the notices had been sent. Edward Carlson died January 4, 1895. On the 24th day of January, 1895, the plaintiff herein, the beneficiary named in the certificate issued to said Carlson, caused the sum of $4.80, the full amount of assessments due from said Carlson, to be tendered to the collector of Livermore Council, together with proofs of death, and demanded payment of the sum of $2,000 named in the certificate issued to said Carlson. The collector refused to accept the sum tendered, giving as a reason therefor "that said Edward Carlson was then dead, and that a dead man could not be reinstated." From the foregoing statement it will be observed that Edward Carlson was suspended December 1, 1894, and died, during such suspension, January 4, 1895, or within the period of 60 days during which, under the by-laws of defendant, he was entitled to reinstatement, whether in sickness or health, by simply paying all arrearages assessed against him up to the date of such payment.

Under the certificate which was issued by defendant to Edward Carlson, there were certain conditions made a predicate to the payment of the sum of $2,000 to the beneficiary therein named. The first of these conditions is that said sum shall be paid "upon satisfactory proof of the death [of Carlson], while in good standing upon the books of the supreme council." The second predicate is that the companion shall have paid all assessments called to the benefit fund within the time and in the manner required by the by-laws then in force or thereafter adopted. And it is further provided that, upon a violation of any of the covenants therein contained, the same shall be void. One of the by-laws, in force, and referred to in the certificate, required the member to pay to the collector, on or before the last day of the month, and without notice, all assessments called for by the executive committee and payable for him during said month, "and in default thereof he shall stand suspended from membership in the order, and all benefits therein, and his benefit certificate shall be void." Under this rule the nonpayment of assessments as specified ipso facto operated as a suspension, and no action was necessary on the part of the grand or subordinate council to emphasize or effectuate the suspension, or to render the certificate void.

The contention of appellant is that the contract does not provide for a forfeiture until the expiration of the 60 days' grace afforded him within which to become reinstated by payment of assessments; that an agreement that a contract shall be void in default of payment at a given time, attended by a further agreement that the rights of a party thereto may be saved by payment within 60 days thereafter, is repugnant to and inconsistent with the idea of forfeiture before the expiration of the 60 days; that forfeiture implies a determination of the contract, and, if complete, reinstatement would necessitate a new contract and a new consideration, and that, as there was no new contract or new consideration provided in the case at bar, the reinstatement is evidence of the existence of the original contract; that no forfeiture could have been declared within the 60 days, and hence, as he died within that period, his right passed to his representative. In mutual benefit societies provision is almost invariably made in the charter, by-laws, or certificates of membership for assessments upon members for the payment of death losses, and for forfeiture of all rights of membership in case assessments are not paid in accordance with the rules and regulations. Such societies have no practical means of meeting their frequently recurring obligations except by the prompt collection of such assessments, and it has been found necessary to adopt stringent means to enforce their prompt payment. Forfeitures are not favored in law, but they will be enforced for a breach of the condition agreed upon, when such condition is clearly set out, and the intention of the parties is made manifest. If, by the contract, previous notice is a necessary precedent to the forfeiture, such notice must be shown to have been given before the forfeiture can occur. If the forfeiture is to take place within a specified time after notice, both the notice and the lapse of the time specified thereafter, during the life of the insured, must be shown. If, in addition to the foregoing requisites, some action by the society is essential to crystallize the forfeiture, such action becomes an added requisite, and, like the others, must have been taken during the life of the insured, to perfect the forfeiture. In other words, the forfeiture must have taken place during the life of the insured. The reason of this is that the contract of life insurance, in the absence of express stipulations to the contrary, becomes complete at the death of the insured. The liability or nonliability of the insurer becomes fixed by that event. The corollary right of the plaintiff, as beneficiary of Edward Carlson, to recover, depends equally, in the absence of some question of waiver or estoppel, upon the conditions existing at the moment of Carlson's death.

The case, then, stands thus: Under his contract, Edward Carlson was bound, without notice, to pay, on or before the last day of each calendar month, to the collector of the subordinate council of which he was a member, all assessments levied against him for the current month, under the penalty of a forfeiture of his beneficial certificate for failure so to do. The forfeiture took place eo instanti, by operation of law. No notice or action by the society was necessary to its consummation. He failed to pay his assessments for November, 1894, and on December 1st was suspended upon the books of the subordinate and supreme council. There was, however, a condition subsequent, contained in the by-laws of defendant, and made a part of the agreement, and in support of which his payment of assessments was a sufficient consideration, viz. that by the payment, within 60 days after forfeiture, of the previous assessments and such others as had accrued in the interim, he could defeat and annul the forfeiture. This was an option of which he might avail himself. He failed to do so, and died within the 60 days. Could his beneficiary avail herself of this privilege within that period? Bacon, in his work on Benefit Societies and Life Insurance, at section 385b, lays down the rule as follows: "If a member neglects to become reinstated during his lifetime, he cannot be reinstated after his death, though the period in which he might be reinstated if living has not expired." "Where a member had been suspended for nonpayment of assessments, and he had neglected during his lifetime to secure his reinstatement, in accordance with the terms of his certificate, by paying arrearages while in good health and within a certain time, his restoration to membership cannot be effected after his death by payment by another person within the time limited of the sum due from him at the time of his death." Nibl. Mut. Ben. Soc. § 292.

Counsel for appellant contends that the foregoing quotations are founded, not upon principle, but upon the syllabus in Modern Woodmen v. Jameson, 29 Pac. 473, and that such syllabus is misleading, in not stating certain factors present there and not involved here. A rehearing was granted in that case (30 Pac. 460, 31 Pac. 733), and the court finally held that the member had not in fact been suspended. We have quoted from Bacon and

Niblack, not because the quotations are based upon Modern Woodmen v. Jameson, but because we regard their statements as being founded in elementary principle. Judge Seymour D. Thompson, an accredited authority on the subject of Corporations, in Borgraefe v. Supreme Lodge, 22 Mo. App. 127, held the following language: "It was argued in behalf of the plaintiff at the bar that there was no forfeiture in this case, because the declaration of a forfeiture is a judicial act, and neither Ada Lodge, nor any other judicatory having the power to declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under the provision of section 3 of law 2, above quoted, it is not necessary that the lodge, or any other judicatory of the order, should adjudge a forfeiture against a delinquent member for nonpayment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constating instruments of mutual insurance companies and other benevolent orders of this character, where the governing statute recites that for the nonpayment of dues, or other named delinquency, the member may be suspended by the lodge or other judicatory. Here the member is not suspended until the lodge or other designated judicatory exercises the power of suspension. Olmstead v. Insurance Co., 50 Mich. 200, 15 N. W. 82. The reason is that whatever right the lodge or the order may have against the member for an infraction of its rules must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts. Chamberlain v. Lincoln, 129 Mass. 70. But where, as in this case, the suspension attaches by operation of law upon an event named, and the member dies before the suspension has been set aside in conformity with the rules of the order, there can be no recovery upon his benefit certificate." This view seems to be sustained by the authorities. Society v. Baldwin, 86 Ill. 479; Rood v. Association, 31 Fed. 62; Madeira v. Society, 16 Fed. 749; McDonald v. Ross-Lewin, 29 Hun, 87; Blanchard v. Insurance Co., 33 N. H. 9; Society v. Helburn, 85 Ky. 1, 2 S. W. 495; Brown v. Grand Council, 81 Iowa, 400, 46 N. W. 1086; Holland v. Supreme Council, 54 N. J. Law, 490, 25 Atl. 367.

It is expressly stipulated by the parties herein that all the assessments specified were duly, regularly, and properly levied and called, and were payable to defendant by Carlson on or before November 30, 1894, as to the November assessments, and on or before December 31, 1894, as to the December assessments; "and no question is raised or arises herein as to the calling, legality, etc.," of said assessments, and the duty of Carlson to pay each and all of them; (2) "that since November 30, 1894, Carlson stood, and now stands, upon the books of Livermore Council * * * and the defendant, suspended from membership, * * * and is not now, and has not been since said last day of November, 1894, in good standing upon the books of this defendant." "Good standing upon the books of the supreme council" at the date of death, and payment of all assessments called for the benefit fund within the time and in the manner required by the by-laws, were the conditions of Carlson's agreement. Not having complied with these conditions, his beneficiary cannot recover, unless defendant has waived the forfeiture, or has performed some act or omitted to perform some act whereby an estoppel can be invoked against it.

Appellant contends: (1) That the levy and notice of the December assessments was a waiver of any forfeiture to which defendant was entitled by nonpayment of the November assessment; (2) that in case of each of the assessments a larger sum was demanded than was due; (3) that notice of the December assessment was void, because it called for payment December 30th, instead of December 31st. It is a general rule that, if an insurance company, after knowledge of any default for which it might terminate the contract of insurance, enters into negotiations or transactions with the assured which recognizes the continual validity of the policy, and treats it as still in force, the right to claim a forfeiture for such previous default is waived. Murray v. Association, 90 Cal. 402, 27 Pac. 309, and cases there cited. That rule has no application, however, to a case like the present, where the insured has a right to reinstatement within 60 days after forfeiture upon paying the amount due and all accruing assessments subsequent to the default and prior to reinstatement. Manifestly, the company, in such a case, must continue to levy the assessments; and to give notice thereof is but to impart needed information to the insured, to the end that he may exercise his right of reinstatement. Niblack, after discussing the question of waiver, states the rule in cases like the present as follows: "When a delinquent member has a right to reinstatement to benefits under his contract of insurance, either with or without conditions, the making of subsequent assessments which he is required to pay before he can be reinstated, and the giving him notice thereof, do not in any manner waive his first default, but are entirely consistent with the duty of the society towards him until he has been in arrears for the time stipulated within which he may be reinstated,"—citing Leffingwell v. Grand Lodge, 86 Iowa, 279, 53 N. W. 243; Schmidt v. Modern Woodmen, 84 Wis. 101, 54 N. W. 264; Stiepel v. Association, 55 Mo. App. 224; Nibl. Mut. Ben. Soc. § 306, p. 585; Insurance Co. v. Cochran, 88 Pa. St. 230; Lantz v. Insurance Co., 139 Pa. St. 546, 21 Atl. 80; Lyon v. Supreme Assembly, 153 Mass. 83, 26 N. E. 236; Insurance Co. v. Laury, 84 Pa. St. 43. There is a class of cases in which notices were given by the insurers calculated to mislead the insured, of which such cases as Moore v. Order of Railway Conductors (Iowa) 57 N. W. 623, and Murray v. Association, 90 Cal. 402, 27 Pac. 309, are samples. But the case at bar is clearly distinguishable from those of that class.

The sum of one dollar, included in the November notice of dues to the local council, was proper. The quarterly dues were payable in advance on the first meeting in October, etc., and, although not delinquent until the end of the quarter, it was due and payable from the beginning of the quarter. True, Carlson had paid it to one Lenhart, but, as he failed to pay it over to the collector, and is not shown to have sustained any relations to the council, official or otherwise, this could not avail to the benefit of Carlson. Carlson was, however, suspended for the nonpayment of the November assessments by the grand body, which had nothing whatever to do with the dues of the local council; hence, we are not concerned with the latter. We need not consider the question of the December assessments, as Carlson's default was perfect on the November assessments. We recommend that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

115 Cal. 579

## FAIRBANKS et al. v. SAN FRANCISCO & N. P. RY. CO. (S. F. 427.)

(Supreme Court of California. Jan. 15, 1897.)

BUILDING—NEGLIGENT DESTRUCTION—JOINDER OF CAUSES OF ACTION—EXTENT OF RECOVERY—ADVERSE POSSESSION—TITLE.

1. A joint action may be sustained by the owner of a building and an insurance company who has paid a loss thereon against defendant for having negligently set fire to the building, though the joint plaintiffs sue to recover, not

only the value of the building in excess of the policy, but damages to the owner's business, proximately caused by defendant's negligence.

2. For the purposes of adverse possession there may be a cleavage of corporeal real estate horizontally; and where a building was a part of the land, and, with claim of title, its occupant and his predecessor have held undisturbed possession thereof and paid taxes thereon for the statutory period required to bar an action for the recovery of real property, the occupant's title in the building is established, though another may yet have title in the supporting land.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Fred E. Fairbanks and another against the San Francisco & North Pacific Railway Company. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Sidney V. Smith, for appellant. Vogelsang & Brown, for respondents.

BRITT, C. Fairbanks and the National Fire Insurance Company joined in this action to recover damages for the destruction of a certain building by fire resulting from defendant's negligence. It was alleged in the complaint that the building was the property of Fairbanks, of the value of $1,835, and insured by the insurance company for $900, which latter sum said company paid to Fairbanks before the commencement of the action; also, that Fairbanks' business carried on in the building was interrupted by its destruction, to his loss of profit stated at $300. Plaintiffs prayed damages in the sum of $2,135. A demurrer to the complaint for misjoinder of plaintiffs and of causes of action was overruled, and defendant answered, denying, among other things, that Fairbanks owned the building. It appeared in evidence that one Fulton formerly owned a tract of land which included said structure. December 10, 1872, he conveyed the land to defendant by deed containing a reservation of the "right to maintain" the building, with the privilege of ingress and egress to and from the same over the lands conveyed. In the year 1884, whatever transferable interest was thus saved to Fulton became vested by proper deeds of conveyance in one Estinghausen, and on June 5, 1890, the latter executed a deed of the land containing the building to Fairbanks. Estinghausen, and after him Fairbanks, until the time of the fire, had possession of the building adversely to defendant, and paid all taxes thereon. They successively claimed to own both the building and the land on which it stood, but, after 1883, neither of them paid taxes on the land itself. It was not assessed to them, nor shown to have been assessed at all. Plaintiffs had a verdict and judgment for $2,000.

Defendant claims that the joinder of plaintiffs was rendered improper by the allegations of injury to Fairbanks' business, a source of damage in which the insurance company had no interest. But the same objection would apply to the value of the building above the amount of the insurance policy; and that this may be recovered in a joint action such as the present is conceded by defendant, and is established by authority upon sound considerations of justice and expediency. Swarthout v. Railway Co., 49 Wis. 625, 6 N. W. 314; Crandall v. Transportation Co., 16 Fed. 75; Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co., 20 Or. 569, 26 Pac. 857. The negligence which gave rise to the action was the single cause of the whole injury, and, unless all the damage of either plaintiff is recoverable in the joint action, defendant must be twice vexed for the same delict; and it seems to us that to allow as damages to the joint plaintiffs the value of the building in excess of the policy, and deny the recovery in the same action of other damages to the insured proximately caused by defendant's negligence, would be to create a useless distinction and balk at an imaginary difficulty. See Code Civ. Proc. § 378; Bliss, Code Pl. § 73; People v. Morrill, 26 Cal. 360.

Counsel have discussed with much learning and ingenuity the effect of the saving clause in the deed of Fulton to defendant,—whether it operated to reserve a mere unassignable easement in gross, as argued with considerable force by defendant, or an exception of a profit a prendre at least in favor of the grantor, as plaintiffs contend. We think the proper construction of the deed unnecessary to be now determined. For the purposes of adverse possession and the invocation of the statute of limitations, there may be cleavage of corporeal real estate horizontally as well as vertically. This appears from the cases relating to mineral strata and tunnels. Caldwell v. Copeland, 37 Pa. St. 427; Lillibridge v. Coal Co., 143 Pa. St. 293, 299, 22 Atl. 1035; Powell v. Lantzy, 173 Pa. St. 543, 34 Atl. 450; Bevan v. Cement Co., 3 Reports, 47. Here the building was part of the land. With claim of title Fairbanks and his predecessor held undisturbed possession thereof and paid taxes thereon for the statutory period required to bar an action for the recovery of real property. Under the view, obtaining in this state, that the statute, when it has run, has the effect to extinguish the right as well as bar the remedy of the former owner of land, nothing further was necessary to the establishment of Fairbanks' title in the structure, although defendant may yet have title in the supporting land. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

115 Cal. 561

## CUNNINGHAM v. LOS ANGELES RY. CO.

(L. A. 181.)

(Supreme Court of California. Jan. 14, 1897.)

STREET-RAILROAD COMPANY — INJURY TO CHILD ON TRACK—ORDINARY CARE—INSTRUCTIONS—COMPLAINT—GENERAL TERMS SUFFICIENT.

1. On a trial for personal injuries, where the issue was whether defendant street-railroad company was exercising ordinary care, which was all it owed to plaintiff, the issue was to be determined from a consideration of what actually occurred at the time of the accident, and it was error to instruct the jury that they might take into consideration the fact that the motorman "had only been at work about twelve days, according to his own testimony, and was a new hand on the road."

2. The instruction would have been correct had defendant been bound to exercise the highest care.

3. On a trial for personal injuries, it was error to charge that defendant street-railroad company was bound to provide "proper cars and appliances, and to provide safe, skillful, watchful, and competent agents or servants to manage the same," without the qualification that so far as its obligation to plaintiff was concerned, who was injured while on the track, it was bound to exercise only ordinary care in the selection of such servants.

4. What precautions, under given circumstances, constitute the ordinary care of parents for their young children, is a question of fact for the jury, and should not be determined by the court as a question of law.

5. On a trial for personal injuries to a young child, where contributory negligence of its parents appears, the question whether defendant notwithstanding such negligence, could have avoided the injury, is for the jury, when fairly involved in the evidence.

6. In an action for personal injuries, the complaint is good against a demurrer, though defendant's negligence be alleged in general terms only.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by David Cunningham, a minor, etc., against the Los Angeles Railroad Company, for personal injuries. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Bicknell & Trask and John D. Pope, for appellant. Murphy & Gottschalk, for respondent.

VAN FLEET, J. Plaintiff, an infant of 18 months, escaped from the premises of its parents into the public street, and went upon the track of defendant's electric railway, running thereon, and was knocked down and injured by one of its cars. He brought this action to recover damages for the injury, alleging negligence by defendant in running over him. From a judgment in his favor, and an order denying defendant's motion for a new trial, the latter appeals.

The jury were instructed that, in determining whether the defendant was negligent in not stopping its car so as to avoid the injury, they had the right to take into consideration the fact that the motorman "had only been at work about twelve days, according to his own testimony, and was a new hand on the road." There was no direct issue upon the question whether the defendant had been guilty of employing incompetent servants, the question being whether the plaintiff was injured through the actual negligence of defendant's servants on the occasion in question; but the fact adverted to in the instruction had incidentally appeared in the cross-examination of the motorman, when examined as a witness for defendant. It is objected that the instruction was erroneous, as submitting to the jury an element which could have no competent bearing upon the question whether defendant was guilty of the degree of negligence with which it was chargeable, under the circumstances of the case; and this objection must, we think, be sustained. Defendant was responsible to plaintiff for a want of ordinary care only, and whether it was in the exercise of such care was to be determined from a consideration of what actually occurred at the time of the alleged negligent act, regardless of any fact affecting the general character of the servant for skill or proficiency in the discharge of his duty. The question was, did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question therefore was, what was the conduct of the servant at the time? and this was to be unembarrassed by any consideration of his general qualifications. The latter consideration is proper where the defendant is required to exercise the highest or utmost degree of care, and is held responsible for slight negligence. Boyce v. Stage Co., 25 Cal. 468; Ficken v. Jones, 28 Cal. 618. In such a case the inquiry becomes pertinent, but not here. Deer. Neg. § 407; 2 Thomp. Neg. 408; Jacobs v. Duke, 1 E. D. Smith, 271; Chase v. Railroad Co., 77 Me. 62. These principles have been expressly approved and followed by this court. Towle v. Improvement Co., 98 Cal. 342, 33 Pac. 207, and see the large number of citations there made.

The court also charged the jury that it was the duty of a person or company operating such a road upon the streets of a city to provide "proper cars and appliances, and to provide safe, skillful, watchful, and competent agents or servants to manage the same." This is complained of, as requiring more than ordinary care at the hands of defendant; that to require it to provide safe servants is, in effect, to make it an insurer of their character for fitness; while, as to plaintiff, it is not such. It is undoubtedly the duty of one engaged in the business of defendant to provide the character of servants defined in the instruction, and none other; but, in performing that duty, the defendant, so far as its obligation to the plaintiff is concerned, was only called upon to exercise ordinary care; and the jury should have been so informed. The instruction was deficient in this qualification. Nor do we think the instruction given on behalf of defendant, as to the degree of care required of its servants, the equivalent of such qualification. We think the court should have refrained from charging that the law does not require parents to keep an attendant with their young children; and that they are not required to shut them up. While, abstractly speaking, these things are perfectly true, the question of whether such precautions are necessary, under any given circumstances, to constitute ordinary care for the safety of their children, with which parents are charged, is one of fact for the jury, and not for the court to determine as matter of law. It is not unlikely that this instruction may have had a material bearing, to the prejudice of defendant, upon the determination by the jury of the question of contributory negligence of the parents which the answer raised. We find no further material departure from a proper submission of the case in the instructions.

The criticism that, by the instruction that it was the duty of the motorman to use "proper caution" in the conduct of his motor, the jury were authorized to hold him to a higher degree of care than required, is not tenable. The language was qualified and limited by the further charge that the degree of care or caution required to be exercised was only ordinary care.

A careful review of the evidence satisfies us that the contention that there was not sufficient evidence to convict the defendant of any negligence cannot be sustained. We regard the evidence on the question as to whether the car could, by the exercise of ordinary care, have been stopped in time to avoid contact with the plaintiff, as substantially conflicting.

Upon the question of contributory negligence by plaintiff's parents, assuming that such negligence clearly appears, nevertheless the question whether, notwithstanding such negligence, the defendant could have avoided the injury, was fairly involved in the evidence, and the case in that regard was a proper one for the jury.

The demurrer to the complaint was properly overruled. While the negligence was averred in general terms, such mode of presenting the facts is sufficient in this character of action, where, as a general thing, the more specific facts are more largely within the knowledge of the defendant than that of the plaintiff; and the complaint cannot, therefore, be held open to the objection of uncertainty. House v. Meyer, 100 Cal. 592, 35 Pac. 308; Davies v. Steamship Co., 89 Cal. 280, 26 Pac. 827; Bliss, Code Pl. § 211; Doe v. Sanger, 78 Cal. 150, 20 Pac. 366.

For the errors above pointed out, the judgment and order must be reversed, and a new trial granted. It is so ordered.

We concur: HARRISON, J.; TEMPLE, J.

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115 Cal. 555

## SYMONS et al. v. CITY AND COUNTY OF SAN FRANCISCO. (No. 15,968.)

(Supreme Court of California. Jan. 8, 1897.)

MUNICIPAL CORPORATION — VACATION OF STREETS —PARTIES IN INTEREST.

The only persons who can complain of the vacation of a street in whole or in part are the owners and occupants of lands adjoining, or through which runs, that part of the street which it is proposed to vacate.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

For opinion in department, see 42 Pac. 913. Affirmed.

HENSHAW, J. Upon consideration in bank the opinion heretofore rendered in department is adhered to and adopted. A taxpayer is permitted to maintain an action to restrain the improper diversion or use of the public funds, or to compel an official to do some act whose omission would increase his burden as a taxpayer. In both cases the ultimate object is the same,—to escape the imposition of an increased taxation, which, except for his right of action, would be by direction or indirection illegally thrust upon him. No such consideration is here presented. It is not made to appear that any additional burden or expense is to be imposed upon plaintiffs as taxpayers, or that any expense at all attends the proposed vacation. While plaintiffs show that they are property owners, they show, also, that they are not owners of property abutting upon the streets proposed to be closed. Owners of abutting property have a special easement, which is property, upon the fronting street. Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750; Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307. But it is well settled that owners of other realty have no such property in a street as entitles them to damages for its vacation. Whatever detriment or inconvenience they may suffer by the closing of the street they bear in common with the community at large, for the public convenience and welfare, as decreed by the proper legislative authorities in ordering the vacation. Coster v. Mayor, etc., 43 N. Y. 414; Insurance Co. v. Stevens, 101 N. Y. 411, 5 N. E. 353; Smith v. City of Boston, 7 Cush. 254; Castle v. County of Berkshire, 11 Gray, 26; City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395; Heller v. Railroad Co., 28 Kan. 625; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167. In Heller v. Railroad Co., supra, the court refused, at the instance of an owner of nonabutting property to enjoin proceedings looking to the vacation of a street, holding that there was no such special interest or property in plaintiff as would entitle her to maintain the proceeding. In Kimball v. Homan, supra, the precise question here presented was considered and determined. The proceeding was in certiorari, and it was declared that the only persons who can seek a review of proceedings to discontinue a highway in whole or in part are the owners and occupants of land through or adjoining which it is proposed to discontinue the road, which adjacency is confined to the part discontinued. If, as plaintiffs contend, the proceedings of the supervisors looking to the vacation of the streets are void, there is no occasion for the interposition of equity (Oakland v. Carpentier, 21 Cal. 642, 666); for plaintiffs would have adequate remedies at law for any illegal and improper obstructions of the streets. The judgment is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; TEMPLE, J.; HARRISON, J.

115 Cal. 496

### SENIOR et al. v. ANDERSON et al. (L. A. 119.)

(Supreme Court of California. Dec. 31, 1896.)

Waters—Appropriation—Beneficial Use—Evidence — Reasonable Time for Application — Adverse Possession—Running of Limitations —Specific Performance—Parties.

1. The quantity of water appropriated, as well as the validity of the appropriation itself, must be determined by the purpose of the diversion and the use of the water diverted, and not by the mere fact of diversion.

2. On the issue of the acreage which had been irrigated from a ditch, and the quantity of water that could have been beneficially used for that purpose, there was evidence that, at no time since the appropriation of the water, had there been more land in cultivation than there was at the time of the trial; that there were 39 acres in trees; that the total quantity in cultivation was between 40 and 50 acres; that the proprietor had "intended to hold the water and keep it, and irrigated the hills for that purpose"; and that it would take 40 inches of water, used all the time, to irrigate the place properly. There was no evidence that any other portions of the proprietor's land were capable of irrigation, or that more than 40 inches would ever be required for the proper cultivation of all the irrigable land. The proprietor had diverted 78.77 inches, and it was conceded that the water was then being used to irrigate about 200 acres of land besides the proprietor's. *Held*, that a finding that the proprietor had appropriated all of the 78.77 inches by using it for a beneficial purpose was not justified by the evidence. McFarland, J., dissenting.

3. A proprietor of a water right is entitled to so much water as he can put to a useful purpose on his lands within a reasonable time by the use of reasonable diligence; and, after 10 years from the date of the diversion, it will be presumed that he has brought under cultivation all the land intended by him for cultivation by the use of water.

4. Where there are two appropriations of water, and the first proprietor seeks to enlarge his appropriation by adverse possession as against the second proprietor, the mere construction of ditches, or the laying of pipes by him for the purpose of using the water on other lands outside his own, do not constitute notice, since he has the right to conduct there at least his original appropriation, but the adverse possession begins only with the actual use of the water.

5. A finding that plaintiffs are not entitled to the specific performance of an oral contract on the ground of part performance will not be disturbed, where the evidence is conflicting and it does not clearly appear that the acts relied on as part performance are attributable to the contract sought to be enforced.

6. In an action to quiet plaintiffs' title to certain waters of a stream, where defendants claim from the same source, and the water used by them is diverted by the same ditch, and their claims of right affect plaintiffs' right, they are properly joined as parties defendant, even if their claims are asserted as individuals.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Edwin Senior and others against J. C. Anderson and others to quiet title to a water right. From a judgment in favor of defendants, and an order denying a new trial, plaintiffs appeal. Reversed.

H. L. Poplin, for appellants. J. B. Chapman, for respondents.

HAYNES, C. Action to quiet title to a water right. The defendants had judgment, and the plaintiffs appeal therefrom, and also from an order denying a new trial.

In 1883 J. D. Hines settled upon 160 acres of public land through which a small mountain stream known as "San Antonio Creek" flowed, and constructed a dam and ditch by which he diverted from said stream about 79 inches of water, and discharged the same upon said land. No notice of said appropriation is shown to have been made, and its purpose and the quantity of water appropriated can only be determined from its subsequent use. That a valid appropriation may be so made, see Wells v. Mantes, 99 Cal. 583, 34 Pac. 324. The defendants claim under said appropriation. Edwin Senior, one of the plaintiffs, in 1886 settled upon 160 acres of public land below the Hines place, through which said stream also ran, and on October 29, 1887, posted a notice claiming to appropriate 50 inches of the water of said stream, measured under a 4-inch pressure, and constructed a ditch to convey the same for use upon his said land. J. D. Hines died in December, 1886, and Alice Hines obtained a patent for the land occupied by J. D. Hines in his lifetime October 25, 1889, and Senior obtained a patent to his land October 30, 1890. The other plaintiffs are vendees of portions of Senior's land and water right. The Hines ranch, above mentioned, was conveyed by Alice Hines to E. S. and W. L. Hall, August 21, 1888, together with the water right appurtenant thereto, and on June 15, 1889, the Halls conveyed said water right—but not the land—to the Ojai Valley Water Company, a corporation. The persons named as defendants are the members of an unincorporated association, or partnership, composed of the stockholders of said corporation, to which association said corporation conveyed its water right May 5, 1894. The agreement by which the association was formed divides the interest acquired into 1,000 shares, being the same number of shares issued by the corporation, and the said agreement fixed the number of shares to which each member of the association was entitled. The corporation was thereupon dissolved.

The principal question is as to the sufficiency of the evidence to justify the sixteenth finding, which is as follows: "That J. D. Hines settled upon certain lands riparian to the said San Antonio creek, and above the lands of the plaintiffs in this action, in 1883, and all the water flowing in the said San Antonio creek to and upon the lands of the said J. D. Hines, in the said year 1883 and ever since, in the ordinary stages of the water, was necessary for uses upon the said land so occupied by the said J. D. Hines for agricultural and domestic uses, and all of said water flowing in the said stream in ordinary stages, and to the amount of 78.77 inches, was diverted from the said stream by the said J. D. Hines and used upon the said lands until the death of the said J. D. Hines, and ever since." Whatever water rights were acquired by Hines were acquired by appropriation. Senior's appropriation having been made prior to the acquisition of title by Alice Hines, no riparian rights attached to Hines' lands which could affect Senior's appropriation. Her patent was expressly made "subject to all accrued water rights"; and as the two appropriations above mentioned, whatever may be their respective quantities, equal or exceed the entire flow of the stream during the irrigating season, the question of riparian rights does not arise in this controversy.

The evidence is quite clear that the capacity of the Hines ditch was practically the same in 1883 that it is now, and that during all the time since 1883 the water ran through it to its full capacity when there was sufficient water in the stream to fill it, and, when there was less, that it was all diverted, except so much—a small quantity—as seeped through the dam by which the water was turned into the ditch. But that is by no means conclusive of the quantity of water appropriated, nor is it, without showing a useful purpose to which the water, or some of it, was applied, evidence of any appropriation. The purpose of the diversion and the use of the water diverted are the general tests of a valid appropriation, as well as of the quantity appropriated. None of the water diverted by the Hines ditch was used upon any other than the Hines land until after the conveyance of the water right by the Halls to the corporation, which was nearly two years after the appropriation by Senior. The extent of the Hines appropriation is therefore not enlarged by the subsequent use of the water by the corporation upon other lands, but must be determined by the use upon the lands for which the water was appropriated. The quantity of land cultivated and irrigated by Hines and his successors until the time of the trial is uncertain, but that no greater quantity of land was cultivated upon the Hines ranch at any time than was under cultivation at the time of the trial is clear, while the preponderance of the testimony is that it was formerly much less.

As to the quantity of land being irrigated upon the Hines ranch at the time of the trial, one of the defendants, W. L. Hall, who is in charge of that property, testified that, at that time, there were "39 acres in trees, no alfalfa," and that "there are about 200 acres being irrigated from the same stream now outside of the old Hines ranch." No witness put the quantity of land that is or has been irrigated upon the Hines ranch at more than 40 to 50 acres. E. S. Hall, also a defendant, testified as follows: "I am son-in-law of Judge Hines, and took charge of the place after his death until August, 1888. When I took charge of it in 1887 the flumes and ditches were practically what they are now. The ditch extended down past the house, and the water, after running off the Hines land, went down a little stream or ravine, but did not reach Senior's land again, but would reach the creek again about three miles below, if it did not sink into the sand or earth. The ditch and flume was kept in use continuously as it was possible. Judge Hines intended to hold the water and keep it, and he irrigated the hills for that purpose. He got domestic water from another stream. I do not know how much was irrigated in 1887. In the summer months all the water was turned into our flume, and only seepage would go down to Mr. Senior's flume." A little later this witness repeated the foregoing statement in almost the same words, including the statement that Hines "irrigated the hillsides for the purpose of holding the water." Miguel Erro testified that he commenced to work for Judge Hines in 1883, and helped to construct the ditch and flume; that the land was cultivated "for alfalfa, for orange and lemon trees, and for barley." "It [the water] was taken north of the house, but afterwards ran down the creek right by the house. * * * When I said, in 1883, when the water ran through this ditch and flume, it passed again into the stream, I mean the little creek where the house is. The water may return to San Antonio creek, but it would be way down." George Stewart testified that it was hard to estimate how much Judge Hines had under cultivation. It was in patches; that he used to irrigate a great deal of it for pasturage; that he judged there were about 50 acres irrigated by Judge Hines, altogether, in 1885–86. E. S. Hall, the present occupant of the Hines ranch, testified that it would take 40 inches used all the time to irrigate the place properly; that "this year" he had 25 inches, and would have been glad to have had more.

There was no evidence tending to show that any portion of the Hines ranch other than that now irrigated is capable of irrigation, or that any larger quantity of water than that mentioned by E. S. Hall is or ever would be required for the cultivation of all the irrigable land on that ranch. This fact, together with the further conceded fact that the water diverted by the Hines ditch is now used to irrigate from 180 to 200 acres of land outside of the Hines ranch, gives great force to the testimony of E. S. Hall, whose relation to Judge Hines gave him ample opportunity to know the facts, that he irrigated the hillsides for the purpose of holding the water, and that water was permitted to flow off in the little stream or ravine which connected with San Antonio creek some three miles below. This evidence clearly shows that the quantity of water claimed by defendants under the Hines appropriation largely exceeds the quantity put to any useful purpose on the Hines ranch, and therefore exceeds the quantity actually appropriated. While the quantity of water appropriated for use upon the Hines land is the measure of the quantity appropriated by Hines, we do not hold that the water so appropriated may not be used upon other lands; but the fact that other lands may be, or are, irrigated from the Hines ditch, does not affect the quantity of water appropriated. In Atchison v. Peterson, 20 Wall. 514, Justice Field, delivering the opinion, said: "The right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right. That is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste, and prevent others from using it for mining or other legitimate purposes." See, also, the California cases there cited, and Simmons v. Winters, 21 Or., 35, 27 Pac. 7; Barnes v. Sabron, 10 Nev. 243; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13.

We do not hold that the Hines appropriation is limited by the quantity of water he could put to a useful purpose upon his land the first or second year, but to such quantity as he could put to a useful purpose upon his land within a reasonable time by the use of reasonable diligence. "To entitle the defendant, however, to the benefit of such an appropriation, he should within a reasonable time apply the water to such beneficial use. As fast as he could reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose. The rule established in Simmons v. Winters, supra, is just and reasonable; but it is not intended that, because a prior appropriator is entitled to a given quantity of water necessary to irrigate the lands he intends to cultivate, he can suspend his improvements an unreasonable time, and then, by adding to the area of his cultivated land, be restored to his original intentional diversion, when subsequent appropriators have acquired rights upon the stream. The fact that he for an unreasonable time delays additional cultivation should be construed into an abandonment of his original claim to divert a sufficient quantity to irrigate his whole tract, and his appropriation, after such unreasonable delay, should be confined to such necessary use as applied to the lands he had cultivated within a reasonable time." Cole v. Logan, 24 Or. 304, 33 Pac. 568. See, also, Simmons v. Winters, supra, and Barnes v. Sabron, supra. We think that the time elapsing after 1883 was ample to bring under cultivation all the land upon the Hines place intended for cultivation by the use of water, and the voluntary disposition by the present owner of the Hines land of so much of the water as is not now used thereon, for use upon the land of others, justifies the conclusion, upon the evidence before us, that the appropriation made by Hines should be restricted, as against the plaintiffs, to the quantity of water now reasonably necessary for the irrigation of the Hines land under cultivation when this action was commenced. We therefore conclude that said finding is not justified by the evidence, though it is immaterial to the plaintiffs where said quantity of water is used, and that the use of the water upon other lands is therefore a false quantity in the problem as to the quantity appropriated by Hines, and whether that quantity has been increased must depend upon the question whether the right to a larger quantity has been acquired by an adverse use for the period of five years, the defense of the statute of limitations having been pleaded by the defendants.

The diversion through the Hines ditch of water not necessary for a useful purpose for any length of time would not give a right as against the plaintiffs, and therefore the application of the water to a beneficial purpose upon other lands by the defendants, or their predecessor in interest, the Ojai Valley Water Company, must mark the beginning of the adverse use. These other lands never belonged to Hines, or to any owner of the Hines land, and the evidence is without conflict that no water was used except upon the Hines ranch until after the conveyance of the water right by the Halls to said corporation. That conveyance was made June 15, 1889, and the complaint in this action was filed August 4, 1894. At what date the use of the water by the corporation upon the outside lands was commenced nowhere appears. Unless an adverse use commenced on or before August 4, 1889, no right was acquired by adverse user. It may be proper to add, in view of another trial, that the mere construction of ditches or the laying of pipes for the purpose of using the water upon other lands outside of the Hines ranch did not constitute such adverse user as would set the statute in motion, since no right could be acquired adversely to Senior otherwise than by the actual use of the water. Besides, whatever right to the water Hines or his successors in interest in the Hines ranch acquired—and as we have seen some right was acquired—was conveyed by the Halls to the corporation. There was, therefore, some water which the corporation had the right to conduct to said outside lands, and the construction of ditches, therefore, could not be notice to Senior of any adverse claim to the water; for, in the absence of the statutory notice, an appropriation of water can only be made by its actual diversion and use. The Halls, in their conveyance to the corporation, reserved all riparian rights attaching to their lands, but did not reserve any right to the water acquired under the Hines appropriation; and all the right they have since had to water upon the Hines ranch was acquired by them as stockholders in the corporation, or as shareholders in the association known as the San Antonio Water Company. Indeed, at the time of their conveyance of the water right to the corporation, no riparian rights existed, the title to said lands being still in the United States; and no subsequent riparian rights could exist affecting either the Hines or the Senior appropriation, such prior accrued rights being expressly reserved in the patents.

Plaintiffs further alleged in their complaint that a certain compromise agreement was made between them and the said corporation, by which Senior was to convey to the corporation whatever rights he had as an appropriator and riparian proprietor, and turn into the flume of the corporation all the water coming into his ditch; the corporation, on its part, to turn out to Senior and his grantees one-tenth of all the water in their flume, or which might thereafter, by development or otherwise, be caused to flow therein, and would also secure to plaintiffs the right of way for pipes or ditches to convey said water to plaintiffs' land across the intervening private lands. And plaintiffs, while asserting their rights as riparian proprietors, and also under Senior's appropriation, prayed for a specific performance of said compromise agreement. A proposition covering the ground above stated was made in a letter written by Mr. Hall, then president of the corporation, to Mr. Senior, but it was qualified so as to express what he was personally willing to do, and would advise the corporation to accept. A connection of the Senior ditch was in fact made in accordance with said proposition, and Hall turned out from the flume of the corporation approximately that proportion of the water for Senior's use. This was about April, 1892, and the water so turned out continued to flow to Senior from that time until the time of the trial. Senior and his co-plaintiffs prepared and executed a deed for the purpose of consummating this compromise, and deeds were prepared at the instance of Hall for the conveyance of said right of way to the plaintiffs, but no deeds were ever delivered, though plaintiffs notified Hall that their deed was executed and ready for delivery. A large part of the evidence in the case was directed to this question, and from which it appeared that the change made, and plaintiffs' use of the water from defendants' flume for two years, was with the knowledge of most, if not all, of the directors and stockholders of the corporation and its successor, the San Antonio Water Company. Mr. Hall testified that the connection was made with the company's flume for experimental purposes, and the matter was not consummated because the corporation would not agree to the compromise, and the court so found. Touching this finding, which is also attacked by appellants, it need only be said that, while much of the evidence seems wholly inconsistent with defendant's claim that it was not agreed to, the conflict in the evidence would not justify us in disturbing the finding, especially in view of the well-settled doctrine that, to justify the specific performance of a contract, the fact of the existence of the contract must clearly appear, and that, where part performance of an oral contract is relied upon, such part performance must be clearly attributable to the contract sought to be enforced. Upon plaintiffs being notified to disconnect their flume from that of the defendants, this action was commenced.

The complaint alleged that the individuals named as defendants are co-partners under the name of the San Antonio Water Company, and the court found that the defendants are the owners of the water rights formerly pertaining to the Ojai Valley Water Company, but not as co-partners; and this finding is also attacked. The question whether the defendants are co-partners, or are a voluntary association, or whether they hold whatever rights they may have as individuals, is immaterial. They claim from the same source, and the water used by them is diverted by the same ditch, and their claims of right, whether several or united in the use of the water, affect the right of the plaintiffs; and they are therefore, even if their rights or claims are asserted as individuals, properly joined as parties defendant in the action to quiet the title of the plaintiffs. Whether the action might have been prosecuted against the association without naming the persons composing it, under section 388, Code Civ. Proc., need not be considered.

The judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELCHER, C.; BRITT, C.

TEMPLE, HENSHAW, HARRISON, and VAN FLEET, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

McFARLAND, J. I dissent. The action was tried without a jury, and the court made very full findings. Judgment went for defendants, from which, and also from an order denying their motion for a new trial, plaintiffs appeal. The action may be called, generally, I suppose, an action to quiet plaintiffs' title to certain waters of a stream called "San Antonio Creek"; but it is exceedingly difficult to tell from the complaint what the particular right is which plaintiffs seek to have declared, or what the particular wrong is of which they complain. It would have been much better if the court had sustained the demurrer to the complaint, at least upon the grounds of ambiguity, uncertainty, and improper joining of causes of action. The complaint could then have been amended so as to have shown clearly what the plaintiffs' asserted right was.

The only exceptions presented by the record are to the insufficiency of the evidence to sustain the various findings, and, of course, these exceptions are subject to the rule that a finding must be sustained when there is substantially conflicting evidence respecting it. The complaint and the prayer show that the main foundation of plaintiffs' asserted rights is a certain contract, alleged to have been made between the plaintiffs and the defendants, touching the right of the plaintiffs to tap and make connections with a certain ditch of defendants, and to take water from it at the point of connection. But the court found that there never was such a contract, and it is sufficient to say that the evidence fully warrants that finding.

It is clear beyond all question that in 1883 one J. D. Hines settled upon certain United States public lands lying on and near said San Antonio creek, and in that year constructed a ditch at a certain point on said creek, and through said ditch diverted the water of said creek to the extent of 78.77 inches, and carried the same to the lands upon which he had settled; that the defendants are the successors in interest of said Hines to said ditch and water right; and that from said 1883 to August 4, 1894, when this suit was commenced, said Hines and his successors in interest, including these defendants, have continuously, notoriously, and adversely to all the world, continued, without interruption, to divert through said ditch onto said lands all the water of said creek when said water was not greater in amount than 78.77 inches. Several years after said 1883, to wit, 1886, one of the plaintiffs, Edwin Senior, also settled upon a tract of public land on and near said creek, and on the 3d of November, 1887, he posted a notice on said creek about one mile below the head of the ditch of defendants above described, stating that he claimed the water there flowing to the extent of 50 inches, and intended to divert the same by a ditch, flume, etc., and in due time constructed a ditch, and in said ditch did divert from the stream at divers times such water as was flowing therein at the point of said diversion for use upon his said land.

The court found that "when the water of the said stream flowing to defendants' dam and ditch, as hereinafter mentioned, was less than 78.77 inches of water, the said plaintiffs did not divert any water from the said stream, except such small quantity as might seep under the defendants' dam, or through the banks of the stream below the dam of defendants." The court also found "that J. D. Hines settled upon certain lands riparian to the said San Antonio creek and above the lands of the plaintiffs in this action in 1883, and all the water flowing in said San Antonio creek, to and upon the lands of said J. D. Hines, in the said year 1883, and ever since, in the ordinary stages of the water, was necessary for uses upon the said lands so occupied by the said J. D. Hines for agricultural and domestic purposes, and all the said water flowing in said stream in ordinary stages, and to the amount of 78.77 inches, was diverted from the said stream by the said J. D. Hines, and used upon the said lands until the death of said J. D. Hines, and ever since." Also, "the court further finds that the said J. D. Hines and his successors in interest have diverted the waters of said Antonio creek to the extent of 78.77 inches, measured under a 4-inch pressure, and have used the same for agricultural and domestic purposes ever since the year 1883, so long and during every portion of each year when that amount of water was flowing therein; and when less than said 78.77 inches, measured under a 4-inch pressure, was flowing in said stream at or above the dam where the same was constructed by the said J. D. Hines in 1883, then the said J. D. Hines and his successors in interest diverted and used the whole of the said water, and such use has been open, notorious, and adverse, and under a claim of right, peaceable, continuous, and uninterrupted, until the commencement of this action."

It is contended by appellants that the foregoing findings are not supported by the evidence. This contention, however, in my opinion, cannot be maintained. As to the actual, continued, notorious diversion of the amount of water above named from 1883 to the commencement of the action in 1894, there is no question or doubt whatever. The whole point of appellants' contention in this matter is that, during the earlier years of Hines' possession of this ditch and water he did not apply the whole of it to a beneficial purpose; that is, that he did not actually use the whole of it in irrigating his land. The point made is that an appropriation of water must be for a beneficial purpose, and that the whole of the water carried by the ditch was not used. No doubt the rule is that there cannot be a valid appropriation of water where the intent is merely to allow it to run to waste. Mr. Pomeroy correctly states the rule as follows: "In order to make a valid appropriation of water upon the public domain, and to obtain an exclusive right to the water thereby, the appropriation must be made with a bona fide present intention of applying the water to some immediate useful or beneficial purpose, or in present bona fide contemplation of a future application of it to such a purpose, by the parties thus appropriating it." In looking through the evidence, it seems to me, that the court was fully justified in finding that the appropriation by Hines was within the principle above announced. The present defendants became owners of the Hines ditch and water right more than five years before the commencement of this suit, and there is no doubt that they, for some years before the commencement of the suit, actually used the whole of this water for a beneficial purpose; and, while there is some conflict in the evidence as to how much water Hines used during the first years of his occupancy of the land, there is sufficient upon that point to justify the finding of the court. Where, as in this case, there has been beyond a doubt a continuous, actual diversion of water through a ditch, and that water has been used generally for a beneficial purpose for a period more than twice as long as the period of limitation, it would be a dangerous thing, in my opinion, to upset a right thus so long exercised upon slight evidence that the whole of the water was not continuously used. Title to valuable property should not thus be hazarded. And where, in such a case, a trial court or jury has found that the appropriation was for a beneficial purpose, we would not be warranted in overturning such finding unless the evidence supporting it was "slight" in an extreme sense. In the present case I see no reason for disturbing the finding.

There are no other features of the case necessary to be specially noticed, and in my judgment the conclusions of the court below should not be disturbed.

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115 Cal. 567

## PEOPLE v. KLOSS. (Cr. 128.)

(Supreme Court of California. Jan. 14, 1897.)

HOMICIDE — INSANITY AND INTOXICATION AS DEFENSES — INSTRUCTIONS — NEW TRIAL — CUMULATIVE EVIDENCE — DILIGENCE — IMPEACHING VERDICT.

1. A requested instruction that, if the jury believed defendant, by reason of epilepsy, or long-continued use of intoxicating liquors, was in such a condition of mind, etc., they should acquit, is objectionable as an instruction in relation to insanity, because of the confusion of intoxication and insanity.

2. Evidence that defendant was frequently under the influence of liquor, and, when so affected, was abusive and quarrelsome, and that he "had been drinking" on the day previous to the morning on which, shortly after midnight, he killed deceased, does not call for an instruction on intoxication at the time of the killing.

3. Testimony of a physician who attended defendant at the time of an injury, that, in his opinion, it was the kind of an injury which would produce epilepsy, is but cumulative evidence, not calling for a new trial; the physicians who testified as experts having had all the data that he had, and more, and defendant's expert having testified to the same thing.

4. An affidavit for new trial in a homicide case on newly-discovered evidence is objectionable in not stating why witness could not have been discovered in the six months between the homicide and trial, or the manner in which he was discovered.

5. To caution the jury to examine with care the defense of insanity, lest a counterfeit of the infirmity furnish immunity from punishment, is not error.

6. Where the intent in question is the premeditated and deliberate intent to take life, an instruction as to consideration of intoxication, "in determining the felonious motive or intent with which he committed the act," is not erroneous because of the use of the word "felonious."

7. A juror cannot impeach a verdict by swearing that he did not understand it, or that he was too timid and confused to express his dissent at the time when he ought to have dissented; it having been read by the foreman and by the clerk on the return of the jury into court, and there having been no dissent when the jury were asked if it was their verdict.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Frank Cooney Kloss, alias Frank Kloss, was convicted of murder, and appeals. Affirmed.

Thornton Woodbury and Henry L. Wilson, for appellant. W. F. Fitzgerald, Atty. Gen., and Charles H. Jackson, Deputy, for the People.

**BEATTY, C. J.** The defendant appeals from a judgment inflicting the death penalty for murder, and from an order denying his motion for a new trial.

Numerous errors are assigned upon the rulings of the trial judge, and it is also contended that the evidence is insufficient to sustain the verdict. The evidence for the prosecution was, in substance: "That on the morning of April 18, 1895, shortly after midnight, the defendant entered a barroom at the corner of Hayes and Laguna streets, in San Francisco, where were present the barkeeper, the deceased, and a party named David Middleton. The deceased and Middleton were asleep. Defendant aroused Middleton, and told him to wake up the deceased, which he refused to do. Defendant then said, 'I will wake him up,' and struck deceased two blows with a knife in the neck. When asked what he had done, defendant said: 'I have woke him up. I have fixed him. I have killed the son of a bitch.' A police whistle being blown, he again walked to the deceased, and struck an additional blow, remarking: 'Dave, I have killed him. I have fixed the son of a bitch,'—showing a knife, and throwing it on the floor. Subsequently, on being arrested, he admitted the stabbing, and, when asked why he had done it, replied that he would explain it at the proper time. It was also shown that about 9 o'clock on the evening of the 17th defendant entered the same saloon, and inquired for the deceased, calling him a son of a bitch, and saying, in substance, he was not prepared for him at 6 o'clock, but he was then. From the effect of the wound the deceased died almost immediately." The evidence was amply sufficient to justify the inference that the killing was unlawful, premeditated, and deliberate,—or, in other words, that it was done with express malice; and the conflicting evidence offered by the defendant tending to prove habits of drunkenness and insanity does not detract from the legal sufficiency of the evidence for the people.

The following instructions were requested by defendant, and refused by the court: "(2) That if you believe this defendant, from a severe blow, or from any other cause, was an epileptic for some five years prior to April 18, 1895, and was also addicted to overindulgence in intoxicating drink during the same period, and for these reasons was in such a mental condition as to prevent him from distinguishing between right and wrong at the commission of the act, then it is your duty to acquit him. (3) That if you believe that the defendant was intoxicated at the time he committed this act, but before he became intoxicated he had not premeditated the killing, then it is your duty to take into consideration the extent of his intoxication in determining whether or not it was of such a degree that he could not at the time premeditate the act. (4) If you believe the defendant, by reason of epilepsy, or long-continued use of intoxicating liquors, was in such a condition of mind at the time he committed the act, even though that condition was temporary, that he could not distinguish right from wrong, you must acquit him." The court did not err in refusing these instructions. Those numbered 2 and 4 are objectionable as instructions in relation to the plea of insanity, on account of the manner in which they confuse intoxication and insanity; and, even if they had been less objectionable in this respect, their refusal would have been harmless, for the reason that the whole law of insanity, as applicable to the case, was fully and clearly given in the charge of the court. The instruction numbered 3 is a sufficiently clear and correct statement of the legal proposition applicable to a case in which it appears that the defendant was intoxicated at the very time of the killing. But in this case that material fact was not shown. It appeared from the evidence that the defendant was addicted to the use of intoxicating liquor, was frequently under its influence, and when so affected was abusive and quarrelsome. "It also appeared that he had been drinking on April 17th." This is absolutely all that is shown by the bill of exceptions in relation to intoxication at the time of the killing, and, in our opinion, is wholly insufficient to establish the fact. It does not show how much or how often he had been drinking on the 17th, or at what hour, or that he had at any time reached the stage of intoxication; and no doubt an habitual drinker might have partaken more than once on the 17th, and been perfectly sober on the 18th. In the absence of any substantial evidence of intoxication at the time of the killing, the superior court was justified in refusing this instruction.

One of the grounds of the motion for a new trial was newly-discovered evidence touching the alleged insanity of the defendant. Aside from the opinions of the experts (which were in direct conflict), the substance of all the evidence adduced at the trial in relation to defendant's insanity is stated as follows in the bill of exceptions: "The defense then introduced evidence showing that defendant was addicted to the use of intoxicating liquor, and was frequently under its influence, and when so affected was ugly and abusive. It also appeared that on April 17th he had been drinking. This evidence was introduced at the morning session of November 13th. There was no testimony of delirium, resulting from liquor, by those testifying in the morning. In the afternoon of November 13th a brother of the defendant took the stand, and testified to the drinking of defendant, to his injury about the head, and to his having had frequent fits; none that he knew of away from home; these fits having some of the symptoms of epilepsy. No one but the brother testified to these fits. There was other testimony of his drinking, and of his being ugly and abusive when under its influence, and on one occasion that he threatened suicide in the presence of another brother." The newly-discovered evidence relied upon in support of the motion is all embodied in the following affidavit: "Now comes E. Robbins, M. D., the affiant herein, and, being duly sworn, on oath deposes and says as follows, to wit: One evening, about eight o'clock, in the latter part of November, 1889, I was called to the Orpheum to see this defendant, who was on the stage, who, they said, they thought was dying. On personal examination I found that he was suffering from concussion of the brain and laceration of the cuticle of the forehead. I found a gash about six inches in length, reaching from the table of the skull. He had a very profuse hemorrhage from the same. I then commenced to wash away the blood, stop the hemorrhage; and, on making a still further examination, I found that the table of the skull was slightly fractured, but not sufficient to trepan the same. I used antiseptics, cleansing the part thoroughly, put in a drainage tube, and then put in six stitches, saturated the part with iodoform, put on an adhesive bandage, and bandaged the same up in the regular bandages, and still the patient was unconscious. By this time the theater had closed. I then asked Mr. Walters if he had a room in the building where the man could lay, and he said he had one. I then requested the employés to take the young man to the room. I then wished to know how the accident happened. They said he was winding up the scenery with the windlass, and that the iron handle slipped out of his hand, and ran back, and struck him on the head. I then said, 'Here is a case that we shall see, when he comes to consciousness, whether he is sane or insane,' for I quite expected to find him permanently insane when he returned to consciousness. Two hours had elapsed when he came to himself and commenced muttering incoherently, talking about things entirely foreign to his business. He wanted to tear off the bandages, and it was with difficulty that we kept his hands from his head. He then said he suffered horribly, and didn't know what had happened. He finally came to consciousness, and, with his friends around the bed, I told him then that if he should ever drink to excess it would affect his brain, and he would, in all probability, kill some person while suffering from emotional insanity produced by liquor. In five days I took out the stitches, and in two weeks the wound was perfectly healed, at which time his conversation was, to a certain extent, rambling, and his sentences disconnected. From my knowledge of the character of the blow, and my examination of the wound where the skull was slightly fractured, it is my opinion that this is the kind of a blow and the sort of a fracture which would produce epilepsy. [Signed] Edwin Robbins." It is conceded by counsel that this evidence was not new, and that it was cumulative as to the occurrence of the blows and injuries to the defendant's head, but as to the pathological results—the resulting and permanent injury—he contends that it was not cumulative. But we think it was, all the facts in regard to the accident being known to other witnesses who testified at the trial, and who presumably stated them to the jury. The physicians who testified as experts had all the data for an opinion that Dr. Robbins had, besides others (the epileptic fits, habits of intoxication, etc.) that he did not have; and defendant's expert testified to the same opinion. The evidence of Dr. Robbins would, therefore, have been merely cumulative, and for this reason alone the superior court was justified in denying the motion, upon the ground under consideration. And, besides, the affidavits are so vague and general on the subject of diligence that we could not have pronounced it an abuse of discretion to have denied the motion on that ground. For aught that appears, Dr. Robbins was in San Francisco from the time of the accident to the date of the trial. The manner in which he was finally discovered is not disclosed, and no explanation given of the reason he could not be discovered during the six months which elapsed between the homicide and the trial. Considering the just disfavor and suspicion with which this ground of the motion is regarded, we think the affidavits as to diligence should have been more explicit than they were.

In the course of his charge to the jury the trial judge used the following language: "It is my duty to say to you, gentlemen, that against the defense of insanity the law entertains no prejudice. On the contrary, if it be established by a preponderance of evidence, the law accords to the accused the full benefit of it, and your duty will be to acquit him of all criminal responsibility by reason of his insanity. It may be true that this defense is sometimes resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. It may have been abused and used in cases of unquestionable guilt, and may have been an excuse for jurors acquitting when their own and the public sympathy has been with the accused party, and justified and excused, according to public sentiment, but not according to law. While, therefore, all this may be true, it is a defense to be weighed fairly, fully, and justly, and, when proven in the manner I shall state and explain to you, must recommend itself to the sense of humanity and the justice of the jury. You are to examine it with care and caution, however, lest an ingenious counterfeit of this mental infirmity should furnish immunity from and perhaps defeat proper and just punishment." Appellant contends that in this part of its charge the court invaded the province of the jury by instructing as to matters of fact. This criticism is, we think, entirely unfounded, and we may add that a similar instruction was approved by this court in People v. Pico, 62 Cal. 54, and in People v. Larrabee (Cal.) 46 Pac. 922.

The trial judge also gave the following as a part of his charge: "Any act committed by a person while in a state of voluntary intoxication is not less criminal by reason of his having been in such a condition; but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular offense or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the felonious motive or intent with which he committed the act." This is a literal transcript of section 22 of the Penal Code, with the exception of the word "felonious," which is interpolated near the end. The defendant contends that the addition of this word constitutes grave error. But we cannot understand in what respect. The only intent in question in this case was the premeditated and deliberate intent to take life; and certainly that was a felonious intent, if it existed. If the objection means that the court instructed the jury that there was in fact any such intent on the part of the defendant, we can only say that the charge will not bear that construction.

Another ground of the motion for a new trial was misconduct on the part of the jury. In support of this allegation the defendant offered to file the following affidavit: "Now comes Isaac Leipsic, juror in the above-entitled cause, which was tried November —, 1895, and, being duly sworn, on oath deposes and says: That the verdict reached and rendered by the jury in the above case, to wit, 'Guilty of murder in the first degree,' was not the verdict which the said Leipsic agreed to. That the said Leipsic was not only misled by the statements of G. T. Ruddick, the foreman of said jury, to the effect that the above verdict would not entail the death penalty of necessity, but also was improperly coerced, confused, and bewildered by the importunity of said Ruddick, and, in effect, caused to bring in a verdict which he did not understand, and did not mean to bring in, and never agreed to. That much hubbub and confusion took place in the jury room at the time of voting; and that, when the jury had finally agreed on a verdict of guilty, this deponent expressly stipulated that the penalty of life imprisonment be added to said verdict. That said foreman, G. T. Ruddick, against the wishes of said deponent, read out a verdict of guilty of murder in the first degree, without adding on the penalty of life imprisonment. And that, when said verdict was read by said foreman, Ruddick, this deponent was so confused he did not at that time realize the situation he was placed in, and through a sense of embarrassment and timidity he at that time refrained from speaking out against said verdict in open court. That when said verdict was read and said jury was polled this deponent did not hear the question asked him if said verdict was his verdict, and he remained silent. That at all times after the jury had retired to the jury room this deponent asserted his refusal to bring in a verdict which would hang this defendant. And that the foreman of said jury, well knowing this, so manipulated the ignorance and confusion of this deponent, and so hastily brought the jury into the box, that this deponent was brought to seemingly agree to a verdict he did not, as a matter of fact, agree to at all. [Signed] Isaac Leipsic." The court refused to allow this affidavit to be filed, upon the ground that a juror could not thus impeach his own verdict. This action by the court was entirely proper. The jury, before retiring to consider their verdict, had been fully and clearly instructed as to the various forms of verdict they might render, and as to the meaning and legal effect of such verdicts respectively. When they came into court, the verdict was read by the foreman, and recorded by the clerk, and then again read to the jury, who were asked if that was their verdict. No juror dissented, and the polling of the jury was waived. A juror cannot be allowed to impeach a verdict, to which he has thus assented, by swearing that he did not understand it, or that he was too timid and confused to express his dissent at the time when he ought to have dissented. Polhemus v. Heiman, 50 Cal. 441; People v. Azoff, 105 Cal. 632, 39 Pac. 59, and cases cited.

No error appearing in the record, the judgment and order appealed from are affirmed, and the superior court is directed to fix a day for carrying its judgment into effect.

We concur: VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

5 Cal. Unrep. 575

## MALONE v. JOHNSON. (S. F. 577.)

(Supreme Court of California. Jan. 23, 1897.)

PLEADINGS — AMENDMENT — CHANGING CAUSE OF ACTION—PLEDGE—VALIDITY.

1. A complaint alleged that on April 1, 1891, defendant gave his note to plaintiff, and to secure payment thereof delivered a stock certificate which he had assigned to plaintiff on March 31, 1887. The prayer was for sale of the stock to apply on the over-due note, and for a personal judgment for any deficiency. An amended complaint alleged that on March 31, 1887, defendant gave his note to plaintiff, and delivered said certificate as security, and that on April 1, 1891, a new note was given in place of the old one, and the certificate redelivered to plaintiff as security for the new note. The prayer was the same, except that plaintiff waived judgment for deficiency. *Held*, that the amendment did not set up a different cause of action.

2. A pledge of corporate stock by indorsement and delivery of the certificate is valid as between the parties.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by John Malone against James K. Johnson. A demurrer to the amended complaint was sustained, and plaintiff appeals. Reversed.

L. F. Cooper and Sawyer & Burnett, for appellant. A. J. Bledsoe, for respondent.

BRITT, C. In this cause judgment final for defendant was rendered on demurrer to an amended complaint. To support the judgment on appeal respondent relies on the plea of the statute of limitations (section 337, Code Civ. Proc.) contained in the demurrer. March 30, 1896, plaintiff filed his original complaint, alleging that on April 1, 1891, defendant executed his promissory note in plaintiff's favor for the sum of $2,405, payable 12 months after date, and to secure such payment delivered to plaintiff a certificate of shares of stock in a certain corporation, which certificate had been previously, to wit, on March 31, 1887, assigned to plaintiff by defendant; and that the note remains unpaid. The prayer was for sale of the stock, application of the proceeds to payment of the debt, personal judgment for any deficiency, etc. In the amended complaint filed April 20, 1896, it was shown that on March 31, 1887, defendant made his promissory note to plaintiff for the sum of $1,615.36, payable in one year, and as security for payment thereof then delivered to plaintiff the aforesaid stock certificate duly indorsed by defendant; that at the same time (March 31, 1887) an instrument in writing was executed by the parties stating the terms of the hypothecation of the stock; that such note was not paid, and on April 1, 1891, the principal and interest thereof amounted to $2,390.73. That defendant then owed plaintiff a further sum of $14.27, and in consideration thereof, and of the surrender of the overdue note, he executed a new note for the aggregate of said debts, $2,405; "that the said defendant, James K. Johnson, to secure payment of said last-mentioned promissory note, * * * did, on said 1st day of April, 1891, redeliver to said plaintiff, John Malone, said certificate of stock, * * * and did then and there agree with plaintiff that he, plaintiff, should hold the same in the same manner and effect to secure the payment of the last-described promissory note of $2,405, as he had held the same to secure payment of the first-described promissory note of $1,615.36." Nonpayment of the new note was then stated, and the prayer was similar to that of the original complaint, except that plaintiff waived judgment for deficiency.

Respondent argues that the amended complaint, filed more than four years after maturity of the note of April 1, 1891, alleged a cause of action different from that set up in the original pleading, and hence does not have relation to the time of filing such original so as to save the bar of the statute. The pleader seems to have deemed it prudent to state in his amended complaint the antecedents of the debt evidenced by the new note and the transaction by which it was secured. This was not an attempt to state a different cause of action. The contract of April 1, 1891, which superseded that of March 31, 1887, was the ground of the claim made against defendant in both complaints. Anderson v. Mayers, 50 Cal. 525. It is further claimed that an extension of the lien on the stock could only be effected by another written agreement for that purpose; that none is alleged, and hence, as we understand the inference which respondent seeks to enforce, the right to proceed against the security is lost by lapse of time. But it appears that the certificate, already indorsed by defendant, was redelivered to plaintiff with the new note as security for its payment. As between the parties, nothing more was essential to a valid pledge of the stock. A second manual delivery was unnecessary indeed to perpetuate the lien if plaintiff still held possession of the certificate at the time the new note was executed. Bank v. Ginty, 108 Cal. 148, 153, 41 Pac. 38; Brown v. Warren, 43 N. H. 430. See Spreckels v. Bank (Cal.) 45 Pac. 329, 331. The judgment should be reversed, and the court below directed to overrule the demurrer to the amended complaint.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below is directed to overrule the demurrer to the amended complaint.

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5 Cal. Unrep. 578

## MEEKER v. SHUSTER et al. (S. F. 374.)

(Supreme Court of California. Jan. 23, 1897.)

EJECTMENT—MORTGAGE IN FORM A DEED.

A grantee of a deed absolute on its face cannot maintain ejectment thereon, where his grantor merely held the title as security for a debt which the grantee paid, and at the same time executed a bond to the original mortgagor in which he agreed to convey if the amount expended by him was repaid, with interest, by a specified time, since the instrument was a mortgage.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Ejectment by M. C. Meeker against Sarah E. Shuster and others. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Thos. Rutledge, for appellant. C. S. Farquar and T. J. Butts, for respondents.

HAYNES, C. This is an action of ejectment brought by the plaintiff to recover possession of certain lands in Sonoma county of which, it is alleged, he is the owner in fee and entitled to possession. Judgment was entered for the defendants upon the findings, and plaintiff appeals therefrom and from an order denying his motion for a new trial.

John Shuster, the husband of Sarah E., and father of the other defendants (James E. and Jacob F. Shuster), died seised of the demanded premises in July, 1883. On June 1, 1879, said John Shuster executed to Aaron Barnes his promissory note for $5,482.89, with interest, and a mortgage upon said premises to secure the same. On September 29, 1883, the claim of said Barnes upon said note and mortgage was allowed by the administrator of the estate of said John Shuster in the sum of $7,282.40. Said lands were inventoried at $8,000, and the personal property at $961.50, and a sale of said lands was ordered by the court to pay the debts of the estate. The defendants, the widow and two of the sons, desired to purchase the land, and applied to Barnes, the mortgagee, for assistance, and he consented to aid them in making the purchase. By arrangement with her said sons, the widow bid in the property at $11,000, each of the defendants putting in the amount of their several interests, and receipted to the administrator therefor, and Barnes also receipted for the amount of his mortgage claim, and made some other advances; and the administrator, with the assent of the sons who were interested in the purchase, conveyed the land to the widow, who, with her said sons, was then, and ever since has been, in possession. Said conveyance was made December 3, 1883, and on the same day the widow conveyed the same land to said Barnes by a deed absolute on its face, and at the same time Barnes executed to the defendants a bond, whereby he agreed to convey to them the same lands on or before December 3, 1893, upon payment of $11,000, with interest at the rate of 9 per centum per annum, the taxes on said premises to be paid equally by the first and second parties until one-half of the principal sum and interest should be paid, and after that the whole of the taxes were to be paid by the widow and her sons. On October 5, 1892, pursuant to an arrangement between the plaintiff and the defendants in this action,—the character and purpose of which is the principal question presented on this appeal,—Meeker paid to Barnes the amount then due him from the defendants, the said bond executed by Barnes was canceled, and Barnes executed and delivered to Meeker a grant, bargain, and sale deed for the said premises, and Meeker executed to the defendants a bond by which he agreed to convey the same premises to the defendants, upon payment, on or before October 5, 1902, of the sum of $8,440, Meeker to pay all taxes, and the defendants to pay interest at the rate of 8 per centum per annum, payable semiannually, and if not so paid to be compounded. It was further agreed that Meeker would "accept payments in part or in full on this bond at any time before maturity, and to make deed when the full amount is paid." This action was commenced May 28, 1894, and was preceded by a demand that defendants remove from the premises and deliver possession to plaintiff's agent. The evidence shows that defendants were in arrears in the payment of interest, but no reference is made to that fact, either in the demand for possession, or in the complaint, which is in the usual form in ejectment, alleging that the plaintiff is seised in fee and entitled to possession. The complaint was not verified, and the answer is a general denial.

The court found, from evidence entirely satisfactory to us, that the transaction between Barnes and the defendants was a loan, for which the deed was taken as a security; that the amount mentioned in the bond given by the plaintiff was the amount then due from the defendants to Barnes; that said sum was loaned by the plaintiff to the defendants to enable them to cancel their indebtedness to Barnes; that plaintiff, at the time said instrument was executed by Barnes to him, and which purported to be an absolute conveyance, knew the character of the interest Barnes had in said land; that the instrument executed by Barnes to him was not intended to pass the title to him; and that plaintiff is not the owner or entitled to the possession of the demanded premises. The findings are very full and minute, several of them being of probative facts merely, but the ultimate facts are also fully found. Many of the specifications of alleged insufficiency of the evidence go to the findings of probative facts relating to the settlement of the estate of John Shuster, deceased, the amounts due Barnes, and other facts of like character; but, concerning these, it need only be said that the amount due Barnes from the defendants was mutually agreed upon and paid, and that sum constitutes the basis of the transaction between plaintiff and defendants which is involved in this action, and the sole question is whether the plaintiff bought and paid for the land, and acquired the title thereto, and then sold it to defendants, or whether the amount he paid Barnes was a loan to defendants, and the deed and bond in effect a mortgage to secure it.

That the deed to Barnes was given and received as a security for money loaned is beyond question. His advancements, including the amount due on the mortgage given him by John Shuster in his lifetime, were for the express purpose of enabling the defendants to purchase the land in question. He testified that he took the deed, instead of a mortgage, for the reason that he supposed the taxes would be less upon the land than upon the mortgage, and that he would be saved the expense of a foreclosure in case he was not repaid; and, in reply to the following question put by the court, namely, "When you entered into this transaction with the Shusters, did you think you were buying the land, or did you think you were loaning money?" he said, "Well, I thought I was loaning money." Touching the transaction with the plaintiff, Mrs. Shuster and her son Jacob testified to a conversation with the plaintiff some five or six months prior to the execution of the deed from Barnes, and the plaintiff, in rebuttal, testified that in that conversation Mrs. Shuster asked him to buy the property, and he replied that he "didn't want the property"; that Mrs. Shuster wanted to give a mortgage, and in reply to that proposition we quote the following from his testimony: "I told her I didn't want to take a mortgage; that if they failed to pay the interest I had to foreclose; that it was more than the property was worth. Then Mrs. Shuster said she would take the deed from Mr. Barnes, and deed to me, and I would give her a bond to purchase the property. I told them that was nothing but a mortgage, or the same thing as a mortgage." The witness then proceeded to explain the matter of taxes, and continued as follows: "I then explained to all present that, if they were to take the deed from Mr. Barnes, the title would be vested in them. Then they would deed to me, and I would give them a bond. The supreme court had said that it was a mortgage. I then asked the question how much money they required. They talked the matter over pro and con, and they thought they needed about $8,440." The plaintiff further testified: "The papers were signed, and we said we would go to the bank, and I would pay Mr. Barnes. We then all went to the recorder's office, and the Shusters and Barnes canceled the bond. I then filed my deed for record and the Shusters filed the bond for record. As we came out Jacob Shuster made the statement that Hitchcock had said he would give them $12,000 for the place any day. I remarked: 'Well, you ought to get $13,000 or $14,000 for the property.' I did not say they ought to sell for less than that."

From the testimony of the plaintiff it is perfectly clear that the transaction between him and the defendants was a loan upon security, and not a purchase by the plaintiff. He had refused to buy. The money paid by plaintiff was the precise amount due from defendants to Barnes. He informed defendants that the deed and bond was a mortgage, and had so been held by the supreme court, the difference being that the taxes would be less upon the land than upon the mortgage, and that a foreclosure would not be necessary. As to the facts involved, and the purpose of the transaction, there can be no question. That plaintiff was mistaken as to the legal effect does not change the rights of the parties. That a deed, absolute upon its face, when given as security for a debt, or for money loaned, is a mortgage, and not a transfer of the legal title, is too well settled in this state to require citation of authorities. It was a loan of $8,440 payable in 10 years, with the privilege of payment of the whole or any part of it, at any time before maturity, with interest at the rate specified, to be paid semiannually, or to be compounded. But, if the transaction amounted to a sale to the plaintiff and a resale to the defendants, this action could not be sustained, since there was no provision in the bond that it should be forfeited for the nonpayment of interest, and no part of the purchase money was due.

We are referred by appellant to Mahoney v. Bostwick, 96 Cal. 58, 30 Pac. 1020, Penney v. Simmons, 99 Cal. 382, 33 Pac. 1121, and many other cases, to the proposition that "the testimony must be so clear and convincing that both parties intended it as a mortgage as to leave in the mind of the trial court no doubt as to the intention of the parties; otherwise, the writing should prevail." In the first of the cases above cited it was said: "But whether the evidence is of such character and strength as to produce conviction is a question for the trial court to determine." And this is repeated in almost the same words in the second of said cases. But in this case, if we were required to be satisfied, from a review of the evidence, that the court below rightly determined the character of the transaction before we could affirm the judgment, we could not hesitate to affirm it. Section 2924 of the Civil Code provides: "Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge." See, also, Montgomery v. Spect, 55 Cal. 352. If the transfer created a trust, as contended by appellant, it would not aid him, since in that case the terms of the trust were evidenced by the bond, and the trustee of the title could not claim the possession until the bond should be forfeited or canceled by the defendants. It was not a trust, however, in the sense of the statute, but a mortgage. The findings are justified by the evidence, and the conclusions of law were correctly drawn therefrom. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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115 Cal. 584

## SMITH et al. v. SAN FRANCISCO & N. P. RY. CO. et al. (S. F. 568, 599.)

(Supreme Court of California. Jan. 15, 1897.)

CORPORATIONS—VOTING STOCK—AGREEMENT—VALIDITY.

1. Under Civ. Code, § 307, providing that every stockholder shall have the right to vote the number of shares standing in his name, "as provided in section 312"; and section 312, providing that, to entitle a person to vote, he must be "a bona fide stockholder, having stock in his own name on the stock books at least ten days prior to the election,"—one is not entitled to vote stock in which he has never had any interest, but which is registered in his name for the purpose of enabling the real owner to avoid statutory liabilities; he not being a bona fide stockholder. Beatty, C. J., dissenting.

2. A written agreement between purchasers of stock in a corporation that they will for five years "retain the power to vote the shares in one body, and that the vote which shall be cast by said shares shall be determined by ballot between them or their survivors," is a proxy, authorizing the vote of all the stock to be cast in accordance with the determination of the majority of the parties thereto.

3. It is sufficient consideration for an agreement between purchasers of stock to have it voted in one block for five years, the vote to be determined by ballot between the parties, that in their agreement among themselves to purchase they had stipulated for such a voting agreement; and it is immaterial that the voting agreement was not executed till after their bid for the stock was made, it having been executed before they had completed the purchase and become the owners by paying the purchase money; and it is likewise immaterial that a certificate for part of the stock was issued to each party.

4. An agreement between purchasers of stock in a corporation, that "to keep control of the corporation from passing to persons other than themselves," the shares, for five years, be voted in one block, the vote to be determined by ballot between them, does not contravene public policy. Beatty, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Smith and others against the San Francisco & North Pacific Railway Company and others. Judgment for plaintiffs. Defendants appeal. Reversed.

W. S. Goodfellow, Jesse W. Lilienthal, and Garrett McEnerney, for appellants. Page, McCutchen & Eells, for respondents.

HARRISON, J. At the election for directors of the San Francisco & North Pacific Railway Company, which was had at the annual meeting of the stockholders held February 25, 1896, the votes offered by Peter Gundecker, G. E. Wagner, and Sidney V. Smith, in whose names certain shares of stock stood on the books of the corporation, were rejected, and at the close of the election the chairman of the meeting announced that Antoine Borel, A. W. Foster, Andrew Markham, P. N. Lilienthal, George A. Newhall, James B. Stetson, and John L. Howard had been duly elected directors of said corporation for the year then next ensuing. The votes of Gundecker and Wagner were rejected upon the ground that they were not bona fide stockholders in the corporation, and the vote of Smith was rejected upon the ground that by virtue of a certain agreement between him and two other stockholders—Foster and Markham—the stock of the three had been pooled for the term of five years, to be voted as a unit, and was cast in pursuance of that agreement. If the votes thus rejected had been received, the election would have resulted in the choice of Smith as one of the directors instead of Lilienthal. The present action was brought under section 315 of the Civil Code, for the purpose of having it declared that Smith instead of Lilienthal was elected a director at said election. The superior court found that Gundecker and Wagner were bona fide stockholders, and that their vote should have been received, and that the agreement by Smith with the other stockholders did not preclude him from the right to vote the stock standing in his own name as he might choose, and that the vote by the other stockholders for his stock was unauthorized and his own vote should have been received. Judgment was thereupon rendered that Lilienthal had not been chosen as a director, and was not entitled to exercise the office, and that at the said election Smith was chosen one of the directors and was entitled to be so recognized. A motion for a new trial on behalf of the defendants was denied, and from both the judgment and the order denying the new trial appeals have been taken.

1. The Gundecker and Wagner Stock. At the time of the election, and for more than 10 days prior thereto, there were standing upon the books of the corporation 4,200 shares of stock in the name of Peter Gundecker and 4,485 shares in the name of G. E. Wagner, and they were represented at the election by Antoine Borel, to whom they had given their proxy. When their votes were tendered by Borel, a protest was made against receiving them, upon the ground that neither of them was or had been a bona fide stockholder of the corporation, and thereupon the protest was sustained, and the votes rejected. In support of the action of the chairman in rejecting these votes it is alleged in the answer herein that neither Gundecker nor Wagner ever held or owned any shares of stock of the corporation, or was ever a bona fide stockholder therein; that the true owner of said shares was the firm of Ladenburg, Thalman & Co., of New York. At the hearing before the court an affidavit for a continuance was presented for the purpose of enabling the defendants to take the depositions of certain witnesses in New York, including Gundecker and Wagner, to establish this issue, and it was admitted by the plaintiffs that if the witnesses were present they would testify to the matters set forth in the affidavit, reserving, however, their objections to its materiality. The matters thus set forth in the affidavit are that at the time Gundecker and Wagner gave their proxies to Borel they were neither of them holders or owners of any stock in the defendant railway company, and had never held or owned any stock in said company; and that at the time the shares were transferred to their names they belonged to the firm of Ladenburg, Thalman & Co., who caused said shares to be so transferred to the names of Gundecker and Wagner as dummies, so as to avoid for said Ladenburg, Thalman & Co. the liability of a stockholder for the debts of said defendant railroad company. When the defendants offered this admission of the plaintiffs in evidence, the court excluded it upon the objection of the plaintiffs that it was immaterial. For the purpose of determining the present appeal, it must be assumed that, if the witnesses had testified in accordance with the admission of the plaintiffs, the court would have found the facts in accordance with their testimony, so that the real question to be determined is whether, if such were the facts, the votes of Gundecker and Wagner should have been received, and this depends upon a proper construction of the provision in section 312 of the Civil Code, requiring every voter at an election for directors in a corporation to be "a bona fide stockholder having stock in his own name on the stock books of the corporation, at least ten days prior to the election."

The act in relation to corporations passed at the first session of the legislature of this state (St. 1850, p. 347) made different provisions for different kinds of corporations, and also different requirements on the part of the stockholders for the election of directors. The provision generally made in this respect was that the directors should be elected by the stockholders, and that "each stockholder shall be entitled to as many votes as he owns shares of stock in the company." Sections 35, 105, 124, 187. The chapter relating to railroad companies provided (section 59) that the stockholder must have owned his stock for 30 days next preceding the election in order to entitle him to vote; and that "no stockholder shall vote at any such election upon any stock except such as he shall have owned for such thirty days"; and the chapter relating to bridge companies provided (section 159) that the stockholder could vote only upon such stock as he had "owned absolutely, or as executor, administrator or guardian, for thirty days previous to such election." The act authorizing the incorporation of mining and manufacturing companies, passed in 1853 (St. 1853, p. 87), provided (section 5) that "each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock"; and further provided (section 11): "Whenever any stock is held by any person as executor, administrator, guardian or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder." The statute relating to the incorporation of railroad companies was revised and re-enacted in 1861 (St. 1861, p. 607), and section 5 of that act provided that directors should be elected "by a majority of the votes of the stockholders being present in person or by written proxy; and every stockholder being so present, either in person or by proxy, at any election for directors shall be entitled to give one vote for every share of stock which he may have owned for ten days next preceding such election; but no stockholder shall vote at any such election upon any stock, except such as he shall have owned for ten days." In none of these statutes was it provided that the stock owned by the stockholder should stand in his name upon the books of the corporation.

At the adoption of the Civil Code in 1872 the legislature sought to bring into a single system, applicable to all corporations, so far as practicable, the entire method of corporate organization and management, and, having provided that directors should be chosen annually by the stockholders, provided in section 307 that every stockholder should have the right to vote in person or by proxy the number of shares standing in his name, "as provided in section 312." It is provided in section 312 that to entitle a person to vote he must be "a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election." It is thus made a requisite of the right to vote that the voter shall not only be registered as a stockholder, but that he shall have been so registered for at least 10 days prior to the election, and that he shall also be a bona fide stockholder at the time of the election. The provision in section 313 that the shares of stock of an estate of a minor or insane person may be "represented"—that is, voted—by his guardian, and of a deceased person by his executor or administrator, indicates that these officers would be entitled to vote the stock without having it transferred to their own name. See In re Election of Directors of Cape May & Delaware Bay Nav. Co., 51 N. J. Law, 78, 16 Atl. 191. These provisions are substantially those previously existing in reference to railroad corporations, although there is added thereto the requirement that the stock must stand in the name of the voter; and, while the requirement of section 159 of the act of 1850, that the stockholder must have owned the stock "absolutely" in order to entitle him to vote, is not preserved, it is now required that in all cases he must, at the time of the election, be a bona fide stockholder. The legislature having included this as a requirement, it must be assumed that something was intended thereby in addition to what was previously made a qualification for voting, and it is the duty of courts to ascertain this intention, and construe the words accordingly. Under the previous statutory provisions in this state it had been decided in People v. Hill, 16 Cal. 113, that the surviving partner of one in whose name stock belonging to the partnership was registered upon the books of the corporation had the right to represent and vote the stock at an election of officers, and that the administrator of the partner in whose name the stock was registered did not have such right; saying that "the real owner of stock should be entitled to represent it at the meetings of the corporation, and the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." In that decision the court pointed out the distinction between the statutes of this state and of those states in which the transfer books were made the exclusive evidence of the right to vote; and it is reasonable to suppose that the provision that the voter must have stock standing in his own name was made in view of that decision.

As early as 1825 the legislature of New York provided by statute that the transfer books of an incorporated company should be the evidence of who were the stockholders of the company, and should determine the right of any claimant to vote at an election. This statute has remained in force in that state, and has been followed in other states by similar statutes, or, in the absence of any statute on the subject, by accepting the decisions thereunder as authority for determining the same question. See Downing v. Potts, 23 N. J. Law, 75; Hoppin v.

Buffum, 9 R. I. 513; State v. Ferris, 42 Conn. 560. Under this statute it was held that a registered stockholder had the right to vote at an election of officers, even though he held the stock as trustee for others without any beneficial interest therein (Ex parte Barker, 6 Wend. 509), or though his stock had been hypothecated for its full value (Ex parte Willcocks, 7 Cow. 402); and when the stock belonging to a bank was registered in the name of its cashier, who held it merely in trust, and who had been superseded by another in that office, it was held that the vote of the registered stockholder should be received in preference to the vote tendered by his successor (Ex parte Mohawk & H. R. Co., 19 Wend. 135). It was, however, held in Ex parte Holmes, 5 Cow. 426, that where stock belonging to the corporation itself was registered in the name of an individual he would not have the right to vote it, for the reason that, since it was the property of the corporation, it could not be voted at all. See, also, Brewster v. Hartley, 37 Cal. 15. It may be assumed that at the adoption of the Civil Code in 1872 the legislature was aware of the provisions of the statutes of New York, and of the decisions thereunder, and those of similar import in other states, to the effect that the one who is registered as a stockholder was entitled to vote, even though at the time of voting he had no interest in the stock; and the insertion of the words "bona fide" as an element of his qualification, in addition to the other requirements of the section, was doubtless made in view of such decisions.

Under a statute requiring him to be the owner, it has been held sufficient that he be registered as the owner, and that the corporation could not inquire into the character of his ownership; but when he is required to be a "bona fide stockholder" the nature of the title under which he holds the stock is open to inquiry. It will be observed that the requirement is not that he shall be a bona fide "owner" of the stock, but that he shall be a bona fide stockholder. The provision in section 298, Civ. Code, that the owners of stock are called "stockholders," does not need or admit of the construction that only those are stockholders who are owners of stock. This section does not purport to be a definition of the term "stockholder," or to limit its extent, as would have been the case if it had said that stockholders are those who own the shares of stock in a corporation, but is consistent with holding that others may be stockholders than merely those who are the owners of the stock, and for the purpose of avoiding such construction section 312 requires the voter at an election to be a bona fide stockholder. One may be a bona fide stockholder without being the owner of the stock. He may have caused himself to be registered as a stockholder in the utmost good faith, both towards the corporation and also towards his fellow stockholders, and yet he may not be the owner of the stock. The owner of the stock may have pledged it as security for his indebtedness, and the creditor may have caused it to be transferred to his own name upon the books of the corporation without changing its ownership. Civ. Code, § 2888; Hawley v. Brumagim, 33 Cal. 394. It may be placed in the name of one as trustee to hold under an express trust, without any interest in the stock, but for the sole purpose of applying the income or disposing of the proceeds of its sale according to the terms of the trust. It may be the property of an estate, and transferred into the name of the executor. In all such cases the transfer would be in good faith, and the person in whose name it was registered would be a bona fide stockholder. In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347. The provisions of section 322, Civ. Code, by which the liabilities of pledgees and trustees in whose names stock is registered are limited to that section, imply that such limitation does not exist in other relations which these persons sustain to the corporation, and corroborates the proposition that they are not to be precluded from voting at an election. Section 312 provides that "at all elections or votes had for any purpose there must be a majority of the subscribed capital stock represented, either in person or by proxy in writing." But, if stock that is registered in the name of a pledgee, or of a trustee, or of an executor, cannot be voted, it might not infrequently happen that a majority of the stock would not be represented at an election. This section received a construction in Stewart v. Mining Co., 54 Cal. 149, and it was there held that one in whose name stock was registered upon the books of the corporation, but who had no interest therein, and was not the owner of any stock in the corporation, had no right to vote the stock; that he was neither the proxy nor the representative of the owners of the stock, nor a member of the corporation; and was, therefore, not a bona fide stockholder. The construction then given by the court to this section has never been modified, and must be regarded as a controlling authority in the present case. The case of People v. Robinson, 64 Cal. 373, 1 Pac. 156, involved only the construction of the act of 1853. It will be observed that in that case one of the considerations stated in the opinion upon which the decision was made was that it did not appear that the right of the registered stockholder to vote as he did was challenged, or that his vendee attempted or claimed the right to cast the vote. That case, moreover, was not an action under section 315, but was in the nature of a quo warranto to oust the defendants from the offices of trustees.

It may not be easy, nor is it requisite under the facts in this case, to formulate a definition of a bona fide stockholder which shall cover all cases, or to draw a line of exclusion by which the right to vote shall be determined; but we are very clear that one in whose name stock has been registered upon the books of the corporation, but who has never had any interest in the stock, and is only a dummy for the real owner, and when the object of such registration was for the admitted purpose of enabling the real owner to avoid certain statutory liabilities, whether such purpose would be effectual or not, is not a bona fide stockholder, within the meaning of this section, and should not be allowed to vote at an election.

2. The Smith Stock. The exclusion of the vote tendered by Smith upon the stock standing in his name was by reason of the following facts: In February, 1893, the estate of James M. Donahue, deceased, was the owner of 42,000 shares, or thereabouts, of the capital stock of the defendant railway company, which the superior court of Marin county had ordered to be sold in the course of the administration of his estate. Prior to the sale, an agreement was entered into between Smith, Foster, and Markham for the purchase of this stock as an entirety, upon the representations of Smith that upon acquiring the shares an agreement would be made by them whereby, in order to secure the control of the management and business policy of the railway company, and for its prudent and economical management in the interest of all of its stockholders, the said 42,000 shares should for the term of five years thereafter be voted as a unit in the election of directors of said railway company. In pursuance of this agreement, Smith and Foster, on the 24th of February, made their joint bid for the shares, offering to purchase them as an entirety for the sum of $800,000 and upwards, and by order of court their bid was accepted, and on March 23d the sale was completed, and the price paid. After the making of the bid, and before the consummation of the purchase and completion of the sale, Smith prepared the agreement for the voting of the shares as a unit that had been contemplated by the parties to the purchase; and on the 22d of March the same was executed in triplicate between Smith, Markham, and Foster. By this instrument, after reciting therein that the parties thereto had purchased the 42,000 shares of stock, and had agreed to retain the power of voting the stock for five years, "so as to keep the control of the corporation from passing to persons other than themselves," it was "mutually agreed between said Foster, Markham, and Smith that they will, during said period, retain the power to vote said shares in one body; and that the vote which shall be cast by said shares, whether for directors or for any other purpose, shall be determined by ballot between them or their survivors." It was in the contemplation of the parties to the agreement that they might sell or otherwise dispose of some of the shares, and accordingly they made provision in this instrument for retaining the right to vote the stock so sold by them, and annexed thereto the form of an agreement to be taken by them from their vendees. This form or draft recited the purchase of the 42,000 shares by Foster, Smith, and Markham, and that "for the purpose of keeping control of said road in the interest of themselves and of all persons who shall buy any portion of the stock from them," they have agreed that for the period of five years "they shall vote the said stock in one block" at all elections for officers. The purchase of the stock by Foster, Smith, and Markham was completed, and the price therefor paid on the 23d of March, and 12,336 shares of the stock were transferred on the books to each of them; 5,000 shares being left in the name of the Mercantile Trust Company, subject to some prior trust. Prior to the day for the election in 1896, a conference was called to be held between Foster, Smith, and Markham, upon proper notice therefor, to determine by ballot how the vote of the shares should be cast at the next annual meeting for directors, and in accordance with said notice said conference was held, at which Foster and Markham were present, and upon a ballot had thereat it was determined that said shares should be voted for Foster, Markham, Newhall, and Lilienthal as directors. The foregoing matters are alleged in the answers of the defendants, and at the trial the defendants sought to introduce in evidence the agreement of March 22d, and offered to prove in connection therewith the matters set forth in their answer relative thereto; but upon the objection by the plaintiffs to this offer, "on the ground that said agreement was not a proxy, and did not provide that any of the parties thereto should vote the stock belonging to the other, and that it was revoked before the election, and was invalid as against public policy," the evidence was excluded; the court saying: "I will assume, for the purpose of my ruling, that it was a valid agreement, but that it was not an agreement which gave any authority to any other person to cast the vote of Mr. Smith." As we have said with reference to the Gundecker and Wagner stock, for the purpose of this appeal it is to be assumed that the evidence offered by the defendants would sustain the allegations of their answer, and the sufficiency of these averments to authorize the exclusion of the vote by Smith is to be determined. It was shown at the trial that at the meeting of the stockholders held on February 25th, Smith tendered a vote for the shares standing in his name, and at the same time Foster presented the vote of the same stock by himself and Markham in behalf of Smith. Mutual protests against the votes were made by different stockholders, and the vote cast by Foster and Mark-

ham was received and counted, and that cast by Smith was rejected. Smith also testified that, after receiving the notice for the conference to determine the ballot to be cast, he informed Foster and Markham that he did not recognize the validity or legality of the agreement, and that he withdrew from the same, and would not be bound by anything which they might do thereunder. That the instrument of March 22d constitutes an agreement that the 42,000 shares are to be voted "in one body," and that the parties thereto agreed that "they" would vote the stock "in one block," is stated therein in express terms. By this instrument they also "mutually agreed" that "the vote" to be cast by said shares should be determined by ballot "between them" or their survivors. To "determine by ballot" is to ascertain the result of balloting upon a proposition by those entitled to cast the ballots; and the "vote"—that is, the voting paper or ticket to be cast for the officers, which the parties agreed should be thus determined—is to be the same for the entire 42,000 shares. That by virtue of this agreement an authority was given by each of the parties to the others to determine "the vote" to be cast by the 42,000 shares of stock is too clear for argument. When they mutually agreed that they would "determine" between them the vote which "shall be cast" for directors, they declared by necessary implication that such vote should be cast in accordance with the results of that ballot, and that, if either of them should fail to cast the vote as should be determined by the ballot, the vote so determined might be cast by the others. If we should hold that this instrument is to be construed as not giving authority to the majority of the parties thereto to cast the vote of the entire 42,000 shares of stock, as might be determined upon such ballot, we should be compelled to hold that the instrument was prepared in disregard of the agreement between the parties, and of the purpose for which it was to be executed. If there is any ambiguity in the language used for the expression of that agreement, it is to be construed so as to carry the agreement into effect, rather than to defeat its operation. No particular form of words is requisite to constitute a proxy. Mor. Priv. Corp. § 486. Like any other agency, the instrument by which it is created may be informal; but if, in order to give effect to its language in view of the purpose for which it is executed, it is necessary to construe the instrument as creating an agency, such construction will be given. The instrument executed between the parties must, therefore, be held to be a proxy, and to authorize the vote of the 42,000 shares of stock to be cast in accordance with the determination of the majority of the parties thereto; and, if it was made upon a consideration sufficient to bind the parties to its enforcement, it must be regarded as still operative. One of the inducements for the purchase of the stock, and under which the parties entered into the agreement, was that the shares should be voted in one body, and held for five years as a unit. It is immaterial that the voting agreement was not reduced to writing and executed until after the bid had been made for the stock. It was so executed before the parties thereto had completed the purchase, and become the owners of the stock by paying the purchase price. Nor is the validity of the agreement or the effect of its terms different by reason of different certificates having been issued in the names of the several parties to the transaction, rather than in the name of one of them. The agreement between them was with reference to the 42,000 shares of stock, and that it should be voted as a unit, and the purpose of the agreement was the economical management of the road, and to prevent irresponsible persons from getting control. It was within the power of the parties to contract in reference to this property as fully as with regard to any other property. They were at liberty to make as a condition of their purchase that its management should be held by either of them, or by a majority of the three, and the terms of the agreement for such purchase could not be repudiated by either after the purchase had been made. It may be assumed that neither of the parties would have entered into the transaction or agreed upon the purchase of the stock except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a sufficient consideration for the agreement granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either. Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627.

Although the court, in excluding this evidence, assumed that the instrument was valid, counsel for respondents have presented an argument in support of their further objection thereto that the instrument is invalid by reason of being against public policy; and it therefore becomes necessary to consider this objection, inasmuch as the action of the court, rather than its reason for so acting, is to be reviewed; for, if the instrument is invalid, the refusal of the court to allow any effect to be gained from its exercise was proper. "Public policy" is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Sir George Jessel, as master of the rolls, said in Besant v. Wood, 12 Ch. Div. 605, that public policy is "to a great extent a matter of individual opinion, because what one man or one judge might think against public policy another might think altogether excellent public policy." And in another case (Registering Co. v. Sampson, L. R. 19 Eq. 465) the same jurist said: "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." It is not in violation of any rule or principle of law for stockholders who own a majority of the stock in a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies, who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect; and they may do this either by themselves or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members; and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint. Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase by persons who contemplate no relation to each other, other than that of owning stock in the same corporation. Such agreement would in any case be outside of the corporation, and disconnected with the interest of every other stockholder, and in either case the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be enforced, will depend upon the object with which it is made, or the acts that are done under it, and will be governed by other rules of law. Mr. Beach, in his treatise on Corporations, says (section 304): "The owners of shares may enter into agreements as between themselves to elect the officers of the company, and to manage its affairs as they or a majority of them shall determine; and it is held that agreements of that character are not illegal, nor void, as against public policy; for, as was said by the court in a leading case, their interests are identical with the interests of the minority of shareholders." The authority thus referred to is Faulds v. Yates, 57 Ill. 416. In that case Faulds was the owner of a majority of the shares of stock in a corporation, and entered into an agreement with the defendants in the nature of a partnership for the working of a mine, and for the purchase by the defendants from him of two-thirds of his stock. It was provided in the agreement between them that they would elect the directors of the company; that they would determine among themselves as to the officers and management of the company; and that, if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election. Upon an attempt to enforce this agreement, it was contended that those parts of it were invalid, for the reason that they were in conflict with the interests of the other stockholders. The court, however, sustained the agreement, using the following language: "There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons, owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. If one man owned a majority of the stock, he surely had the right to select the agents for its honest management." In Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627, the parties were jointly interested in certain shares of stock which had been issued to them in a single certificate, and it was agreed between them that the stock should not be sold, or in any manner disposed of, or the certificates surrendered, for a period of 10 years, without their joint consent in writing, but should remain as first issued, "for the purpose of enabling the said parties of the first part to prevent the control and management of the company from passing over to persons who might be less qualified or less disposed to make the business of the said company a success and its stock valuable." By the same agreement Dolphin was appointed a proxy to vote the whole of said shares at all elections, and the proxy was made irrevocable for 10 years, unless sooner revoked by joint consent. In an action brought for the purpose of having the agreement declared void, and that there be-issued to the plaintiff certificates for one-half of the shares, the court held that the agreement was not void, or against public policy, saying: "The object and purpose of the arrangement, as stated in the contract, is not of itself vicious, but rather the contrary. This is not a case where, as in some of the cases cited by the respondent, there is a combination of stockholders for the special benefit of some party, or where the power to cast the vote is in a party having no beneficial interest. The arrangement purported to be for the benefit of all the stockholders, and the attorney was one of the parties beneficially interested. It will hardly be claimed that a majority of stockholders may not combine to control an election of directors." See, also, Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506; Brown v. Steamship Co., 5 Blatchf. 525, Fed. Cas. No. 2,025.

In cases of "voting trusts," where the owners of stock transfer the shares to trustees with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement, and withdraw his stock at will; and it is also held that stockholders who become such after an agreement of this nature is entered into are not bound by its terms, but will hold their shares freed from the limitations of the agreement. Fisher v. Bush, 35 Hun, 641; Woodruff v. Railroad Co., 30 Fed. 91; Brown v. Steamship Co., 5 Blatchf. 525, Fed. Cas. No. 2,025. In Moses v. Scott, 8 Ala. 608, 4 South. 742, certain stockholders had formed a voting trust, and placed their stock in the hands of four trustees, with power to vote the stock as a unit at all meetings as three of them should think best, or, if they failed to agree, as three-fourths of the stock represented should determine, and had agreed not to sell their stock so pooled for three years. There was no consideration for this agreement other than the mutual promise of the several stockholders, and, while the court refused to enforce the agreement concerning the sale, upon the ground that it was in restraint of the free alienation of property, it said: "We cannot say there is anything per se illegal in an agreement entered into by and between certain stockholders in a joint-stock company by which they promise to vote together as a unit in all matters pertaining to the government of the corporation. Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gainsay his discretion, and it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote, when cast, is but the expressed wish of the stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleased."

The agreement in question cannot be regarded as illegal by reason of being in restraint of trade. The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673, Civ. Code, makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy; and there is nothing inconsistent with public policy for two or more persons who contemplate purchasing certain property to agree with each other, as a condition of the purchase, that neither will dispose of his share within a limited period, or for less than a fixed sum, or except upon certain limitations. They have the same right to contract with reference to the terms under which they will hold or dispose of the property after it shall have been purchased, as they have to agree upon any other terms upon which the purchase shall be made; and they no more violate a rule of public policy in making such agreement a consideration of their purchase than would two or more partners, who should purchase property for partnership purposes, and agree that it should not be disposed of unless their vendee would assent to certain conditions regarding its use. These terms enter into and form a part of the consideration for the agreement to purchase, and are as binding and enforceable as any other terms of the agreement. Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335; Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57; Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981. The contract in Fisher v. Bush, 35 Hun, 641, was held to be invalid for want of any other consideration than the mutual promise of the parties; but it was said in that case: "If these parties and their associates were the promoters of this corporation, then, doubtless, they could have entered into a valid agreement regulating a sale of the same, and requiring the owners to hold them from market for a reasonable and definite period of time, and thus forbidding a sale by either of his interests to one against whom his associates might have a reasonable objection. Moffatt v. Farquhar, 7 Ch. Div. 591; reported in 23 Moak, Eng. R. 731. A stipulation of that character would not be illegal, as against public policy, as it would be simply a provision, assented to by all, that the newcomer into the business transaction should be with the approval of the other joint owners."

Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy, and it was held in People's Home Sav. Bank v. Superior Court of City and County of San Francisco, 104 Cal. 649, 38 Pac. 452, that a by-law restricting the selection of proxies to stockholders was invalid, that the statute placed no limitation upon the right of selection, and that a stockholder may appoint as his proxy one who is an entire stranger to the corporation. The right to appear by proxy implies, of itself, that the voting power may be separated from the ownership of the stock; and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to exercise this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act. Under an appointment without words of limitation, the proxy may act against the interests of the stockholder, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person; while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power and the attempt to authorize the exercise of an unlawful power.

The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term. Shepaug Voting-Trust Cases, 60 Conn. 553, 24 Atl. 32, sometimes reported under the name of Bostwick v. Chapman; White v. Tire Co., 52 N. J. Eq. 178, 28 Atl. 75. We have been cited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid. The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree, for the same consideration, to cast the vote himself; and an agreement with others to appoint a proxy upon the same considerations would be equally invalid. In Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847, an agreement by the purchaser of stock to give to other stockholders his irrevocable proxy, for the purpose of securing and maintaining the control of the company, was held invalid, for the reason that it was one of the terms of the agreement that the directors to be elected under its provisions should employ the one giving the proxy at a fixed salary during its existence. Such an agreement was held to operate as an inducement to elect directors who would not act disinterestedly for the benefit of all of the stockholders, but rather to promote the interest of the parties to the agreement alone, and was therefore void, as being against public policy. The court, however, said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders." It was upon this principle that the agreements in Guernsey v. Cook, 120 Mass. 501, and Fennessy v. Ross, 5 App. Div. 342, 39 N. Y. Supp. 323, were held invalid. The same principle was declared in Gage v. Fisher (N. D.) 65 N. W. 809. In Railroad Co. v. Nicholas, 98 Ala. 92, 12 South. 723, the court held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, saying: "Where a proxy is duly constituted, and the power of the appointment is without limitation, the vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end attempted to be effected by the exercise of the voting power."

From the foregoing considerations it follows that the superior court erred in finding that Gundecker and Wagner were bona fide stockholders in the defendant railway company, and also in refusing to receive in evidence the instrument of March 22d, and the evidence offered by the defendants in connection therewith, for the purpose of sustaining the averments of their answer. The judgment and order denying a new trial are reversed.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

(Jan. 16, 1897.)

BEATTY, C. J. I dissent from the judgment, and from the conclusions of the court on both of the principal points decided. The contract between Smith, Markham, and Foster was, in my opinion, void, as against the policy of the law giving to the holders of a majority of the stock of a corporation the right of control. Its sole purpose and object was to give to a minority of the stockholders the power to control the affairs of the corporation against the will of the majority, and that object is secured by means of this judgment. There is not time at my command to go over the decisions, but I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it, with the effect of putting a minority in control of the corporation. As to the power of the chairman of a stockholders' meeting to refuse the vote of a registered stockholder upon the ground that he is not the bona fide owner of the stock standing in his name, I deny that it exists. As I construe sections 307 and 312 of the Civil Code, the registered stockholder must be allowed to vote; and if there is a claim that he is not the real owner of the stock which he has voted, that claim must be asserted, and the remedy sought, in the proceeding defined in section 315. To hold otherwise is to invest the chairman of the meeting with a power capable of the grossest abuse, and in its nature purely arbitrary; for there is neither time nor means of trying the question of ownership at the meeting. Nor is there any necessity for investing the chairman or the members present with any such power. The real owner of stock can always have it properly transferred and registered, and the failure to do so is his own fault. Or, if a case may sometimes arise in which the right of the owner to have the stock transferred on the books is delayed or impeded, he may enjoin the apparent owner from voting it. In other words, he has his remedy in his own hands in most cases, and in the rare instances in which it is otherwise the courts will afford him a remedy. But there is no adequate remedy for the registered stockholder whose vote is excluded merely because the chairman of a stockholders' meeting may choose, without notice, without pleading, and without evidence, to sustain an objection of some other stockholder that he is not really the owner of stock which appears to be his. In this case, however, the objection was made by parties who themselves had no claim to the stock offered to be voted. It had been legally issued and regularly transferred by the owner to the persons in whose name it stood on the books, and the objection was that they were dummies, to whom it had been transferred for the purpose of avoiding the stockholders' liability to creditors, etc. This was not, in my opinion, a valid objection to the right of the holders of the stock to vote it. The owners had a right to put it in the hands of trustees, and their motive for so doing was not open to inquiry for the purpose of this election. Creditors of the corporation could not be deprived of their action against the real owners by the transfer, nor could the corporation be deprived of its right to collect assessments; but only the creditors and the corporation could question the transaction, and they only in a proper proceeding for the enforcement of their rights.

115 Cal. 611

## FOSTER et al. v. SMITH et al. (S. F. 572.)

(Supreme Court of California. Jan. 15, 1897.)

APPEAL—DISMISSAL.

Appeal from an order denying an injunction pendente lite will be dismissed, the action being to enjoin the voting of stock at a certain election, and that election having already been held.

In bank. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Foster and others to enjoin Smith and others. From an order denying an injunction pendente lite, plaintiffs appeal. Dismissed.

W. S. Goodfellow and Jesse W. Lilienthal, for appellants. Page, McCutchen & Eells, for respondents.

HARRISON, J. The annual meeting of stockholders for the election of directors of the San Francisco & North Pacific Railway Company was called to be held on the 21st day of January, 1896. On the 16th of January the plaintiffs herein filed their complaint in the superior court of Marin county against the defendants, in which they prayed for an injunction restraining the defendant Smith from casting any vote for directors at said annual meeting upon certain shares of stock, except in accordance with the result of a ballot previously had under the terms of a certain written agreement between him and the plaintiffs, Foster and Markham; and that the defendant railway company and its officers be enjoined from receiving any vote from Smith, except in accordance with said ballot,—the agreement being the same which was considered in the case of Smith v. Railway Co. (S. F. 568 and 599; just decided) 47 Pac. 582. Upon the filing of the complaint the judge of the superior court, on the application of the plaintiffs therefor, made an order directing the defendants to show cause before him on the 18th of January why an injunction as prayed for should not issue pendente lite, and restraining them in the meantime, and until the determination of said order, to show cause, and the further order of the court, from the acts sought to be prevented by the injunction. The hearing of the matter was continued from time to time until February 3d, when it was presented upon affidavits filed on behalf of the respective parties, and on the 20th of February the court made its order denying the application for the injunction pendente lite, and dissolving the restraining order. The present appeal is from this order.

The appeal has been argued in connection with the case of Smith v. Railway Co., supra, from which it appears that, after the order herein appealed from was made, the election of directors by the railway company was had February 23, 1896, and that the present appeal was not taken until the 16th of April. It thus appears that the parties to the litigation have no rights which can be affected by a reversal of the order, and that the correctness of the order has become merely an abstract question. The injunction sought by the action was limited to the election then about to be held; and an injunction pendente lite, as well as the restraining order given, would have no greater extent than was sought in the action itself. If the parties should obtain a final judgment in the action upon the other issues presented in the complaint, the superior court would not grant an injunction as a part of the relief, for the facts set forth as the grounds for the injunction sought would not then exist. If the order should be reversed, the superior court would have no function to perform in consequence of such reversal. To re-establish the restraining order, or to issue an injunction pendente lite, would be a vain and frivolous act. Any opinion that we might give upon the merits of the plaintiffs' application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute an adjudication of the rights of the parties. People v. Common Council of City of Troy, 82 N. Y. 575; In re Manning, 139 N. Y. 446, 34 N. E. 931. It was said in the case last cited, upon a similar question: "The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions such as this case in its present situation presents." The appeal should therefore be dismissed, and it is so ordered.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

BEATTY, C. J. As the dismissal of the appeal has the same effect as an affirmance of the order appealed from, I do not dissent from the order of dismissal, but, in my opinion, the order denying the injunction should be affirmed.

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5 Cal. Unrep. 569

## BARRETT v. SUPERIOR COURT OF PLACER COUNTY. (S. F. 539.)

(Supreme Court of California. Jan. 18, 1897.)

REVIEW—ADMINISTRATRIX—REVOCATION OF LETTERS—NOTICE—OUSTER.

1. Under Code Civ. Proc. § 1395, which provides that, if sufficient security is not given within the time fixed, the right of an administrator to the administration shall cease, etc., where an administratrix fails to comply with the order, and obtains no further time, she is not entitled to notice of an order revoking her letters after the limitation has expired.

2. Where there has been a failure to comply with an order for an administratrix to give additional security, an order "that the right of the administratrix to the administration of this estate cease" cuts off her powers, and ousts her from office.

Department 1. Application by Maggie G. Barrett against the superior court of Placer county (J. E. Prewett, judge), for a bill of review. Writ discharged.

George B. Merrill, for petitioner. Benjamin P. Tabor, for respondent.

GAROUTTE, J. This is an application for a writ of review, asking the court to annul an order made by the superior court of Placer county in the month of May, 1896, appointing one Mitchell administrator of the estate of Joseph Byrn, deceased. It is claimed that such order was beyond the jurisdiction of the court.

Petitioner, Maggie Barrett, was the administratrix of the estate of said deceased. Upon the 15th day of June, 1895, the judge of said court issued a citation to her and the sureties upon her bond, ordering them to appear before him upon a certain named day and be examined as to their property and its value. This hearing resulted in the court making an order, upon July 1, 1895, that the administratrix furnish additional security in a certain named amount within the next five succeeding days. This additional security was not furnished to the judge within the time fixed, but a new bond was presented to the judge for approval some seven days thereafter, and approval thereof was refused. Upon July 9th, at the hour of 10 a. m., said superior court made the following order, which was duly entered in its minutes, in the matter of the estate of Joseph Byrn, deceased: "That the right of the administratrix to the administration of this estate cease." Thereafter, upon the same day, at 2 p. m., the court made the following order, which was entered in the minutes: "That her powers as such administratrix be, and the same are hereby, suspended, and her letters as such revoked, until the further hearing upon the question of her permanent removal, now pending, to be heard on September 12, 1895."

Petitioner sustains her application for the writ upon the ground that her letters of administration had not been revoked when her successor was appointed, and, in fact, never have been revoked, and hence such appointment was without the court's jurisdiction. Some of the orders of the superior court made in this case have already been before us upon a writ of review (see Barrett v. Superior Court, 43 Pac. 519), and it was there, at least incidentally, held that a failure to comply with the order of the court requiring the giving of additional security resulted, ipso facto, in a revocation of her letters. This court said: "Section 1395 does not require any order to be served upon the administratrix, but declares that the mere failure to give the security within the time fixed by the judge's order shall, of itself, without any further action on the part of the court, cause the right of the administrator to the administration to cease." The section declares: "If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who elects to give a sufficient bond, must be appointed to the administration." This language is clear, explicit and positive, and we are not at all prepared to say that the construction given it in the former opinion of the court is not the correct one.

Conceding the letters of the administratrix were not revoked by operation of law, then we have the order of 10 a. m., July 9th, that the right of the administratrix to the administration of this estate cease. If her powers and rights as administratrix did not, ipso facto, cease upon her failure to file the bond within the time required, then this order of the court cut off those powers and rights, and completely ousted her from office. The validity of this order is attacked upon the ground that it was made without notice. But no notice is required by the statute, and no notice was necessary. Both the court and the administratrix knew all the facts. There was no evidence to take. The administratrix was required to file additional security within five days. When she failed to comply with the order, and obtained no further time in which to comply with it, either one of two results necessarily followed; that is, by operation of law she was no longer administratrix of the estate, or, if an order of the court was necessary to revoke her letters, then they were revoked, for such an order was made. With either construction of the statute, her position is equally unfortunate. It is evident that the order was intended to revoke her letters. There was no other reason for making it. It meant this, or it meant nothing. It was broad enough to cover the ground. It was not required to be in any particular form, and was sufficient to serve every purpose intended.

The order made at 2 p. m. upon July 9th becomes immaterial, and the consideration of it unnecessary in view of the construction given the order of 10 a. m. If petitioner was removed from office by an order made at 10 a. m., and her letters revoked, an order made some hours later served no effective purpose, unless it could be construed as setting aside the earlier order. It does not purport to do so. This could hardly be its construction by implication; and, in the absence of express and direct language indicating such intention on the part of the court, we could not so hold. We find no such clear intention in the order. It is recited in the record that the later order was made by mistake and inadvertence. Whatever may be the true reason is immaterial, and the order of 10 a. m. must stand. The administratrix having been ousted from office, and her letters revoked, the court did not exceed its jurisdiction in appointing her successor. For the foregoing reasons, the writ is discharged.

We concur: VAN FLEET, J.; HARRISON, J.

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(115 Cal. 613)

## LAVER et al. v. HOTALING. (S. F. 502.)

(Supreme Court of California. Jan. 19, 1897.)

ACTION FOR SERVICES—CUSTOMARY CHARGES—EVIDENCE.

On the trial of an action by an architect on a quantum meruit, plaintiff's evidence of the customary charges of architects for similar services is not made incompetent by defendant's showing that the customary charges made by architects originated in and conform to a rule established by an association of architects. McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Augustus Laver and others against A. P. Hotaling on a quantum meruit. From an order granting a new trial to defendant, plaintiffs appeal. Reversed.

Robert Harrison and Michael Mullany, for appellants. A. P. Van Duzer and Walter H. Levy, for respondent.

BEATTY, C. J. Plaintiffs are co-partners in the practice of their profession as architects. They sued in this action to recover the alleged reasonable value of services performed, it is claimed, at defendant's request, in the preparation of drawings, plans, and specifications for a building defendant had in mind to erect. After verdict and judgment in plaintiffs' favor, the court granted a new trial, on the sole ground, specified in its order, that it erred at the trial "in permitting the introduction of evidence of a rule of compensation of architects, established by architects' institutes or associations." The plaintiffs appeal from the order granting a new trial, and contend that, if any evidence of a rule of compensation established by architects' institutes or associations was admitted, it was not introduced or offered by them. A careful examination of the record convinces us that this contention is well founded. In order to prove the value of their services the plaintiffs introduced evidence of the customary charges of architects for similar services. This evidence was, of course, entirely competent, just as the current market price is evidence of the value of goods sold. On cross-examination of plaintiffs' witnesses, and on the direct examination of his own witnesses, defendant brought out the fact that the customary rates of charges made by architects originated in and conforms to a rule established by an association of architects. But the fact that the customary rate of charges originated in a rule which, as such, was not binding upon the defendant, did not render evidence of the actual custom incompetent. If the usual and regular wages of a mechanic are three dollars per day, does such customary rate become any less competent evidence of the value of his services when it is shown to have been first prescribed by a rule of his union? Certainly not. The rule, it is true, is not binding, as a rule, upon those who have not made it a part of their contract, and no one is held to have made it a part of his contract unless charged with knowledge of it. But, however ignorant an employer may be, of the customary rate of compensation, such customary rate is evidence of value in any suit by his employé upon a quantum meruit. The superior court did not err, therefore, in admitting the evidence offered by the plaintiffs, or in refusing to strike it out after the defendant had proved the rule of architects, and certainly the defendant was not entitled to a new trial because of the testimony offered by him. The instruction of the court to the jury with reference to this testimony may have been misleading, but it was not excepted to at the time, nor was it specified as a ground of the motion for a new trial, and can lend no support to the order. Other grounds were specified in support of the motion, but none of them are relied upon in the argument of counsel, and we cannot see that they possess any merit. The order granting a new trial is reversed.

We concur: VAN FLEET, J.; TEMPLE, J.; HARRISON, J.; HENSHAW, J.

I dissent. McFARLAND, J.

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5 Cal. Unrep. 572

PEOPLE ex rel. WIRT v. BUDD. (S. F. 775.)

(Supreme Court of California. Jan. 19, 1897.)

Mandamus — Parties — Appointment of Police Commissioners.

A citizen is not "beneficially interested" (Code Civ. Proc. § 1086) in the appointment of police commissioners for the city and county of San Francisco, so as to entitle him to sue, without permission of the attorney general, for a writ of mandate to compel the governor to make such appointment.

In bank. Petition, on the relation of N. S. Wirt, against James H. Budd, for a writ of mandate. Dismissed.

N. S. Wirt, for relator. Davis Louderback, for police commissioners. W. F. Fitzgerald, Atty. Gen., and D. H. Anderson, Deputy Atty. Gen., for defendant.

PER CURIAM. This is an application, on notice, for a peremptory writ of mandate to the governor of California to appoint two police commissioners for the city and county of San Francisco. The attorney general moves to dismiss the proceeding, upon the ground that the relator has received no authority to sue in the name of the people of the state, and that he is not himself a party beneficially interested (Code Civ. Proc. § 1086), in any sense that distinguishes him from other citizens of the state. The grounds of the motion are conceded, and the motion must be granted. Linden v. Supervisors, 45 Cal. 6; Ashe v. Supervisors, 71 Cal. 236, 16 Pac. 783; Colnon v. Orr, 71 Cal. 43, 11 Pac. 814; Marini v. Graham, 67 Cal. 130, 7 Pac. 442. Proceeding dismissed.

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115 Cal. 617

WILLIAMS v. BORGWARDT. (L. A. 335.)

(Supreme Court of California. Jan. 20, 1897.)

Appeal—Supersedeas Bond.

Leave to file a stay bond in the supreme court will not be granted where the only excuse of appellant for failure of the sureties on his original stay bond to justify was that they were out of the county on the day set for justification, without a showing that they were notified to appear for justification, or that their absence was without appellant's consent, or that an attempt was made to secure other sureties.

In bank. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by C. S. Williams against H. L. Borgwardt, Jr. There was a judgment for defendant, and plaintiff appeals. Application to file a stay bond. Denied.

D. H. Whittemore, for appellant. E. Rousseau, for respondent.

PER CURIAM. This is an application for leave to file a stay bond in this court under the rule of practice established in Hill v. Finnigan, 54 Cal. 493. Since the decision of that case the inherent power of this court to make an order to operate as a supersedeas, upon condition that a good bond shall be filed here, has not been questioned, and frequently such orders have been made. But they have not been made, and they ought not to be made, in the absence of any excuse for the failure to give the undertaking or to justify the sureties in the manner and at the time prescribed and intended by the statute. In this case an undertaking was filed in due time, the sureties were objected to, and notice given that they would justify on a day named. The respondent attended at the time and place named in the notice of justification, but the appellant and the sureties failed to attend. The only excuse offered for such failure is that the sureties, being absent from the county, were unable to attend. It is not shown that they were notified or requested to attend, or that they were absent without the consent of the appellant, or that any effort was made to secure their attendance or to procure other sureties. In short, there is nothing to show either accident, surprise, inadvertence, or excusable neglect, and for this court to extend the relief asked would be equivalent to making a rule that the appellant may always neglect to follow the procedure prescribed by the statute, secure that upon his mere request this court will issue its supersedeas upon the filing of a bond to be approved by us. We do not think such practice should be sanctioned or encouraged. It would necessarily involve greater expense and inconvenience to respondents, and would seriously encroach upon the time of this court. Application denied.

5 Cal. Unrep. 573

## LEET et al. v. BOARD OF SUP'RS OF KERN COUNTY. (L. A. 202.)

(Supreme Court of California. Jan. 22, 1897.)

APPEAL—WHEN LIES—DISMISSAL.

1. Where a board of supervisors refuses a liquor license, and, after a peremptory writ of mandate, approves the bond filed by the applicants, and orders the license to issue, it cannot appeal from the judgment of mandate.

2. An appeal by supervisors from a judgment of mandate requiring it to issue a liquor license, when the hearing is after the license has expired, will be dismissed.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Petition by Leet & Lang, co-partners, for a writ of mandate to the board of supervisors of Kern county, requiring them to grant petitioners a license to retail liquors. From a judgment of mandate, and from an order denying a new trial, the board appeal. Dismissed.

Alvin Fay, for appellants. Laird & Packard and J. W. Mahon, for respondents.

SEARLS, C. The appellants constitute the board of supervisors in and for the county of Kern, state of California. Ordinance No. 52, adopted by the board of supervisors of the county of Kern, provides for the issuance of license to sell at retail spirituous, malt, or fermented liquors or wines. The ordinance provides the mode of application, time of hearing the application, etc., and then provides as follows: "The board of supervisors shall deny the said application for license, and refuse license to be issued thereunder, if on such hearing it shall appear to the satisfaction of the board, either that applicant for such license is an unfit and not a proper person to have or to hold such license, or that such application is not made in good faith, or that the statements made in such application are untrue, or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of saloon or otherwise. Leet & Lang, co-partners, filed their application for a license to retail liquors, etc., on block 231, in the town of Bakersfield, county of Kern, accompanied by the recommendation of a majority of the owners of lots in said block 231, as by the ordinance required. A hearing of the application was had, and testimony pro and con received, whereupon the board finally refused to grant the license. Thereupon applicants procured from the superior court an alternative writ of mandate, which, after answer by the appellants here, and upon a hearing, was on the 22d day of October, 1895, made peremptory. A copy of the peremptory writ was served upon the supervisors, and, as is shown by the record, they on the same day, to wit, October 22, 1895, approved the bond filed by applicants, and ordered the license to issue. This appeared on the hearing of the motion for a new trial subsequently made, and may have been the reason for a denial of that motion. Under these circumstances, we recommend that the appeal herein be dismissed, for two reasons:

1. As was said in San Diego School Dist. of San Diego Co. v. Board of Sup'rs of San Diego Co., 97 Cal. 438, 32 Pac. 517, which was in all essentials similar to this: "The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied, and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved." A reversal of the judgment here would not have the effect to annul the license, "nor did the appellants, by compliance with the judgment, lose any property rights of which restitution could be made in case of reversal."

2. As the license issued October 22, 1895, more than one year since, we may well suppose that it has served its purpose, and that all rights thereunder have ceased to exist. Foster v. Smith (S. F. 572; Jan. 15, 1897) 47 Pac. 591, dismissing an appeal under similar circumstances, and citing People v. Common Council of Troy, 82 N. Y. 575, and In re Manning, 139 N. Y. 446, 34 N. E. 931; the court quoting from the last-mentioned case as follows: "The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case, in its present situation, presents."

We concur: HAYNES, C.; BELCHER C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal herein is dismissed.

115 Cal. 626

## FIRST NAT. BANK OF SAN DIEGO v. NASON. (L. A. 141.)

(Supreme Court of California. Jan. 22, 1897.)

DISMISSAL — WANT OF PROSECUTION — DISCRETION OF COURT.

1. The power of the superior court to dismiss an action for want of prosecution is dis-

cretionary, and its exercise is only reviewable for a patent abuse of such discretion.

2. Where summons was not issued for nearly a year after the filing of the complaint, and not served for nearly another year, though defendant was a resident of the county, and after issue joined the case stood for a year and a half without any effort to bring it to trial, a judgment dismissing the action for want of prosecution will not be reversed, because defendant had threatened to take advantage of the insolvency laws if judgment was obtained.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the First National Bank of San Diego against Arthur G. Nason. From a judgment dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

Trippett & Neale, for appellant. Cassius Carter and Withington & Carter, for respondent.

SEARLS, C. This is an appeal by the plaintiff from a judgment of dismissal of its action for want of prosecution. The action was brought May 28, 1892, to recover $3,500 and interest on a promissory note made by defendant April 3, 1888, payable 60 days after date. Summons issued April 20, 1893, and was served January 4, 1894. Defendant filed his answer February 7, 1894, which, if true, constituted a defense to the action. August 7, 1895, defendant moved to dismiss the action, and the motion was granted August 16, 1895.

From the foregoing statement it appears that at the date of dismissal the action had been pending over three years. The bill of exceptions, in addition to the above, shows, on the part of defendant, that for two years next before the motion to dismiss he had resided in the city of San Diego, and as a supervisor of the county of San Diego had occupied an office in the superior court building. On the part of plaintiff the bill of exceptions shows that the reason plaintiff had not prosecuted its action was that defendant had threatened to go into insolvency, under the laws of this state, if plaintiff pushed its action to judgment against him, in which event it would get nothing; and hence it delayed in the hope of finally realizing something on its claim.

1. The power of the superior court to dismiss an action for want of prosecution has been too often asserted and too uniformly upheld to call for discussion. Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Saville v. Frisbie, 70 Cal. 87, 11 Pac. 502; Chipman v. Hibberd, 47 Cal. 638; Simmons v. Keller, 50 Cal. 38; Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Murray v. Gleeson, 100 Cal. 511, 35 Pac. 88; Grigsby v. Napa County, 36 Cal. 585; Pickett v. Hastings, 39 Cal. 105. There are many other cases to like effect, but these are sufficient.

2. The exercise of this power must, in the very nature of things, be left to the discretion of the nisi prius court, subject only to reversal for a patent abuse of such discretion. Each particular case presents its own peculiar features, and no ironclad rule can justly be devised applicable alike to all.

3. Where the delay has been had at the instance or request of the defendant, the court will properly refuse to dismiss. Cowell v. Stuart, 69 Cal. 525. We fail to discern in the cause disclosed by the bill of exceptions any valid reason for the delay on the part of plaintiff to prosecute its action. The threat of defendant to take advantage of the insolvent laws was but evidence of a disposition to do what the law permitted, provided he was insolvent, and, as it was not coupled with any request for delay or promise of payment in the event of such delay, we are at a loss to see any valid excuse for postponement on the part of plaintiff in prosecuting its action. The delay of nearly a year to take out a summons after filing the complaint, the delay of nearly another year to serve the summons, with the defendant ever present, and the delay of a year and a half after issue joined, in a simple action upon a promissory note, may well have led the court below to believe that plaintiff was seeking the judicial arm of the law, not to secure prompt justice, but as a means to some ulterior purpose. We find no abuse of discretion in the action of the court below, and recommend that the judgment be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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(115 Cal. 629)

## Ex parte SEUBE. (Cr. 190.)

(Supreme Court of California. Jan. 22, 1897.)

INTOXICATING LIQUORS — LICENSE — ORDINANCE — VALIDITY—CONSTRUCTION.

1. A section of an ordinance providing that "every person who sells * * * liquors * * * must obtain a license," is not void as imposing a license tax on each sale, and not on the business of selling, it appearing from the entire ordinance that the intent was to impose the tax on the business of selling. Merced County v. Helm, 36 Pac. 399, 102 Cal. 159, distinguished.

2. In construing a section of an ordinance it must be read in connection with the other sections.

In bank. Petition by B. Seube for a writ of habeas corpus to obtain his release from the custody of E. W. Jones, sheriff, who held him by virtue of a commitment issued by a justice of the peace. Writ denied.

W. G. Dyar and B. F. Howard, for petitioner. E. W. Jones, in pro. per.

BEATTY, C. J. The petitioner was convicted and sentenced to pay a fine, with the alternative of imprisonment, upon a charge of carrying on the business of selling liquors without a license, contrary to the provisions of an ordinance of Colusa county. He claims that his imprisonment is unlawful, because the ordinance is void, and he bases this contention upon the decision in the case of Merced County v. Helm, 102 Cal. 159, 36 Pac. 399, in which it was held that an ordinance in some respects similar to the Colusa county ordinance was in excess of the powers of the board of supervisors, because it attempted to impose a license tax upon each single sale, and not upon the business of selling. I have always considered that the rule of construction applied in that case went to the extreme verge of strictness, and the court has been disposed to limit, rather than extend, its application, as appears from the manner in which the case of Ex parte Mansfield was distinguished in 106 Cal. 400, 39 Pac. 775. In this case the language of the ordinance differs from that of the ordinance construed in Merced County v. Helm, and clearly supports a construction which brings it within the conceded power of the board of supervisors "to license for the purposes of regulation and revenue all and every kind of business not prohibited by law and carried on in such county." St. 1891, p. 306. The first, fourth and fifteenth sections of the ordinance read as follows:

"(1) That for the purpose of regulating certain businesses and occupations in the county of Colusa, and for the purpose of raising revenue for county purposes, a license tax shall be, and the same is hereby, imposed upon persons, occupations and businesses carried on in said county of Colusa, state of California, in the following manner and for the following sums or rates, to wit."

"(4) Every person who sells spirituous, malt or fermented liquors or wines, in quantities less than one quart, must obtain a license, and pay therefor one hundred dollars per year."

"(15) Every person who commences or carries on any business or calling, for the transaction or carrying on of which a license is required by this ordinance, without first procuring a license as prescribed herein, is guilty of a misdemeanor."

The claim of petitioner is that section 4 must be read by itself, and without reference to the other sections and parts of the ordinance, and that, so read, it is fatally affected by the vice found in the Merced county ordinance; that is to say, that it attempts to impose the license tax upon every single act of selling. But we know of no rule of statutory construction which requires us to take one section of the ordinance by itself and give it a construction at variance with other sections. On the contrary, the rule is to look at the whole ordinance, and to give each section a construction which will make the whole consistent and operative according to the apparent intent of the framers. But, even if we were to look to section 4 alone, the petitioner could claim nothing from the doctrine stated by Lord Cairns in Partington v. Attorney General, L. R. 4 H. L. 122, as quoted in Merced County v. Helm: "The principle of all fiscal legislation is that, if the person sought to be taxed comes within the letter of the law. he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an 'equitable construction,' certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." If the letter of the ordinance embraces all who sell, it certainly embraces all who make a business of selling; and petitioner cannot claim that the acts charged in the complaint upon which he was convicted do not come within the letter of the ordinance. The only point he can urge is that the whole ordinance is void because it imposes, or attempts to impose, a license tax upon every single sale. Speaking for myself, I should say that if the ordinance, looking exclusively to section 4, necessarily bore that construction, it would only be void pro tanto. But this point need not be decided, because it is perfectly clear from all the provisions of the ordinance that the intention of its framers was to impose the tax only upon the business of selling. It is only those who carry on the business who incur the penalty, and it was for carrying on the business that the petitioner was arrested and prosecuted. The prisoner is remanded.

We concur: HENSHAW, J.; TEMPLE, J; VAN FLEET, J.

McFARLAND, J. I concur in the judgment.

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115 Cal. 622

## MARSHALL et al. v. LUIZ et al. (S. F. 434.)

(Supreme Court of California. Jan. 22, 1897.)

RIGHTS OF TENANT UNDER LEASE—LIEN OF LANDLORD—CHATTEL MORTGAGE ON CROP.

Under a lease of a farm for a year, containing also an agreement for the furnishing by the lessor to the lessee of cows for dairying purposes, such agreement "in no wise, however, to affect the foregoing lease of real property," the lessee became entitled, under Civ. Code, § 819, to "take the annual products of the soil"; and a provision of the lease that the tenant should not remove any hay or grain from the farm for sale did not give the landlord any lien thereon which he could enforce as against a mortgagee of the tenant without notice of such provision, who took possession of the crop after its severance from the land.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; F. M. Angelotti, Judge.

Action by James Marshall and others against Frank Luiz and others to enjoin the sale of property under a chattel mortgage. Judgment for defendants, from which, and from an order dissolving a temporary injunction granted, plaintiff appeal. Affirmed.

Hepburn Wilkins, for appellants. Jas. W. Cochrane, for respondents.

BRITT, C. By the terms of a written lease the plaintiffs in this action let to defendant Luiz for the term of one year beginning September 1, 1894, a tract of farming and grazing land at the rental of $2,880, payable one-half on said September 1 and the remainder on April 15, 1895. Among the covenants of the lease, for breach of which the lessors might re-enter, the lessee agreed that nothing should be sold from the land or removed therefrom except dairy products and calves and hogs raised on the place, "and that no hay, grain, or other product of the soil is to or shall be sold or carried off from said land while this lease remains in force"; that the lessee might keep on the premises seven horses, also certain cows of the lessors, to be presently mentioned, but except these should take no live stock to feed or pasture there; and should plow about 100 acres, and no more, "being the field usually cultivated for hay, and to be used for that purpose." It was stipulated that during the term the lessors would furnish to the lessee for the purpose of dairying on said land 160 cows, then on the same, which he agreed to properly care for; the use of the cows "in no wise, however, to affect the foregoing lease of the real property, but the whole of the rental mentioned and reserved being for said real property; and * * * the parties of the first part shall have in the premises all such legal rights and remedies as pertain to leasing real property, and as though herein no mention of personal property was made." The lease concluded as follows: "If at the expiration of this lease, and upon the fulfillment of all the conditions herein mentioned, the party of the second part shall have any hay left in the barn, he shall be paid the sum of $6 per ton for said hay." Said second party, the tenant, paid on account of rent the sum of $700 only, and is insolvent. In May, 1895, he executed a chattel mortgage of the growing crop of oat hay planted by him on the premises to defendant Freitas. The court found that Freitas took the mortgage for value and without notice of the provisions of the lease. In July following, the mortgagee obtained a judgment against Luiz for the foreclosure of said mortgage and sale of the crop, which had then been harvested for hay, and thereunder the defendant Harrison, as sheriff of the county, seized the hay, and was about to sell the same, when the lessors commenced the present action to enjoin such sale and the removal of the hay from the premises. On final hearing the relief demanded was denied, and an injunction issued ad interim was dissolved. It is the view of plaintiffs, as stated by counsel, that the lease "is a contract for the purpose of carrying on the dairy business. * * * The landlord practically reserves the crops to himself, and such reserved crops remain the property of the owners of the land, and cannot be disposed of by the tenant or become liable for his debts."

We are unable to agree that the lease constituted merely a contract for the purpose of carrying on the business of dairying, or that this object should be considered controlling of those provisions which create the conventional relation of landlord and tenant between the parties. They were at too much pains to specify in the instrument the independence of the contract for dairying, and that for the lease of real property, to permit of such construction. Luiz was a tenant for years, having as such an estate in the land, and consequent right to the annual products of the soil, unless this right was withheld from him by some provision of the lease. Civ. Code, § 819. We find no language in the instrument apt for that purpose. It contains no engagement that the hay shall be fed to plaintiffs' cows, or applied in any manner to the use of plaintiffs; except that, if the tenant "shall have any hay left in the barn," he shall be paid therefor,—a contract of future sale on a contingency, which conferred no title on the lessors. True, the tenant had obligated himself not to sell or remove the hay from the premises, and his infraction of this promise—admitting, as we may, that the mortgage, inducing a sale and removal, was in contravention thereof—may have been morally and legally wrong; but it was a wrong for which redress was to be sought by re-entry or appropriate action for damages. McCombs v. Becker, 3 Hun, 342; Colville v. Miles, 127 N. Y. 159, 27 N. E. 809. Certainly, it seems to us, the lessors have no lien upon or other interest in the hay itself which equity ought to enforce against a third person whose claims thereon were acquired in ignorance of the lessors' pretensions. More v. Ord, 15 Cal. 204; Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228; Society v. Purvis, 112 Cal. 236, 241, 44 Pac. 561. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

115 Cal. 345

## PETERS v. BOWMAN. (S. F. 203.)

(Supreme Court of California. Jan. 19, 1897.)

In bank. Petition for rehearing. Denied. For original opinion, see 47 Pac. 113.

BEATTY, C. J. A rehearing of this cause is denied, but the statement contained in the department opinion to the effect that no similar case had been cited in which damages were allowed requires correction. The case of City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, was noted on the margin of appellant's brief, but escaped attention. There are circumstances which distinguish that case from this, particularly with respect to the culpability of the defendant; but the similarity is sufficient to justify counsel in his claim that his position is supported by a case in point. I can only say that the reasoning of the opinion in that case has failed to convince me, and that the decision stands alone and without other support than may be found in the turntable cases, from which the supreme court of Illinois was unable to distinguish it. I think, however, that there is a distinction which relieves us of the necessity of extending an exceptionally harsh rule of liability to such a case. A turntable is not only a danger specially created by the act of the owner but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams, which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and where they do not exist naturally must be created, in order to store water for stock and domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches, and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the Turntable Cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character.

But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. It is necessary to discriminate between the cases in which culpability does and does not exist. In the Illinois case cited by counsel the city of Pekin was held to have been culpable in excavating a deep pit within the city limits, which afterwards filled up with water. It might be granted that that case was well decided, and the principle of the Turntable Cases properly applied, without holding that this defendant is similarly liable. There the existence of a pond in a thickly-peopled quarter was due to the act of the party charged. Here, the existence of the pond was due to the exercise by the city of San Francisco of a power and authority which the defendant could not lawfully resist. By the act of the city, and without any fault on his part, his lot was converted into a pond. He might, it is true, have filled it up; but he was no more bound to do so than if it had been a natural pond, because it was in no respect more of a nuisance than it would have been if it had been there before the city was laid out. The facts being undisputed, it is the province and the duty of the court to decide, as matter of law, whether a defendant has been guilty of culpable neligence, and I think that it would be most unjust to hold that in this case the defendant has omitted any duty that he owed to the child of plaintiff. The case of Malloy v. Society (Cal.) 21 Pac. 525, which is also much relied upon by counsel, was altogether different in its circumstances, and the culpable negligence of the defendant was clear and evident. Rehearing denied.

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(5 Cal. Unrep. 583)

## PALMER v. BURNHAM. (S. F. 475.)[1]

(Supreme Court of California. Jan. 23, 1897.)

MUNICIPAL CORPORATIONS—CONTRACT FOR STREET WORK—FIXING TIME FOR COMPLETION.

Under St. 1885, p. 151, § 6, which authorizes a superintendent of streets to enter into a written contract for grading or other street work, and requires him to fix the time for the commencement and for the completion of the work under all contracts, a fixing of the time for the commencement of work under a contract at "within 15 days from the date thereof," and for its completion at 180 days "thereafter," makes the time for the completion dependent on the time of actual commencement, and is not such a compliance with the statute as entitles the contractor to enforce assessments for the work.

[1] Rehearing granted.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by C. T. H. Palmer, as assignee of C. A. Warren, against Helen M. Burnham and others, to enforce a lien for an assessment for street work under a contract for grading in the city of Oakland. Judgment for defendant on demurrer to the complaint, and plaintiff appeals. Affirmed.

C. T. H. Palmer, in pro. per. J. C. Bates, for respondent.

SEARLS, C. Action to recover by C. T. H. Palmer, as assignee of C. A. Warren, contractor, upon a street assessment, and to enforce a lien therefor for grading Broadway, a public street in the city of Oakland. A demurrer was interposed by the defendants to the amended complaint of the plaintiff, which was sustained by the court, and, plaintiff having failed and declined to amend, final judgment went for the defendants. Plaintiff appeals from the judgment, and the cause comes up on the judgment roll.

The only questions presented relate to the sufficiency of the amended complaint. The resolution of intention to grade "to the official subgrade for macadamizing," etc., Broadway, from the northern line of Fourteenth street to the northern boundary line of the city of Oakland, was adopted March 18, 1889, and such proceedings were thereafter had that the work was completed prior to June 24, 1890. The improvement was therefore performed under "An act to provide for work upon streets, lanes," etc., approved March 18, 1885 (St. 1885, p. 147), and the act amendatory thereof, approved March 14, 1889 (St. 1889, p. 157). The contract under which the grading was performed was dated August 2, 1889, and the pleader, after averring that the superintendent of streets entered into the same with C. A. Warren, the contractor, continues and avers that he (the superintendent) "fixed the time for beginning said work to be within fifteen days from the date thereof, and the time for completing said work to be within one hundred and eighty days thereafter." It is also alleged that the work was commenced August 16, 1889, and "under direction of said council, by its resolutions Nos. 14,667, 14,853. and 15,062, said superintendent of streets enlarged and extended the time of completing said work, viz. February 4, A. D. 1890, by ninety days, and April 22, 1890, by forty days, and June 17, 1890, by thirty days." It is further averred that the work was completed according to the "terms of the contract with its said extensions of time."

Section 6 of the act of 1885 (St. 1885, p. 151) confers power upon the superintendent of streets to enter into written contracts of the character herein involved, and provides that "he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him, * * * and he may extend the time so fixed from time to time, under direction of the city council." It has been repeatedly held by this court that all extensions of time for the completion of contracts for street work must be made before the period fixed therein for its completion, or within the periods to which it has been previously extended. Beveridge v. Livingstone. 54 Cal. 56, 57; Fanning v. Schammel, 68 Cal. 429, 9 Pac. 427; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Raisch v. San Francisco, 80 Cal. 1, 22 Pac. 22; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Heft v. Payne, 97 Cal. 108, 31 Pac. 844. If the 180 days fixed in the contract are to be reckoned from August 2, 1889, the date of the contract, then the time expired January 29, 1890; and, as it could not be thereafter extended, the attempt to do so on the 4th of February, 1890, was a vain act under the foregoing authorities, and could not galvanize the contract into new life.

Appellant's contention is that the expression in the pleading, that "the time for completing said work to be within one hundred and eighty days thereafter," must be construed to mean 180 days from the date of its commencement, which, as before stated, was August 16, 1889, and from which time 180 days would extend beyond the date of the first extension. People v. Los Angeles Electric Ry. Co., 91 Cal. 341, 27 Pac. 673, is relied upon in support of this construction. This construction, however, leaves the contract subject to another grave objection, in that it leaves the time of the completion of the contract indefinite. The statute requires the superintendent of streets to fix the time for the commencement and for the completion of the work. This authority is conferred upon and is to be exercised by him, and, until it is done, the contract, as has been said, is inchoate or remains in abeyance. To fix the running of a precise period of time from the happening of an uncertain event is to leave it indefinite. It is not left to the contractor to fix the time within which his contract may be completed, yet in the present case, as he had 15 days after the date of the contract within which to commence the work, he might, under the theory of appellant, determine within 15 days when it should be completed. It seems to have been the intention of the lawmakers to require record evidence of the various steps taken in consummating street improvements, to the end that parties interested may have certain knowledge as to the regularity of proceedings whereby their property is incumbered by the liens created thereby. To say that the validity of a given improvement is to be determined by the time at which the work thereon is commenced, when such work is within certain limits optional with the contractor, and for the determination of which only oral proof can be had, is to leave the validity of such proceedings open to doubt and uncertainty, and must, we think, lead to unhappy results. It is sufficient to say that where the statute, as here, requires the superintendent of streets to fix the time for the completion of the work, he must do so by such designation as will render it certain or capable of being made certain by computation, and that to establish, as the initial point from which the time is to run, an event which is uncertain, and to a certain extent in the volition of another, renders the time uncertain and void under the statute. These views render the consideration of the other points raised on the demurrer unnecessary. We recommend that the judgment be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(115 Cal. 619)

BROWN v. ROUSE et al. (S. F. 773.)

(Supreme Court of California. Jan. 21, 1897.)

APPEAL—BOND—JUSTIFICATION OF SURETIES—NOTICE—SERVICE BY MAIL.

1. Under Code Civ. Proc. § 948, providing that, on exception to the sureties on a stay bond, "unless they or other sureties justify" within a certain time, the judgment appealed from shall be no longer stayed, appellant may, at the time fixed for the justification, file a new bond with different sureties.

2. Under Code Civ. Proc. § 948, requiring appellant to justify his sureties within 20 days after exceptions thereto, on five days' notice, his failure to justify at the time specified in the notice does not prevent his giving a second notice and justifying other sureties within the 20 days.

3. Code Civ. Proc. § 1013, providing that, when service is by mail, and a right may be exercised or an act is to be done by the adverse party, the time within which such right may be exercised or act done is extended one day for every 25 miles distance between the place of deposit and the place of address, does not apply to notice of the justification of sureties on an appellant's stay bond, as respondent in such case has merely the right to be present at the justification, and is not required to exercise any right or do any act.

In bank. Action by Adam Brown against Charlotte D. Rouse and others. There was a judgment for plaintiff, and defendants appeal. Application for supersedeas. Granted.

John H. Durst, for appellants. W. C. Kennedy, for respondent.

BEATTY, C. J. This is a motion for supersedeas, based upon the following facts: The defendants appealed from a money judgment, and in due time filed a stay bond in sufficient amount and proper form. On November 24, 1896, plaintiff excepted to the sufficiency of the sureties, and defendants gave notice that they would justify before the county clerk on December 4th, at 11 o'clock a. m. At that day and hour the plaintiff attended before the clerk, but neither the defendant nor her sureties appeared. On the same day, December 4, 1896, the defendant's attorney, who resided and had his office in San Francisco, mailed to plaintiff's attorney at San José, where he resided and had his office, another notice to the effect that the sureties would justify before the county clerk of Santa Clara county—the county in which the action had been tried—on the 10th day of December, 1896, at 11 o'clock a. m. At that day and hour the defendant's attorney appeared at the clerk's office and tendered a new bond, with other sureties, who duly justified before the clerk, and he thereupon approved and filed said bond. The plaintiff's attorney, deeming the second notice of justification of the sureties unwarranted and insufficient, declined to appear before the clerk on the 10th day of December, and afterwards moved the superior court to order execution to issue, notwithstanding the approval by the clerk of the bond filed on that day. The motion for execution was granted by the court, and the question to be decided here is whether the appellant is entitled to a writ of supersedeas.

The respondent, in resisting her application, urges three reasons for holding that the county clerk exceeded his authority in approving the bond filed on December 10th. In the first place, he says the notice was to the effect that the sureties on the original bond would justify, and the appellant had no right, in view of that notice, to file a new bond with different sureties. We think, however, that the right to do so is conferred in express terms by the statute. Code Civ. Proc. § 948. In the next place, the respondent contends that, according to the decision in Hill v. Finnigan, 54 Cal. 494, the appellant, by failing to produce her sureties for justification on December 4th, in pursuance of her first notice, thereby forfeited her right to justify them, or other sureties, at any other time. But the case of Hill v. Finnigan did not involve any such question, and it was not decided upon any principle or proposition which justifies the claim made by counsel. It was said, in effect, in the opinion in that case, that the statute contemplates but one proceeding in the trial court to stay execution, and that to allow others after failure of the first might enable the appellant, by a series of pretended efforts to justify, to unreasonably delay the prevailing party in the enforcement of his rights. But the "one proceeding" contemplated by the statute, and referred to in that opinion, is the proceeding in which the appellant is allowed all of 20 days after exception to the sufficiency of his sureties to justify them, or others in their place. When that 20 days has elapsed without justification then the proceeding is at an end, and the right to a stay is lost so far as the trial court is concerned. But if the sureties fail to appear in pursuance of one notice, and there is sufficient time left of the 20 days allowed for justification to produce the same or other sureties, upon 5 days' notice, the appellant may give a new notice, as was done in this case, and the respondent must attend or the sureties will be well justified in his absence. Lastly, the respondent contends that the notice of the 4th of December did not give him the time to which he was entitled. It was mailed in San Francisco and directed to San José, which is 50 miles distant, and therefore he contends that he was entitled, under section 1013 of the Code of Civil Procedure, to 7 days' notice, because he says the law gave him 5 days after the service of the notice to exercise the right of appearing and cross-examining the sureties, and, therefore, he was entitled to 2 days additional time for every 25 miles between San Francisco and San José. But in this case the law does not give the respondent the right to appear and cross-examine within any certain number of days. It requires him to appear at the time specified in the notice, and he is entitled to only 5 days' notice. Section 1013 applies to such provisions and rules as those which require an answer within 10 days after notice of demurrer overruled, or service of notice of motion for new trial within 10 days after notice of filing of decision. It applies, in other words, according to its terms, where some act must be done or right exercised within a certain number of days after service, and not to the right to be present at a proceeding of which a prescribed notice must be given.

For these reasons, we think, the stay bond tendered by appellant on December 10th was properly approved by the clerk, and that the order for execution to issue was improperly granted. Let a writ of supersedeas issue as prayed.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.

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117 Cal. 577

## HIBERNIA SAVINGS & LOAN SOC. v. LEWIS et al. (S. F. 309.)

(Supreme Court of California. Jan. 23, 1897.)

WRIT OF ASSISTANCE—PURCHASER PENDENTE LITE —NOTICE—JUDGMENT—COLLATERAL ATTACK.

1. A writ of assistance running to the mortgagor, or a purchaser from him pendente lite with notice, is the proper remedy to place in possession the mortgagee, who has purchased at the foreclosure sale.

2. On foreclosure, the mortgagor's attorney filed an answer for his client, alleging that, after the commencement of the suit, the parties had agreed that the default mentioned in the complaint should be waived, and foreclosure postponed, such answer being sworn to by the attorney, who stated that the "affiant knows that the facts set forth in the above answer are true." *Held* sufficient to show that the attorney had actual notice of the pendency of the suit when he purchased the premises from the mortgagor between the date of said agreement and the filing of the answer.

3. On writ of assistance against a purchaser from the mortgagor pendente lite, defendant cannot attack the judgment of foreclosure, valid on its face, on the ground that, when the mortgagor appeared and submitted to the jurisdiction of the court, he mistakenly supposed the summons was valid.

Commissioners' decision. Department 1. Appeal from superior court of city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Hibernia Savings & Loan Society against Anna A. Lewis and others, in which there was a decree for plaintiff. From an order granting a writ of assistance against defendant J. D. Boyer, he appeals. Affirmed.

J. D. Boyer, in pro. per. Tobin & Tobin, for respondent.

SEARLS, C. Two appeals were taken in this case,—one from an order refusing to vacate the judgment, and the other from an order granting a writ of assistance. Upon motion of counsel for respondent the appeal from the order refusing to vacate the judgment was dismissed. 111 Cal. 519, 44 Pac. 175. It follows that the only questions for consideration are those involved in the appeal from the order granting the writ of assistance.

The action was brought December 1, 1892, to foreclose a mortgage, executed May 26, 1891, by Anna A. Lewis and William F. Lewis (who are husband and wife), upon a city lot, situate at the southeasterly corner of Jackson and Baker streets, San Francisco, to secure the joint and several promissory note of the mortgagors, bearing even date with the mortgage for $7,000, and payable one year after date, with interest, etc. The mortgage was duly recorded at the date of its execution. The Santa Cruz Rock Pavement Company and sundry other parties were made defendants, as subsequent lienholders; but, as they are not involved in this appeal, they need not be further mentioned. Summons was duly served upon Anna A. Lewis, and she made default. Defendant William F. Lewis was served with summons March 1, 1894, in Sonoma county, and appeared, and in March, 1894, filed a demurrer to the complaint, which was overruled, whereupon, and on April 11, 1894, he filed an answer in the case. On May 31, 1894, on motion of defendant William F. Lewis, he was permitted to withdraw his answer. A decree of foreclosure was entered in due form December 5, 1894, under which the mortgaged property was duly sold, the plaintiff (respondent here) becoming the purchaser, and, no redemption having been had, a deed was in due time executed, exhibited to appellant, who was in possession, and possession demanded from him, which was refused, and thereafter, on application of plaintiff, and after a hearing and opposition by appellant, the writ issued. The appellant, J. D. Boyer, was in possession of the property under a deed of conveyance executed by the mortgagors, Anna A. and William F. Lewis, May 4, 1893, and duly recorded at the date thereof.

As will be seen from the foregoing statement, appellant purchased the mortgaged premises during the pendency of the action to foreclose. A writ of assistance is the proper remedy to place the mortgagee who has purchased under a foreclosure sale in possession under his deed. It runs against the mortgagor and all persons who have purchased the fee under him pendente lite with notice. Freem. Ex'ns, § 37d; Wiltsie, Foreclosures, § 593; Montgomery v. Tutt, 11 Cal. 191; Frisbie v. Fogarty, 34 Cal. 11; Skinner v. Beatty, 16 Cal. 156; Montgomery v. Middlemiss, 21 Cal. 103; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Newmark v. Chapman, 53 Cal. 559.

Appellant contends that he is not bound by the decree, for the want of notice, either constructive or actual, of the pendency of the action. Respondent avers, in his brief, that a lis pendens was recorded December 1, 1892, in Liber 40 of Lis Pendens, at page 50. We find no proof of this fact in the record, and cannot assume it to be correct. We think, however, the court was fully justified in holding, as it must have done, that appellant had actual notice of the pendency of the action. The facts as disclosed by the record on this point are: (1) That the appellant, who was the purchaser from the mortgagors, appeared in this action as the attorney for William F. Lewis, and filed a demurrer to the complaint, and upon its being overruled, on the 11th of April, 1894, filed an answer for said Lewis to the complaint. (2) Said answer set out that, after the commencement of the action (some 13 days after December 1, 1892, as the affidavit shows), plaintiff and defendant entered into an agreement whereby it was stipulated that the time for payment should be extended, and the default mentioned in the complaint should be waived, in consideration of which Anna A. Lewis paid to plaintiff $200, etc. This answer was sworn to by the appellant here, as attorney for the defendant, who says in his affidavit "that the affiant knows the facts set forth in the above answer are true." If he knew those allegations to be true, he must have then known of the pendency of the action, as the sole object of that agreement was to postpone the pending foreclosure. The object of notice to a purchaser pending the action is to give him an opportunity of being substituted as a party thereto under section 385, Code Civ. Proc., and thus to conserve his rights, or he may permit the action to continue in the name of his grantor, but in either event he is equally bound by the judgment with his grantor.

Appellant further contends that neither he nor his grantor, William F. Lewis, are bound by the judgment, for the reason that the latter was served with an alias summons, which issued more than one year after the original summons. Section 408, Code Civ. Proc., which provides for an alias summons, contains the proviso "that no such alias summons shall be issued after the expiration of one year from the date of the filing of the complaint." The complaint having been filed December 1, 1892, and the alias summons not having issued until February 14, 1894, was not in time. But under section 416, Code Civ. Proc., "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint on him." When defendant William F. Lewis appeared, demurred to the complaint, and filed an answer thereto, the court acquired jurisdiction of his person thereby, and whether there was or was not a valid summons or any summons in the case was of no moment. It is true that appellant made a showing of mistake in answering, and that he supposed the summons was valid when he appeared in the case, etc. This was proper in his motion to set aside the judgment, which motion, it seems, was denied and an appeal taken from the order. But that appeal was dismissed. In the present appeal the judgment, being fair on its face, and one which on the judgment roll the court had authority to render, cannot be collaterally attacked for mere voidable error which can only be reached by appeal from the judgment or proceedings aimed at its existence subsequent to the rendition thereof. "It is a doctrine of law, too long established to require the citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court." Peck v. Jenness, 7 How. 624. The order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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(115 Cal. 632)

## JACKSON v. PUGET SOUND LUMBER CO. et al. (S. F. 774.)

(Supreme Court of California. Jan. 22, 1897.)

BILL OF EXCEPTIONS — FILING — CERTIFICATE OF ALLOWANCE.

Under Code Civ. Proc. § 650, directing that the bill of exceptions be filed after it is signed by the judge or referee, with his certificate that it is allowed, the filing thereof by the referee after settlement and allowance by him as to the proceedings before him does not deprive the judge of authority to settle and allow it as to matters which took place in court, or the appellant of the right, on timely request, to have him do so.

In bank. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by Alexander Jackson against the Puget Sound Lumber Company and others. Plaintiff had judgment, and defendants appeal. Plaintiff moves to dismiss. Denied.

L. L. Cory and Geo. E. Church, for appellants. Wiley J. Tinnin, for respondent.

BEATTY, C. J. This is a motion to dismiss an appeal from the judgment upon the ground of failure to file the transcript within 40 days after the appeal was perfected. The motion is resisted upon the ground that there is an unsettled bill of exceptions in the case, awaiting the action of the trial judge. It appears that in the superior court the cause was referred to a court commissioner to take an account and report findings, etc. Upon the filing of his report, and after various proceedings in court, a judgment was rendered in favor of the plaintiff in October, 1895, from which the defendant has appealed. In due time after judgment the defendant served upon the plaintiff a draft of his proposed bill of exceptions, which included a statement of the testimony taken, and other proceedings had before the referee, as well as the proceedings in court subsequent to the filing of the referee's report. Amendments to this proposed bill were suggested by the plaintiff, relating exclusively to the proceedings before the referee, and the draft and the amendment were sent to the referee for settlement. He allowed certain of the proposed amendments, whereupon the bill was engrossed by defendant, and its allowance certified by the referee. There is some conflict in the evidence as to what next occurred, but the most positive and certain testimony is to the effect that the referee, without notice to the defendant, filed the bill, as settled by him, without presenting it to the superior judge for settlement and allowance as to the matters which took place in court. When this was discovered by appellant (and he made the discovery while printing his transcript, and before the time to file it had elapsed), he requested the judge to add his certificate of allowance to the bill, and, until that should be done, suspended the work of printing. The judge took this application under advisement, and finally, after the expiration of 40 days from the filing of the bill of exceptions, declined to certify it, upon the sole ground that the filing of the bill in the clerk's office left him without the right or authority to take further action. In this, we think, the trial judge erred. The defendant had done all that the law required him to do, and was entitled to have his bill of exceptions certified, for otherwise it could not avail him in this court. The statute, it is true, directs that the bill shall be filed after it is signed by the judge or referee, with his certificate that it is allowed. Code Civ. Proc. § 650. But it is not to be concluded from this provision that if the settled and engrossed bill of exceptions happens to be filed with the clerk, by inadvertence of the judge or referee, or even of the party seeking its allowance, before it has been properly certified, the right to a proper certificate is forever lost. On the contrary, it ought to be considered that such filing was premature and unauthorized, and, if a timely request is made for the certificate of allowance, it should be granted, and the bill refiled. There is nothing in the statute which conflicts with this most reasonable conclusion, nor is anything to the contrary decided in Keller v. Lewis, 56 Cal. 469, or Adams v. Dohrmann, 63 Cal. 419. The latter case, indeed, is not authority for anything, because a rehearing was ordered by the court in bank, and only set aside because it proved to have been granted one day too late. We think the trial judge should settle and allow the bill of exceptions according to the facts, notwithstanding the premature filing of it, and that the motion to dismiss the appeal should be denied. It is so ordered.

We concur: HENSHAW, J.; HARRISON, J.; McFARLAND, J.

(115 Cal. 657)

## PIERCE v. BIRKHOLM et al.

(No. 15,464.)

(Supreme Court of California. Jan. 26, 1897.)

BUILDING CONTRACTS — STATUTORY PROVISIONS — MECHANIC'S LIEN.

1. A contract to erect a house in conformity with plans prepared by and in the possession of a designated architect, filed with the recorder without a copy of the plans, does not comply with Code Civ. Proc. § 1183, which requires building contracts to be in writing, and to be filed before work is commenced.

2. A building contract, filed with the county recorder under the mechanic's lien law, was void for failure to set out the plans. Code Civ. Proc. § 1183, provides that in such case labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the instance of the owner. Section 1187 provides that all persons save the original contractor must file claims of liens within 30 days after the completion of the building. *Held*, that where the original contractor abandoned the building, and the owner finished it, persons furnishing labor and materials were entitled to liens on filing their claims within 30 days from the completion.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Separate actions by David T. Pierce and others against H. H. Birkholm and others. The actions were consolidated, and there was a judgment for defendants, and plaintiffs appeal. Reversed.

William H. Jordan, Parker & Eells, and Morrison & Foerster, for appellants. W. S. Goodfellow, for respondents.

BELCHER, C. The plaintiff and six other parties commenced actions to foreclose mechanics' liens for labor and material furnished and used in the construction of a building for the defendant Birkholm. The actions were consolidated, and tried together. The court below gave judgment in favor of the defendants, from which the plaintiffs have appealed, without any statement or bill of exceptions.

It is alleged in the complaint of Pierce, and the other complaints are substantially the same, that on the 15th day of March, 1889, the defendant Birkholm and one Willis entered into a written contract whereby Willis agreed to construct for Birkholm a two-story dwelling house and shed connected therewith, upon certain described real property, and to furnish all the materials therefor, for the sum of $5,445, 25 per cent. of which sum was to be paid 36 days after the building should be fully completed and accepted; that the building, as shown by the written contract, was to be constructed in conformity with plans, drawings, and specifications for the same, made by an architect employed by the owner, and signed by the parties to the contract; that neither the said contract nor any memorandum thereof was ever filed in the office of the recorder of the county where the property was situated, and that the said plans, drawings, and specifications were never so filed; that the building was fully completed and accepted by the owner on the 20th day of August, 1889; that prior to its completion it had been abandoned by the contractor; that during the progress of the work of construction the plaintiff, at the instance of the contractor, furnished labor and materials therefor, and subsequently, within less than 30 days after the date of completion, filed his claim of lien upon the property for the amount unpaid to him; and within 90 days thereafter the action was commenced.

The defendant, by his answer, denied that either the contract or any memorandum thereof was filed in the office of the county recorder; denied that the plans, drawings, and specifications referred to in the complaint were a part of said contract; and then set up the character and substance of the written instrument which he alleged was actually filed. He further denied, upon information and belief, many other averments of the complaint. Subsequently, by an amendment to his answer, he admitted that on the 12th day of June, 1889, while the building was in process of construction, the contractor abandoned the building, and failed and neglected to complete the same, and that on or about said last-named day, and more than 30 days before the filing of plaintiffs' claims of lien, or any of them, he, the said contractor, "ceased from labor upon said unfinished and uncompleted contract, nor was labor ever resumed thereon."

At the trial of the cause, no evidence, other than documentary, was introduced by either party, and the case was submitted upon the following admissions: It was admitter that all the allegations contained in the complaints were true as therein alleged, save and except the allegation that the contract between Willis and Birkholm was not filed for record, nor any memorandum thereof, before the commencement of work upon the building, and also save and except the allegations regarding attorneys' fees.

The court found the facts to be as follows: (1) "Before the commencement of the work referred to in the complaints, there was filed for record in the office of the county recorder of the city and county of San Francisco a written instrument subscribed by the defendant Birkholm and the defendant Willis, a copy of which is hereto annexed, marked 'Exhibit A,' and made a part hereof, and the same was the only instrument at any time filed for record. No plans, drawings, or specifications were at any time filed with said contract, or at all. Nor were any plans, drawings, or specifications ever at any time annexed to said instrument." (2) "The defendant Willis, the contractor who was constructing the building for the defendant Birkholm, as alleged in the complaint, did, while the said building was in process of construction, to wit, on the 12th day of June, 1889, abandon said building, and failed and neglected at any time to complete the same, or his contract with the defendant for the construction of said building, and on the said last-named day, and more than thirty days before the filing of the plaintiffs' claims of lien, or any of them, ceased from labor upon said unfinished and uncompleted contract; nor was labor ever resumed thereon by him, or any person representing him. That after the said contractor had so abandoned his contract, and within less than thirty days from and after said 12th day of June, 1889, the defendant Birkholm, with his own independent means, commenced work upon said building, and completed the same on the 20th day of August, 1889." And as conclusions of law the court found "that the liens of the plaintiffs, and each of them, were not filed within the time required by law, and also that the plaintiffs are entitled to take nothing as against the defendant Birkholm, and that said defendant Birkholm is entitled to judgment for his costs."

The instrument referred to in finding 1 as "Exhibit A" is fully set out, and it appears that the only provision therein in regard to the general character of the work to be done is as follows: "The contractor agrees within that on or before the 15th day of July, A. D. 1889, that he will, from the date hereof, furnish the necessary labor and materials, including tools, implements, and appliances required, and erect and complete in a workmanlike manner a two-story dwelling house and shed, and deliver the same to the owner free from all liens and charges, in conformity with the plans, drawings, and specifications for the same made by Charles C. Shaner, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto and others concerned in said erection."

The first and principal question is, were there any plans, drawings, and specifications, and, if so, did they constitute a part of the building contract? This question must, in our opinion, be answered in the affirmative. The language of the contract above quoted clearly implies that there were plans, drawings, and specifications, in conformity with which the building was to be constructed; and the fact that the contract did not state in terms that they were annexed to it, and made a part of it, was immaterial. That they did constitute an essential part of the contract abundantly appears, for without them the "general character of the work to be done" could not be ascertained. It could not be told what was to be the size or shape of the house, or what materials—whether wood, brick, or stone—

were to be used in its construction. In the case of Greig v. Riordan, 99 Cal. 316, 33 Pac. 913, the provisions of the contract that the building was to be erected and completed in a workmanlike manner, and delivered to the owner free from all liens and charges, "in conformity with the plans, drawings, and specifications," etc., were the same as in this case. And the court said: "In the matter of 'the general character of the work to be done,' the contract as filed was, without the 'plans, drawings, and specifications,' which formed an essential part thereof, fatally defective. If it be urged that the contract did not in terms recite that the 'plans, drawings, and specifications' were attached thereto and made a part of the contract, the answer is twofold: (1) It abundantly appears that they formed an essential part of the contract, and they became a part thereof as effectively as though in express terms so designated. (2) Without them the contract is so indefinite and uncertain as not to comply with the requirements of the statute." And in that case it was held, as it has been held in many other similar cases, that the contract was void. Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111; Barker v. Doherty, 97 Cal. 10, 31 Pac. 1117; Dunlop v. Kennedy, 102 Cal. 443, 36 Pac. 765.

This being so, the only remaining question is, were the plaintiffs' claims of lien filed within the time required by the statute? Section 1183 of the Code of Civil Procedure provides that, if the contract or a memorandum thereof is not filed in the office of the county recorder before the work is commenced, it shall be wholly void, and no recovery shall be had thereon; and in such case the labor done and materials furnished by all persons except the contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." And section 1187 provides that "every person, save the original contractor, claiming the benefit of this chapter," must file his claim of lien within 30 days after the completion of any building, improvement, or structure. Here, the contract being void, there was no original contractor, and the plaintiffs are deemed to have furnished their labor and materials at the personal instance of the owner. And under section 1187 they were required only to file their claims of lien within 30 days after the building was completed. It appears from the findings that there was no cessation of labor on the building for the period of 30 days, and that the building was completed on the 20th day of August, 1889; and it is admitted that the plaintiffs filed their claims of lien within 30 days thereafter. This was in time to meet the requirements of the law, and to entitle the plaintiffs to the relief demanded. The case of Johnson v. La Grave, 102 Cal. 324, 36 Pac. 651, is not in point. In that case there was a valid contract for the construction of a building, and the contractor, after performing a portion of his contract, abandoned it, and refused to proceed further in its execution. Section 1187, Code Civ. Proc., provides that "cessation from labor for thirty days upon any unfinished contract * * * shall be deemed equivalent to a completion thereof for all the purposes of this chapter." Laws 1887, p. 154. It was held that under these circumstances it was incumbent upon parties claiming liens by virtue of the original contract to file their claims of lien within 30 days after there had been a cessation of labor for 30 days upon the unfinished contract. Here there was no valid contract, and hence the rule declared in that case does not apply. The judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

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115 Cal. 642

## RICHARDS v. LAKE VIEW LAND CO.

(L. A. 173.)

(Supreme Court of California. Jan. 26, 1897.)

CONTRACT TO PAY MONEY—AVERMENT AS TO BREACH.

An allegation that "there is now due and owing from defendant," etc., on a contract for the payment of money, is not sufficient as an allegation of nonpayment constituting a breach of the contract.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Charles E. Richards against the Lake View Land Company. From a judgment for plaintiff, defendant appeals. Reversed.

Knight & Harpham, for appellant. E. B. Stanton and O. P. Widaman, for respondent.

McFARLAND, J. Defendant appeals upon the judgment roll from a judgment for plaintiff, the point made by appellant being that the demurrer to the first, fifth, and seventh counts of the complaint should have been sustained. The complaint contains several different counts. In each count there is an averment of an indebtedness of the appellant to a certain person upon a contract, and an assignment by such person of the alleged cause of action to respondent. In each of the counts, except the first, fifth, and seventh, there is an averment that the amount claimed "has not been paid, or any part thereof"; but in the first count the only averment on the subject of nonpayment is that "there is now due and owing from said defendant to the said plaintiff" a certain stated amount. In the fifth count the only averment is that "there is now due," etc., and in the seventh count the averment also is that "there is now due," etc. It has been settled in this state by a long line of decisions from Frisch v. Caler, 21 Cal. 71, to the very recent case of Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891, that in an action to recover money upon a contract "the failure to pay constitutes the breach, and must be alleged," and that such language as that used in said counts is not the equivalent of an averment of nonpayment, but is a mere conclusion of law, and not an averment of fact. See Ryan v. Holliday, supra, and cases there cited. It is useless, at this late day, to discuss the merits of the rule. It is a rule easily complied with, and, being firmly established, cannot now be disregarded in order to meet the exigencies of particular cases. Respondent contends that this defect in the fifth count is cured by the answer. Upon looking at the answer, it does not seem to us to bring the case within the rule contended for by respondent; but it hardly seems necessary to now determine that question definitely, for, as the other two counts will have to be amended so as to directly aver nonpayment, a similar amendment can readily be made to the fifth count, which will avoid this question. The judgment is reversed, with directions to the court below to sustain the demurrer to the first, fifth, and seventh counts of the complaint.

We concur: HENSHAW, J.; TEMPLE, J.

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(5 Cal. Unrep. 586)

## BANCROFT v. SAN FRANCISCO TOOL CO.

(S. F. 484.)[1]

(Supreme Court of California. Jan. 27, 1897.)

PASSENGER ELEVATOR — CONSTRUCTION CONTRACT —IMPLIED WARRANTY—DEFECTIVE DESIGN—ACTION FOR BREACH OF WARRANTY — LIMITATIONS.

1. A warranty in a written contract to manufacture and put up a passenger elevator, that the contractor would furnish first-class work, and keep the elevator in repair for one year, does not include a warranty that the design submitted with the specifications would be suitable.

2. The implied warranty created by Civ. Code, § 1770, which provides that one who manufactures an article under an order for a particular purpose warrants that it is reasonably fit for such purpose, forms a part of a written contract to manufacture and put up a passenger elevator, so that an action for breach thereof is one on a written contract (Code Civ. Proc. § 337), for breach of which action may be brought within four years.

3. A cause of action for a breach of warranty that the design of a passenger elevator would be suitable for the purpose for which it was intended accrues when the elevator is completed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by H. H. Bancroft against the San Francisco Tool Company. There was a judgment for defendant for costs, and from an order denying a new trial plaintiff appeals. Reversed.

Galpin & Zeigler, for appellant. E. J. Pringle, for respondent.

SEARLS, C. This is an action to recover damages from the corporation defendant, alleged to have been sustained by plaintiff by reason of the fall of a passenger elevator erected by said defendant for plaintiff in the History Building, Market street, San Francisco. Defendant, among other defenses to the action, set up the bar of the statute of limitations as found in subdivision 1 of section 339 of the Code of Civil Procedure, which provides that "an action upon a contract, obligation, or liability, not founded on instrument in writing, or founded upon an instrument of writing executed out of this state," shall be brought within two years. At the trial, and upon the close of plaintiff's testimony, defendant moved the court for a nonsuit, which motion was granted, and judgment entered in favor of defendant for costs. This appeal is from an order of the court denying a motion on behalf of plaintiff for a new trial.

Whether or not plaintiff's cause of action is barred by the statute of limitations is the only question necessary to be considered on this appeal. Some minor questions were made at the trial, none of which, however, have any bearing upon the main point, viz. the bar of the statute; and, manifestly, if the cause of action was barred, the nonsuit was properly granted, while, if not so barred, the nonsuit was clearly erroneous, and a new trial should have been granted. It appears from the record that early in 1887 the plaintiff was engaged in the construction of what is known as the "History Building," on Market street, San Francisco,—a building consisting of five stories and a basement; that he required three elevators therein, viz. two freight and one passenger elevator. On the 4th day of April, 1887, the defendant corporation submitted to plaintiff a proposition in writing, which is in part as follows:

"San Francisco, April 4, 1887. A. L. Bancroft & Co., City: We will furnish three hydraulic elevators as follows, and as per plan submitted with this specification.

"Elevators: Three hydraulic cylinders complete, with elevating sheaves mounted on same as shown on plan.

"Details of erection: 1,300 feet of ⅝-inch wire rope."

Then follows a long list of materials to be furnished, consisting of iron sheaves, shafting, counterweights, water gates, casing, elbows, cast-iron tees, flanges, sewer pipe, steam pump, tank, cages, "one cage to be made for carrying passengers," etc., which need not be mentioned in greater detail. The offer proceeds as follows: "We will furnish the work heretofore mentioned in a first-class, workmanlike manner for the sum of five thousand dollars ($5,000), guarantying these elevators for one year; that is to say, we will keep them in first-class order for one year, free of charge to you.' Payments to be made as follows: On completion of the two freight elevators we to receive two thousand dollars, and on the completion of passenger elevator we to receive fifteen hundred dollars, and after thirty days' satisfactory running we to receive balance due on contract." The proposition was accepted by plaintiff on or before April 6, 1887, except that by mutual agreement the payments were to be made in monthly sums of $500 each, the first payment of $500 being made by plaintiff on said April 6, 1887. The elevators were constructed by defendant, and the final payment on account thereof was made February 15, 1888. It is not quite clear from the testimony when the elevators were completed. Plaintiff, in his amended complaint, avers that in February, 1888, all of said elevators had been erected in said building, except that various parts thereof were, as plaintiff is informed and believes, altered by the defendant from time to time, and were not in good running order down to August, 1888, and "that in said month said plaintiff accepted said elevators." Defendant, in his answer to the amended complaint, avers that the elevators were completed July 1, 1887, and kept by it in first-class order until July 1, 1888. Plaintiff, in his testimony, admits that the passenger elevator started to run about July, 1887, but says it would run a while and then stop for repairs and alterations, etc. It ran that way, he says, for two or three months; one of his (plaintiff's) employés running it. We may assume, for the purposes of the case, that it was finally accepted by plaintiff in August, 1888, as stated in the complaint. The passenger elevator fell September 19, 1888, causing the damage complained of. This action was commenced September 18, 1890, more than two years after the work was accepted, and within two years after the injury occasioned by the fall of the elevator. The testimony tended to show that the drum over which the cables ran was 15 inches in diameter, and the wire cable running over it was five-eighths of an inch in diameter; that, in order to be safe, the drum should be at least 60 times the diameter of the cable, or, in the present instance, should be 37½ inches in diameter, etc. We may, for the sake of brevity, discard all scientific terms, and say the evidence tended to show a faulty design in the machinery, and that by reason thereof, and not in consequence of bad workmanship, the cable or cables were overtaxed. That the wire ropes should not have been taxed over one-sixth of their breaking resistance, the co-efficient of safety in a passenger elevator being six, while in the present instance it was only about two; and that, by reason of being overtaxed, the cables soon gave out, and the accident occurred.

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[1] Rehearing granted.

1. The only language used in the proposition or offer of the defendant which is or can be construed into a warranty is hereinbefore set out, and we repeat it: "We will furnish the work heretofore mentioned in a first-class, workmanlike manner for the sum of $5,000, guarantying these elevators for one year; that is to say, we will keep them in first-class order for one year free of charge to you." This language only exhibits an intent to warrant the character or quality of the work to be performed upon the elevator, and cannot, by any fair canon of interpretation, be extended so as to include the suitableness of the design. The plan or design of the elevators was submitted with the specifications. The offer was to "furnish three hydraulic elevators as follows, and as per plan submitted within this specification." According to this plan, the materials were to be furnished and the work performed "in a first-class, workmanlike manner." There is no warranty of the plan or design in the language used. As was said by the court below in granting the nonsuit: "First-class materials and workmanship may be furnished on a poor design or device, as well as on a good one." No particular form of words is necessary to constitute an express warranty. If it appears from the language used that an intent to warrant exists, and is relied upon, it is sufficient. Indeed, some of the authorities go so far as to hold that the positive affirmation of a material fact by the vendor, which is relied upon by the vendee, will be treated as a warranty, regardless of the actual intent of the vendor. This last position is, however, not supported by the weight of authority. Where, as in the present instance, the contract is in writing, we cannot go beyond the instrument to formulate an express warranty, since the written instrument is conclusively supposed to embody the whole contract. Lamb v. Crafts, 12 Metc. (Mass.) 353; Reed v. Wood, 9 Vt. 286; Boardman v. Spooner, 13 Allen, 353; Dean v. Mason, 4 Conn. 432; Benj. Sales (6th Ed.) p. 625, and cases there cited; Johnson v. Powers, 65 Cal. 179, 3 Pac. 625. As the contract contains no language importing a warranty of the plan or design of the passenger elevator, and as the evidence shows that it was such design that was faulty, and caused the injury to plaintiff, defendant was not liable as and for an express warranty.

2. Independent of express contractual specifications, the law implies certain warranties in given cases. In this state a contract of sale or agreement to sell does not imply a warranty, except as provided in the Civil Code (section 1764). Section 1770 of the same Code is as follows: "One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose." This section applies to the case in hand, and the only question involved is this: Does the implied warranty of the statute become a part of the written contract, so as to enable plain-

tiff to maintain an action for a breach thereof within four years, or does it constitute an obligation or liability, not founded upon an instrument in writing, upon which an action must be brought within two years, as provided by subdivision 1 of section 339 of the Code of Civil Procedure? The contention of appellant is "that the warranty implied by law, that the elevator was reasonably fit for the purpose of carrying passengers, is a part of the written contract," and hence, of course, that the limitation of four years applies, as in case of written contracts. In other words, the contention is that what is by the law implied in an express contract is as much a part of it as what is expressed. Implied warranties are created by law, or spring from the facts existing at the time of sale. We think this contention is founded upon a firm basis. "What is implied in a contract is as much a part of it as what is expressed." 1 Beach, Mod. Cont. § 710; Jones v. Turner, 86 Hun, 157, 30 N. Y. Supp. 65. Thus, A. contracts for the sale of goods to B., and no time is provided for delivery. The law adds that delivery must be made within a reasonable time. To put it in the form of a syllogism as in pleading, the law becomes the major premise, the contract the minor premise, and from these the conclusion flows. Thus, one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose. The defendant manufactured for plaintiff, under an agreement in writing, an elevator, to be used in the conduct of passengers, which was not reasonably fit for that purpose. The conclusion is that there was a breach of the warranty for which defendant is liable. The law did not make a new or separate contract between the parties, but attached the legal obligation of a warranty to that which they made. The obligation attaches to and becomes an integral part of the contract, which is discharged upon the fulfillment of the latter, and which exists in all its rigor upon a breach of such a contract, and is only barred by time upon the expiration of the four years prescribed by section 337 of the Code of Civil Procedure, as the limitation for commencing actions on contracts in writing. The breach of the warranty is based upon the erroneous design of the passenger elevator, and such breach occurred when the elevator was completed. Wood, Lim. p. 394; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, and cases there cited; Byrum v. Agricultural Works, 91 Cal. 657, 27 Pac. 1093. In case of the warranty of title of personal property sold the rule is different. There there is no breach until the possession of the purchaser is disturbed by the true owner. Gross v. Kierski, 41 Cal. 111. As four years had not elapsed between the completion of the contract and the date of suit brought, the cause was not barred, and we recommend that the order of the court below denying plaintiff's motion for a new trial be reversed, and a new trial ordered.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order of the court below denying plaintiff's motion for a new trial is reversed, and a new trial ordered.

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115 Cal. 694

## JOHNSTON et al. v. BROWN et al.

(S. F. 353.)

(Supreme Court of California. Jan. 28, 1897.)

ATTORNEY AND CLIENT—EXISTENCE OF RELATION—JUDGMENT—RES JUDICATA.

1. In one of several actions between the same parties, depending on the same facts, it appeared that on a previous trial of one of them the partner of one of the attorneys for defendants assisted in the trial, and acted as one of the attorneys. *Held*, that the court was justified in finding that he was an attorney for defendants, the other evidence as to such fact being conflicting, within Code Civ. Proc. § 170, disqualifying a judge related to the attorney of a party.

2. The doctrine of res judicata does not apply to motions in a pending action.

Department 1. Appeal from superior court, San Benito county; James F. Breen, Judge.

Action by Johnston, administratrix, and others, against Brown and others. From an order changing the place of trial, defendants appeal. Affirmed.

Scott & Dooling and N. C. Briggs, for appellants. D. W. Burchard (Frs. E. Spencer, G. B. Montgomery, and L. W. Jefferson, of counsel), for respondents.

HARRISON, J. Appeal from an order changing the place of trial. The motion was made upon the ground that the judge of the court was disqualified by reason of being related, within the third degree, to one of the attorneys for the defendants. At the hearing of the motion it was made to appear that John L. Hudner was the husband of a niece of the Honorable James F. Breen, the judge of the superior court for the county of San Benito, in which the action was pending, and for more than three years prior to the making of the motion had been the general law partner of N. C. Briggs, one of the attorneys of record for the defendants, and was such general law partner at the time of the appearance herein. One of the plaintiffs made an affidavit, which was read at the hearing of the motion, in which she stated "that the said John L. Hudner, Esq., has been acting continuously since the filing of defendants' answer herein, in conjunction with his law partner, as one of the attorneys in the case, althought the answer is signed by his law partner, N. C. Briggs, Esq.; that, at all times since the appearance of the defendants in this action, said John L. Hudner has been actively engaged in the examination of witnesses and preparation for trial, in conjunction with his said law partner, N. C. Briggs, Esq., and as counselor for the defendants herein." In an affidavit by one of the defendants it was stated "that said Hudner has not been employed by said defendants as one of their, or either of their, attorneys in said action, and that said Hudner has not performed any services in said action, or in any respect assisted defendants in their defense to said action." It was also stated in this affidavit that Mr. Hudner "has nothing coming to him by reason of any fee due or payable to N. C. Briggs for his services as attorney in said action, nor by reason of any partnership or business association with said Briggs." The defendants also presented a document, signed by Mr. Hudner, by which they were "released" from any and all liability to him as attorney for them, and in which he declared that "I am not an attorney, directly or indirectly, in said cause, and that I have no interest therein, and will not participate in the trial of the said cause," and also a document, signed by both Briggs and Hudner, by which they agreed that their partnership, "so far as the same relates to the legal or other services to be performed in the above-entitled action," was dissolved. It was also shown that this action is one of several of the same nature brought by the same plaintiffs against the defendants to set aside certain deeds of land in San Benito county, and depending upon the same facts. One of these actions had been tried before the present motion was made, before another judge, who had been called in therefor by reason of the claim of Judge Breen that he was disqualified; and it was shown that at the trial of that cause Mr. Hudner "sat at the table with his law partner, and assisted at the trial of said cause, and acted as one of the attorneys for the same defendants that are now defendants herein." Upon this showing the court found that Mr. Hudner was, in legal effect, one of the attorneys for the defendants, within the contemplation of section 170, Code Civ. Proc., and that by reason thereof he was disqualified to sit or act as a judge in the action, and accordingly made an order transferring the cause to the county of Santa Clara for trial. From this order the defendants have appealed.

Whether a judge is disqualified to sit or act in an action or proceeding pending in his court is a question of law, depending upon the existence of the facts which are necessary to constitute such disqualification; and, although the decision of the question may affect the judge who makes the decision, the rules for determining the existence of the facts are the same as though the decision affected another person than the judge. Whether Mr. Hudner was an attorney of the defendants was to be determined by Judge Breen from the matters presented to him at the hearing of the motion, and, if there was any conflict in the affidavits of the respective parties, his decision upon such conflict is not open to review. It was not requisite that Mr. Hudner should be an attorney of record in the case, nor did his relation as attorney for the defendants depend upon their obligation to compensate him for his services, or upon the continuance of his partnership with Mr. Briggs. The fact that at the previous trial of one of the actions, in which his relation to the cause and to the defendants was the same as in the present action, he sat at the table in court with his partner, took notes of the evidence offered, and assisted as one of the attorneys in the trial of said case, as found by the court in its order changing the place of trial, justified the court in determining between the conflict in the respective affidavits, that he was in fact an attorney for the defendants, and in holding himself disqualified to try the cause.

The court was not precluded from making the order by reason of a former application having been denied. The doctrine of res judicata is not applicable to motions in a pending action. Ford v. Doyle, 44 Cal. 635; Bowers v. Cherokee Bob, 46 Cal. 279. A previous denial of the same motion may be a sufficient reason for the court to refuse to entertain it again. Code Civ. Proc. § 182. But this is a matter which is addressed to its discretion, and it will be presumed to have properly exercised its discretion if it permits the motion to be presented a second time. Hitchcock v. McElrath, 69 Cal. 634, 11 Pac. 487. The order is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.

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115 Cal. 430

## GRAY et al. v. LUCAS et al. (S. F. 458.)

(Supreme Court of California. Jan. 28, 1897.)

In bank. On rehearing. Affirmed.

For opinion, in department 1, see 47 Pac. 354.

PER CURIAM. A rehearing is denied. The opinion filed herein is modified by striking out the words, "And these grounds should therefore be embodied either in a finding of facts, or in a bill of exceptions."

BEATTY, C. J., dissents.

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115 Cal. 648

## SIEVERS v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 432.)

(Supreme Court of California. Jan. 25, 1897.)

MUNICIPAL CORPORATIONS—GRADING STREETS—INJURIES TO ADJOINING PROPERTY—NEGLIGENCE OF CITY ENGINEER.

1. Where a street ordered to be graded up to the "official grade" is, by the errors of the city engineer in giving the levels, filled to a height eight feet above the official grade, causing sur-

face water to accumulate on adjoining property, the city is not liable for the injury thus caused.

2. The rule of respondeat superior does not apply to render a city liable for injuries caused by the negligence of the city engineer in the performance of a duty imposed upon him by law.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by John H. Sievers against the city and county of San Francisco. From a judgment of nonsuit the plaintiff appeals. Affirmed.

Otto Tum Suden (F. W. Van Reynegom, of counsel), for appellant. H. T. Creswell and Rhodes Borden, for respondent.

HENSHAW, J. Plaintiff brought his action to recover of the defendant damages for injury occasioned to his property by the grading of Van Ness avenue at the crossing of Chestnut street. The work, as done, dammed a well-defined channel, through which surface water was wont to flow, and backed the water upon the land of plaintiff. It was developed upon the trial that a contract had been let, after regular proceedings, by the authorities, to grade Van Ness avenue to the "official grade" at a stipulated price per cubic yard of filling. The official grade was 75 feet above base. An attempt had been made by the supervisors to change the grade to 83 feet above base. This attempt, however, was admittedly abortive, as in Warren v. Riddell, 106 Cal. 352, 39 Pac. 781, and during all of the time the official grade remained established at 75 feet. The city engineer and surveyor, whose duty it was to furnish grade lines and levels (St. 1891, p. 206), assumed 83 feet to be the official grade, and the contractor filled in accordingly. It is conceded that filling to the true grade would have occasioned plaintiff no damage, and that the injury which befell him was caused by the extra 8 feet of superimposed earth. Plaintiff averred that the city caused and procured the crossing to be filled with soil, sand, and rock to a height of 83 feet above base. Upon the showing above indicated, he suffered a nonsuit, and appeals from the judgment.

His charge is that the city procured the work to be done. Unless the proofs support this averment, the nonsuit was properly granted. It does not appear that the supervisors, in any of their proceedings, called for any grading except "to the official grade and line." The bids were received under this call, and the contract ran in the same language. Precisely as in Warren v. Riddell, supra, the contractors, through error induced by the city surveyor, or superintendent of streets, or by both, graded 6 or 8 feet above the line called for by the contract. The extra 6 or 8 feet of filling, which alone, it is admitted, caused the injury, were not placed under any contract with or directions from the city. The case, then, differs radically from the many cited and relied upon by appellant, where the injury has resulted from work done for and as directed by the municipal authorities. Thus, in Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, the injury resulted from street filling done exactly in accordance with the contract. In Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41, Montgomery avenue was graded as the city directed. But the work dammed a natural water course, and the city was held responsible for the resulting injury to property. In Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, the city had diverted the waters flowing in a natural water way into a sewer, and had negligently permitted the sewer to fall into a defective condition, whereby the escaping waters caused damage, for which the city was held liable. In Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750, the grading was properly done to the official grade, but for resulting damages defendant was held responsible. In Tyler v. Tehama Co., 109 Cal. 618, 42 Pac. 240, a bridge was built as and where the supervisors directed. But it was constructed upon private property, for the injury to which the owner received compensation. In all of these cases the act or omission had the sanction, express or implied, of the municipal authorities. In the case at bar the injury resulted from the act of the contractor, neither contemplated nor called for by the supervisors. It is apparent, therefore, that the injury did not arise from the act of an independent contractor in doing what his contract called for.

But appellant contends that the error of the surveyor and superintendent of streets in fixing the grade level was the mistake which misled the contractor and occasioned the injury, and that for this error of its servants and agents the city is responsible. But the doctrine respondeat superior has found little favor in this state, when it has been invoked against a municipal corporation for dereliction or remissness of its agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers and prescribed and limited by express law. In the performance of its governmental or public functions the corporation is either deemed a public agency, a mandatory of the state, as in Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. 177, and, therefore, not liable to be sued civilly for damages, or it is considered, in the performance of these functions, to be clothed with sovereignty, and therefore not liable in an action. Lloyd v. Mayor, etc., 5 N. Y. 369. Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed and limited by law, the officer is not treated as the servant or agent of the corporation in the performance of these duties thus expressly enjoined, but is held to be the servant and agent of and controlled by the law, and for his acts the municipality will not be held liable. Thus, in Crowell v. Sonoma Co., 25

Cal. 313, the county was not held responsible, in an action for injuries to property, for the negligent act of the road overseer in the performance of his duties, upon the ground that the relation between the road overseer and the county bore no resemblance to that of employer and employé. In Winbigler v. Los Angeles, 45 Cal. 36, the city was held not to be liable for the failure of the street superintendent to keep a bridge in repair, and Crowell v. Sonoma Co. was cited as authority. In Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364, the negligence of the city marshal, who under direction of the city council was constructing a sewer, occasioned injury for which the city was sued. The rule was again announced that, in the absence of a statutory provision imposing the liability, a municipal corporation is not liable for injuries occasioned through the neglect of the officers of the corporation properly to perform their duties. In some of these cases the complaint was for negligent omission; in others, for negligent commission by the officers. In the first the damages claimed were for injury to property, in the others for personal injuries; but the principle underlying them all is, as above pointed out, that in its governmental functions the municipality is to be treated either as an independent sovereignty, not liable to be sued, or as an agent and mandatory of the state, upon which alone the responsibility rests. There being no common-law liability upon a municipal corporation to keep highways in repair, for injuries which resulted to person or property by reason of their defective condition the municipality was not held responsible. Then, as pointed out in Barnett v. Contra Costa Co., supra, if the legislature enjoined it as a duty upon the municipality, it was considered a public and not a corporate duty, and, when any specific duty in this regard was imposed by statute upon any officer of the municipality, for his failure to perform it, he alone, and not the city, is generally deemed responsible. Huffman v. San Joaquin Co., 21 Cal. 427. In a learned and very instructive note to Goddard v. Inhabitants of Harpswell (Me.) 30 Am. St. Rep. 373, 24 Atl. 958, Mr. Freeman, after careful and critical review and analysis of many authorities, deduces and expresses the rule of liability for the acts of an officer of the municipality in the following language: "When an officer of a municipality has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort whereby a citizen is injured, either in person or property, the tort is the act of the officer only, and, ordinarily, no recovery of damages can be had, except against him."

Now, in the particular matter under consideration, the surveyor and the street superintendent drew none of their powers in the premises from the orders or directions of the board of supervisors. They derived them all from the express provisions of the statute. They were the servants of the law, not of the supervisors. Neither of these was vested with any discretion whatsoever in the performance of the particular duties enjoined upon them. It was the duty of the engineer to give the true grade, and no other. It was the duty of the superintendent to see that the street was filled to the official grade, and to no other. In the performance of these duties they were not subject to nor controlled by the supervisors of the city. If agents of the city at all in this regard, they were agents acting under limited and restricted authority, fixed by statute. Chambers v. Satterlee, 40 Cal. 529. They could no more bind the city by instructing the contractor to grade above the line called for by the city than they could bind it by instructing the contractor to take his dirt for filling from plaintiff's private property. Having negligently performed a duty imposed upon them by express law, and not by order of the municipality, a duty in the performance of which they were vested with no discretion, so far as concerns the particular matter under consideration, the city cannot be held responsible for their dereliction.

There was no error of which plaintiff may justly complain in the admission of evidence. Plaintiff pleaded and proved that the official grade was in fact 75 feet. He also proved that the grading actually done was to 83 feet. He further showed the proceedings of the board of supervisors, all of which called for grading to the official grade, and none of which specified what that grade was in feet. The evidence objected to and admitted upon cross-examination went to charge the surveyor with the commission of the error which caused the extra filling. In the absence of such evidence there would be nothing to connect the city with the matter. The evidence, then, tended to strengthen, rather than to weaken, plaintiff's case. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; BEATTY, C. J.

(115 Cal. 644)

## VAN SLYKE v. BROADWAY INS. CO.

(S. F. 542.)[1]

(Supreme Court of California. Jan. 26, 1897.)

CONTRACT — INDEFINITENESS — PAROL EVIDENCE.

1. A contract between an insurance agent and the company for "a contingent commission of five per cent.," which does not give the facts on which the contingency depends, or state the sum on which the 5 per cent. is to be calculated, obviously fails to express any meaning, and hence cannot be aided by parol.

2. So, also, of a contract which provides that the company shall share the expenses of the agent's office pro rata with another company, to a certain sum per year, as shown by the agent's ledger, but does not state in what proportion the expenses shall be paid by the two companies.

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[1] For opinion on rehearing, see 47 Pac. 928.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by E. W. S. Van Slyke against the Broadway Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Rhodes & Rhodes, for appellant. Pierson & Mitchell, for respondent.

SEARLS, C. This is an action to recover from defendant, a corporation, upon three several causes of action, sums of money aggregating $1,596.65. Plaintiff had judgment for a balance of $1,309.73. Defendant appeals, and the cause comes up on the judgment roll, without any bill of exceptions.

The whole contention arises over plaintiff's third cause of action. It appears that defendant, the Broadway Insurance Company, is a corporation organized under the laws of the state of New York, and engaged in the insurance business in California. Plaintiff was the general agent of defendant in the state of California. It appears from the third cause of action, as set out in the complaint, that there were from October 1, 1893, to October 1, 1894, several written agreements between plaintiff and defendant, stating the terms of plaintiff's agency, and providing for his compensation as such agent, and in each of which agreements defendant bound itself to pay to the plaintiff, in addition to other compensation for his services: (1) "A contingent commission of five per cent." (2) "To share the expenses of the general agent's office in San Francisco pro rata with the Mutual Fire Insurance Company for clerks' salaries, rent, and office furniture and fixtures, to the maximum amount of $3,200 per year, as shown by the ledger of the general agent in San Francisco, Cala." After citing from the agreements the clause in relation to the "contingent commission of five per cent.," the pleader avers in apt terms that by said agreement both plaintiff and defendant intended and understood that defendant should pay to plaintiff on the amount of premiums actually received and collected by plaintiff, after deducting therefrom the amounts paid by plaintiff as return premiums, and for reinsurance and for losses against which defendant had insured. The complaint then proceeds to show the amount collected as premiums, the sums paid out as return premiums for reinsurance and for losses, and shows, as a result, that there is due plaintiff, on this basis, the sum of $596.66. Touching the item of office expenses, it is averred, in substance, that it was intended and understood by both plaintiff and defendant that defendant should pay to plaintiff such proportion of his office expenses as the amount collected by him for defendant bore to the amount collected by him for the Mutual Fire Insurance Company. The complaint then shows the amount of office expenses incurred for the several services mentioned in the agreement, and that upon such basis there is due from defendant on account thereof, and as its proportion, the sum of $937.53. At the close of this third cause of action, plaintiff admits that there is due to defendant from him the sum of $628.46, on certain accounts stated between them; and the prayer for judgment is for the several sums demanded in the several counts, less the sum so admitted to be due to defendant. Defendant demurred to the third count of the complaint upon the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that several causes of action are improperly united, and not separately stated, to wit, a cause of action for a contingent commission of 5 per cent. with a cause of action for a pro rata share of the general agent's office, and a cause of action upon an account stated. The demurrer was overruled by the court, and the ruling is assigned as error.

We are of opinion that the demurrer to the third cause of action should have been sustained. The clause of the written agreement relating to the commission to be received by plaintiff is, "a contingent commission of five per cent." The agreement is silent as to the basis upon which the contingency depends, and as to the sum or sums upon which the "five per cent." is to be calculated. The case presented is one of a patent ambiguity, which cannot be "holpen by averment." That parol evidence is inadmissible for the purpose of altering the legal operation of an instrument by evidence of an intention to an effect which is not expressed in the instrument is elementary. 1 Starkie, Ev. 666. The agreement as pleaded is void for uncertainty. Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386. The second clause of the same cause of action is subject to similar objections. According to the complaint, defendant was to share the expenses of the general agent's office at San Francisco pro rata with another company, up to $3,200 per year, "as shown by the ledger of the general agent in San Francisco, Cala." Upon what rate the portions of expenses to be paid by the two several companies, respectively, is to be computed, does not appear. It is not more definite in this respect than it would have been had it declared that each of the companies should pay a part of the expenses, without designating what part or proportion. The complaint is silent as to what the ledger of the general agent showed. The two clauses of the count are as indefinite, and the meaning thereof as impossible of ascertainment by construction, as would be the quotient of a specified number divided by an indefinite divisor. These defects, being patent on the face of the agreement, are not subject to be aided either by averment or evidence. The case of Balfour v. Irrigation Co., 109 Cal. 221, 41 Pac. 876, relied upon by respondent, is not at all in point. There the language of the contract of the parties was held to be susceptible of either one of two interpretations, and it was held that a latent ambiguity was presented, which might be explained by proof of extrinsic circumstances showing the sense in which the parties intended and understood the expression used. The difficulty in the present case is that the parties have failed to use any expression from which a definite meaning can be deduced. We do not deem it necessary to discuss the elementary principles of patent and latent ambiguities, and the distinction between them. The subject is too well understood to need exposition. It may be well, however, to state that where the agreement between the parties is one not required to be in writing to avoid the statute of frauds, and is one and entire, and only a part of it is reduced to writing, the residue may be proven by extrinsic evidence. Jeffery v. Walton, 1 Starkie, 267. That case was an action for not taking proper care of a horse hired by the defendant of the plaintiff. The following memorandum made at the time of hiring was offered in evidence: "Six weeks at two guineas. Wm. Walton, Jr." Lord Ellenborough regarded the memorandum as incomplete, but conclusive as far as it went. "The written agreement," said he, "merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as a part of the agreement." There are other authorities to the same effect. In the present case it may well be that similar conditions existed. If so, the entire contract should be pleaded. We recommend that the judgment be reversed, and the court below directed to sustain the demurrer to the third count of plaintiff's complaint, and that plaintiff have leave to amend if he shall be so advised.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to sustain the demurrer to the third count of plaintiff's complaint, and that plaintiff have leave to amend if he shall be so advised.

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115 Cal. 663

## TILLAUX v. TILLAUX. (S. F. 342.)

(Supreme Court of California. Jan. 26, 1897.)

DEED TO WIFE—CONSIDERATION—UNDUE INFLUENCE.

1. Love and affection are a sufficient consideration for a deed from a husband to his wife.

2. There is no presumption from the marriage relation that a deed from the husband to his wife was the result of undue influence.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Paul Tillaux against Clare H. Tillaux. Judgment for defendant, and plaintiff appeals. Affirmed.

Curtis Hillyer, for appellant. Jos. K. Hawkins, Lennon & Hawkins, and Lloyd & Wood, for respondent.

McFARLAND, J. A demurrer to the complaint was sustained, and judgment rendered for defendant; and from the judgment plaintiff appeals. On the 15th day of April, 1890, the plaintiff executed and delivered to defendant a deed conveying to her a certain described lot or parcel of land. It was duly acknowledged by plaintiff, and was on said April 15th duly recorded in the proper county. Upon its face, the deed was an absolute conveyance to defendant of the title in fee to said land, without any reservation, condition, or limitation. It declared no trust, and limited no use to any person other than the defendant herself. By the said deed, the land was conveyed to defendant, "and her heirs and assigns, forever," together with all "appurtenances," etc., and "the reversion and reversions, remainder and remainders, rents, issues, and profits thereof." The consideration expressed was "love and affection" for defendant, and also "for her better maintenance, support," etc. More than four years afterwards, on June 19, 1894, this present action was commenced to procure a reconveyance of said land from defendant to plaintiff; and on May 4, 1895, there was filed a fourth amended complaint, which was somewhat different from the original, and to which the demurrer was sustained.

Counsel for respondent insist, among other things, that the demurrer was properly sustained, because upon the face of the complaint the alleged cause of action is barred by the statute of limitations, because it is stale from laches, and because the complaint is fatally defective on account of uncertainty; but we do not deem it necessary to determine these points, for the reason that, in our opinion, the complaint does not in other respects state facts sufficient to constitute a cause of action.

It is averred in the complaint, in addition to the facts above stated, that at the time of the execution of said deed, and "as a part of the same transaction," the parties executed a certain written agreement, marked "Exhibit A," set forth in the complaint. In this agreement it is first stated that the parties "finding that, by reason of domestic difficulties that have arisen between them, they cannot, with their existing opinions, live together, they do hereby promise and agree one with the other, in and for good and proper considerations flowing to each other, to live separate and apart a mensa et thoro." It is then mutually covenanted that "they do hereby, each of them, agree not to molest or interfere with one or the other in or about the business or living of the other." It is then covenanted that the husband should have certain personal property, and the wife certain other personal property. Then the plaintiff agrees to "give and convey" to the defendant the lot of land here in controversy; and at the same time he did execute and deliver to defendant a deed of conveyance of said lot, as hereinbefore mentioned. It is further covenanted as follows: "It is further agreed that the term of existence of these articles of separation, so far as the same affects the living apart of the parties hereto, shall be for such time as the parties hereto may mutually determine hereafter, and for all other purposes for the period of the whole future." It is averred in the complaint that, after the making and delivery of said agreement and deed, "the plaintiff and defendant continued to live together," and that they did continue to live together continuously for nearly four years thereafter. It is further averred that, before the execution of said deed, the said parties had frequent quarrels, and that defendant had at divers times abused plaintiff, and caused him grievous bodily and mental suffering; that after the execution of said deed, and while the parties were living together as aforesaid, the defendant "for a time [no definite period being mentioned] did cease to molest and abuse plaintiff, and did permit him to live in peace and quiet"; that "thereafter" defendant "recommenced her abuse of plaintiff," and by various acts, which are described, caused plaintiff great bodily and mental suffering; and that about the month of February, 1894, the plaintiff, on account of her abuse, left the defendant and has not since returned.

The main points made by appellant in support of the sufficiency of the complaint seem to be that there was no consideration for the deed; that, if the promise of defendant not to molest plaintiff can be taken in any sense as a consideration, such consideration is void, because it was a mere agreement to do what the law expressly required her to do; and that, generally, the deed must be held void on account of the confidential relation of husband and wife that existed between the parties. We do not think that these positions are tenable.

A deed by the owner of land, duly signed and acknowledged by him, and delivered to the grantee, conveying the land to the latter in fee simple, is one of the most solemn of civil acts. It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry. It is not void on account of either want of failure of consideration; nor does want or failure of consideration raise a resulting trust. Leading authorities declaring this principle are cited in the opinion of the supreme court of Michigan in Jackson v. Cleveland, 15 Mich. 94. The court, among other things, say: "A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off, as creditors and the like. * * * This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these." After alluding to the old common-law rule that a feoffment without consideration was practically no conveyance, and explaining the technical ground upon which it rested, and showing that it did not obtain when any consideration was expressed, the court say: "A court of chancery has never ventured, against the expressed will of the donor appearing on the face of the deed, 'to take the use from the donee, and give it back to the donor.'" In Devlin on Deeds (section 1189) the author says: "It is now settled law that a trust does not result to the grantor merely because there was no consideration for the conveyance;" and he cites a multitude of authorities in support of the proposition,—among others, Burt v. Wilson, 28 Cal. 632, which is strongly in point. See, particularly, Young v. Peachy, 2 Atk. 257; Lloyd v. Spillet, Id. 150; Groff v. Rohrer, 35 Md. 327, and cases there cited; Sturtevant v. Sturtevant, 20 N. Y. 39; Hill, Trustees, p. 106 et seq. In Hill on Trustees (page 107) the author says: "It may therefore be stated, as the clear result of the authorities, that when a person, being a stranger in blood of the donor,—and a fortiori if connected with him by blood,—is in possession of an estate under a voluntary conveyance, duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest, unless that title be displaced by sufficient evidence of an intention on the part of the donor to create a trust; and as was observed by the chancellor in the case of Cook v. Fountain, 3 Swanst. 590, he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it away from him." And the author further says: "But parol declarations cannot be received with this object; for in these cases there exists no resulting or presumptive trust, and the admission of such evidence would be for the purpose of contradicting the written instrument, and establishing a trust in the very teeth of the statute of frauds." "The grantor cannot claim that a trust results to himself when he has executed a deed without consideration." Devl. Deeds, § 834. Therefore, in the case at bar, if it appeared from the complaint that there was no consideration for the deed in question, it would not for that reason be void, nor would the want of consideration raise any resulting trust. This is not an action to enforce an executory contract. It is an action to set aside a completely executed conveyance of land, which transferred the legal and equitable title. As a matter of fact, however, the deed expresses a full and meritorious consideration, viz. love and affection of a husband for a wife, and a purpose to provide for her support and maintenance,—a consideration which, as was said in Barker v. Koneman, 13 Cal. 11, the law regards with favor, and supports even as against subsequent creditors. Neither is there any such difficulty here about direct conveyances between husband and wife as existed at common law when they were considered as one person, and a deed from one to the other was void at law, although it could be made effective in equity. They may have here any transactions with each other respecting property which either might have if unmarried. There is no necessity for the interposition of a third person as trustee.

Of course, a conveyance of land may be avoided when made or procured through accident, mistake, fraud, or undue influence, and the facts constituting any of such grounds of avoidance are fully alleged and clearly proven. In the case at bar there is no pretense that the deed was executed through accident or mistake. The main contention of appellant really seems to be that undue influence must be presumed from the confidential relation of husband and wife; and that, on account of such relation, the deed must be held to be presumptively fraudulent. But such is not the law. Our Code allows a husband and wife to deal freely with each other in all transactions touching property; and the proposition that under our law a conveyance from one to the other is prima facie void cannot be maintained. Of course, when in such a case facts are alleged upon which undue influence is asserted, they will be considered in view of the confidential relation; but to say that a deed of conveyance of land from a husband to a wife is on its face invalid would be to dispense with the statute, and go back to the rule of the common law. This question has frequently been raised and determined adversely to appellant's contention in contests of wills, where it has been attempted to upset wills of deceased husbands on account of the alleged undue influence of their wives; and it has been settled in such cases that the mere fact of the marriage relation was not sufficient to sustain the charge of undue influence, and that "there is no legal presumption against the validity of any provision which a husband may make in a wife's favor." See Estate of Langford, 108 Cal. 622, 623, 41 Pac. 705, and cases there cited. And there is no reason why the principle should not apply more strongly to deeds. With respect to deeds, while they have frequently been attacked on the ground of intent to defraud creditors, we do not recall a case where there has ever been a contention by creditors that a deed was prima facie void merely because executed by a husband to a wife. At common law, deeds between husbands and wives were void; but courts of equity enforced them. These courts at first looked closely into the transaction, and exercised their discretion to refuse aid when the circumstances showed unfairness. However they always enforced them when they were for the benefit of the wife, and no rights of creditors intervened; and they finally came to hold that all deeds which would be good in law if made to a third party were good in equity if made by a husband to a wife. See Sims v. Rickets, 35 Ind. 181, where the authorities on the subject are elaborately reviewed. But here the subject does not present itself in the shape of ascertaining how far a court of equity should lend its aid to enforce a deed void at law, and therefore many of the earlier decisions on the point are now of no value; for here the old common-law rule has been abrogated, and a deed from a husband to his wife needs no decree of a court of equity to make it effective. If sufficient in form it carries the full legal and equitable title to the land described in it to the grantee, who needs no chancellor to recreate it. She can safely defend it in a court of law. In this state a conveyance from husband to wife has been frequently sustained; and, although the attacks were generally by creditors, yet it must necessarily have been held in those cases that such conveyance was not prima facie void on account of the marriage relation; and some of the cases were direct attacks by the husband or his grantee. Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Carter v. McQuade, 83 Cal. 274, 23 Pac. 348; Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715; Dow v. Mining Co., 31 Cal. 653; Barker v. Koneman, 13 Cal. 9; Kohner v. Ashenauer, 17 Cal. 579. In Emmons v. Barton, supra, where a deed from husband to wife was attacked, the court said: "A voluntary conveyance is not prima facie fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law." In Taylor v. Opperman, supra, the court said, quoting from a text writer, that "the prima facie presumption arising from a deed of the husband to the wife of community real property is that it was intended to change its character from community property to separate property of the wife." And in Carter v. McQuade, supra, the court said as follows: "In this state either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried. Civ. Code, § 158. A husband may convey real or personal property to his wife, and, whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes, and is thereafter to be treated as, her separate property." The case of Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715, is strictly in point; for in that case the husband, having conveyed the land in question to his wife, undertook himself afterwards to get it back; and he relied also upon the fact that the land was a homestead, and therefore could not be conveyed by the husband to the wife. But this court held that, although the homestead character of the land may not have been affected by the deed, yet the legal title to the land passed to the wife, and the husband could not have it declared to be in him. The court, among other things, say: "In this state either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. Therefore a husband may convey his real estate directly to his wife, as he may to any other person." And the court say further: "We see no just reason for permitting the husband to question his own conveyance of the property, and as no one else is complaining, or could be injured thereby, the same must be upheld." And in response to the point that the transaction was a gift, and, being incomplete, could not be enforced, the court said: "If the gift were not perfectly executed, and this were an attempt to compel a specific performance, the rule invoked would be applicable. But as we have held that the execution of the conveyance was perfect without the signature and acknowledgment of the wife, and the action is by the grantor to avoid the same, the point is not well made." By the foregoing authorities, and others not here collated, the principle is clearly declared that the marriage relation does not ipso facto raise the presumption that a deed of conveyance from the husband to the wife has been the result of undue influence, but that such deed prima facie conveys to the wife whatever, according to the rules of conveyancing, its terms embrace. We have discussed the subject at some length, because an expression or two in one or two former opinions give some faint color, scarcely visible, to a different doctrine.

Appellant contends that there are facts averred in the case at bar which, viewed in the light of the marriage relation, are sufficient to make the deed in question invalid; and the case of Brison v. Brison, 90 Cal. 323, 27 Pac. 186, also 75 Cal. 525, 17 Pac. 689, is cited in support of the contention. The facts in that case were very peculiar, and presented an instance of a wife violating an express promise made by her to a husband, upon which he had the right to implicitly rely, not only on account of the legal confidential relation between them, but also on account of the actual confidence which he had in her, as the relation between them had always been most affectionate and confiding. The husband was about to go from California to another country, where he apprehended danger to his person, and, being solicitous that in case of his death his wife might have his property without the delay of administration, was advised by an attorney that the best way to accomplish that result was to convey his land to his wife absolutely, "if you have implicit confidence that your wife will deed it back to you." He replied: "If I could not have confidence in my wife, who in the world could I have confidence in? Certainly, I have the utmost confidence in her." Thereupon he made his wishes known to his wife, and explained the situation to her, and she expressly promised to reconvey the land to him when he returned. Under these circumstances, he conveyed the land to her; but upon his return she refused to reconvey, and an action by the husband against the wife for a reconveyance was sustained. The action was sustained, however, not upon the mere ground of the marriage relation between the parties, but because the wife had violated the confidence reposed in her by the husband. This court said (90 Cal. 330, 27 Pac. 187): "The relation of husband and wife between the parties is admitted, and also that the plaintiff had at all times confidence in his wife, and in her devotion and fidelity to him, and that he made the deed to her relying upon that confidence. Upon these allegations, this court said, upon a former appeal (75 Cal. 529, 17 Pac. 691): 'The relation of the parties, therefore, was confidential in fact as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that, he would not have made it. The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive fraud.'" Again, the court say (90 Cal. 333, 334, 27 Pac. 189) that the husband "was induced to make, and did make, a deed absolute in form of said land to the defendant, instead of making said will, with this distinct understanding between them, that, if he should return from Arizona, the defendant would convey back to him the said land." There, then, were facts which would warrant a court in stretching to its utmost tension the doctrine that an absolute conveyance from the husband to the wife may be invalidated on account of the breach of the wife of a parol promise upon which the husband, owing to the legal and actual confidence which he reposed in her, had the right to rely. However, Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, was a supplement to Brison v. Brison. That action presented a contest between Harlow, a grantee of the wife, Mrs. Brison, and Catlin, grantee of the husband, Mr. Brison; and the court there held that "the deed made in 1881 by W. W. Brison to his wife undoubtedly vested in her the legal title to the land"; that the judgment in Brison v. Brison did not affect Harlow, because he had received his deed before the commencement of the action; that "assuming that Mrs. Brison was a trustee for the benefit of her husband, that trust not appearing upon the deed which conveyed to her the legal title, it does not follow that her grantee did not take the property discharged of the trust"; and that "if the deeds of the respective parties were put in evidence, without anything more, appellant's [Harlow's] title must have prevailed, and hence the burden was upon respondent [Catlin] to allege and prove some fact that would qualify or invalidate appellant's title." Of course, if the deed from Brison to his wife had been prima facie void on account of presumed undue influence based on the marriage relation, there would have been no need of proof of "some fact" to invalidate it.

But the facts in the Brison Case were very different from those in the case at bar. We may waive consideration of the fact that while appellant avers, generally, that he had confidence in his wife, he shows specifically that he had not. There is no pretense here that the deed was made, as in the Brison Case, upon the promise of the wife to reconvey to the husband. On the contrary, it is shown that the conveyance was to be "for the period of the whole future." After the conveyance she continued to hold the land for several years, with the knowledge of the husband; and there was no condition subsequent. The alleged promise of the respondent "not to molest or interfere" with him "in or about the business or living" of appellant was, in the first place, of no legal consequence, as a mere general promise of a wife; and, in the second place, it was clearly incidental to a separation, and might, perhaps, have some legal value as a part of a contract for separation. But there was no separation until shortly before the commencement of this action; and if appellant did not choose to live separately, as he had a right to do under the articles of separation, he cannot complain that the respondent failed to fulfill a promise which he gave her no opportunity to comply with. Viewed in the light of the other facts shown by the complaint, no importance attaches to the general averment that respondent made certain promises without the intention of fulfilling them. This averment refers exclusively to her alleged promises not to molest appellant, and to let him live in peace and quiet; but, as before stated, these promises, if they can be regarded at all, are to be considered as incidental and referable to a condition of separation. There is no averment that she had no intention to perform the agreement of separation, or that she promised to live peaceably with appellant in the usual affectionate relation of husband and wife; and as, by the consent and act of appellant himself, the separation did not take place, the averment that she never had an intention of doing something which he gave her no opportunity to do must be taken as a mere meaningless assertion of no legal value. We think that the demurrer was properly sustained; for, upon the averments of the complaint, we see no reason why the appellant should be allowed to repudiate, years after its execution, his own solemn deed. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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115 Cal. 677

## CARPY v. DOWDELL et al. (S. F. 348.)

(Supreme Court of California. Jan. 26, 1897.)

BANKS—AUTHORITY OF CASHIER FROM COURSE OF DEALING—CHATTEL MORTGAGE—ESTOPPEL—PLEADING.

1. The cashier of a bank, who for a number of years, with the knowledge of the directors, has been accustomed to act for the bank in sales of property on which it held mortgages, under contracts approved by him, may bind the bank in a similar transaction without formal authority from the directors.

2. A bank, which has given its consent to a contract for the sale of personalty on which it held a mortgage, is estopped to deny the validity of such contract after it has been entered into, and a portion of the property delivered for shipment thereunder.

3. An estoppel by matters in pais is sufficiently pleaded by pleading the facts constituting it.

Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Charles Carpy against James Dowdell and others to foreclose two chattel mortgages. Judgment for plaintiff, and defendants appeal from an order denying a motion for a new trial. Reversed.

Rodgers & Paterson and F. E. Johnson, for appellants. Daniel Titus, for respondent.

McFARLAND, J. Judgment went for plaintiff in the court below, and defendants appeal from an order denying their motion for a new trial. The action is to foreclose two certain chattel mortgages executed by the appellants, Dowdell & Son, to the Bank of St. Helena, upon certain wine, to secure two promissory notes given by said appellants to said bank, which were assigned to respondent immediately before the commencement of this action. The notes were overdue when assigned to respondent, and he then knew the facts upon which the defense in this case rests; and it is not seriously contended that he does not stand in the shoes of the bank. If the bank could not have maintained this action, then it cannot be maintained by respondent. The wine was stored in cellars in the town of St. Helena, in Napa county. On April 3, 1895, appellants had negotiations at St. Helena with George F. Chevalier, a wine merchant of San Francisco (doing business under the name of F. Chevalier & Co.), for the sale to him of a large part of said wine. He knew that the wine was mortgaged to the bank, and during the day had a conversation at the bank, with its cashier, about the contemplated purchase. About 7 or 8 o'clock in the evening, in pursuance of a previous appointment, the Dowdells, Chevalier, and the said cashier met at the said bank for the purpose of completing the said purchase of the wine by Chevalier. The cashier was requested to draw up a written contract, which he did, and it was duly signed and executed by the Dowdells and Chevalier. By this instrument the former sold to the latter, and the latter purchased, 368,000 gallons of the wine, at 11 cents per gallon. Delivery of the wine was to commence immediately, and to be continued at the rate of not less than 50,000 gallons per month. Five thousand dollars was to be paid on May 1st, and thereafter there were to be monthly payments for all wine delivered. When the cashier had nearly completed the writing of the instrument, he said: "I neglected the most important part, as far as I am concerned. This is where I get in; as the payments shall be made to the Bank of St. Helena." Thereupon he inserted the following clause: "All payments on said wine to be made to the Bank of St. Helena for our account, the cashier of said bank to receipt for the same." The preponderance of the evidence shows that Chevalier offered to make to the bank, at that time, the first payment provided by the contract, and that the cashier said it was not necessary; and it fully appears that Chevalier was perfectly able financially to make all the payments provided by the contract, and was so understood to be by the cashier, who so testified. Chevalier & Co. have always been willing, ready, and able to take the wine, and pay for it according to the contract. Immediately after the execution of the contract, Dowdell & Son commenced to deliver the wine to Chevalier & Co., and on April 13th "had delivered on the cars at the station for shipment six car loads thereof, which said purchaser was about to remove from said county of Napa under and by virtue of said agreement of sale." But on April 11th the bank had assigned the notes and mortgages to the respondent, Carpy, who, on the 13th, commenced this action, and by means of a receiver and an injunction stopped the removal of said cars and the delivery of any more of the wine by appellants to said Chevalier & Co.

Appellants contend that under the circumstances above stated the bank could not legally, by a suit to foreclose, prevent the delivery of the wine to Chevalier & Co. pursuant to said contract which it had consented to and induced the parties to make. The contention of respondent is, briefly: First, that what the cashier did does not bind the bank; and, second, that what he did was of no legal consequence whatever, even if his acts in the premises be considered as the acts of the bank. As to the first of said positions, we think that it is clearly untenable. It is in proof without contradiction that, to the knowledge and with the consent and tacit approval of the directors of the bank, this same cashier had for many years been having with others and with appellants the same kind of transactions as the one here under consideration; that is, the bank had been in the habit of taking mortgages from various persons on wine, and the cashier, with the knowledge and consent of the directors as aforesaid, had permitted wine thus mortgaged to be sold to third parties under contracts similar to the one here involved. This was proven at the trial by the president of the bank and four of its other directors, by the said cashier himself, by several witnesses who had similar transactions with the bank, and by the appellant Arthur B. C. Dowdell, who, prior to this contract, had several similar transactions with said cashier. We have said that this was proven without contradiction, by which we mean that the facts above stated were so proven, although some of the witnesses testified that there had not been any resolution upon the subject passed by the board of directors in corporate body assembled, and that they did not understand that the cashier had been given any power to release a mortgage. Under these circumstances it is not necessary to determine what powers the cashier had merely by virtue of his position as cashier; for when a corporation, by a long course of acquiescence, holds out an officer or agent as having authority to do certain things, it cannot, after he has acted, repudiate his acts. This principle is decided by many authorities, but it is sufficient here to cite Morse, Banks (3d Ed.) § 171g, and cases there cited; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428; Merchants' Nat. Bank of Boston v. State Nat. Bank, 10 Wall. 604; Bank v. McCarthy, 7 Mo. App. 318; Carey v. Petroleum Co., 33 Cal. 694. In Morse on Banks & Banking, supra, it is said,—and the cases cited fully warrant the text,—as follows: "Evidence of powers habitually exercised by a cashier with the knowledge and acquiescence of the bank defines his powers as to the public, if they are such as the directors have authority to confer on him. A bank for several years permitted its cashier to cancel trust deeds given to secure money loaned, and was thereby estopped to deny his power to cancel." It is also there declared that, where the conduct of a cashier has been open and long continued, "it must have come to the knowledge of any ordinarily vigilant directory"; citing Bank v. McCarthy, supra, which fully sustains the text. Martin v. Webb, supra, is a case in which the principle under discussion was directly involved and clearly stated. Mr. Justice Harlan, in delivering the opinion of the court, said, among other things, as follows: "While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol, and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection, in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, elect the officers of the bank, and to make declarations of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." It is clear, therefore, that the acts of the cashier in the premises were the acts of the bank.

But it is contended by respondent, substantially, that the conduct of the cashier, even if considered as binding the bank, amounted in law to absolutely nothing; that, notwithstanding this conduct, the bank, although having consented to and encouraged the sale, and being in effect a party to it, could interfere with and put an end to it at any time, and without any reason, and merely at its own whim. This would be violative of the principles of fair dealing, and unwarranted, we think, by the law. We do not think it necessary to determine here that the consent of a mortgagee of chattels to the sale of the mortgaged property and its removal from the county amounts to an absolute release of the entire mortgage, and as against all parties who may choose afterwards to deal with it,—although there are many authorities to that effect, some of which have hereinbefore been noted. We think, however, that upon sound principles the bank was estopped, at least, from interfering with the sale by appellants to Chevalier while its terms were being complied with, and from the attempt to disregard and practically annul such sale by the proceedings in foreclosure. There is no pretense that anything whatever took place after the sale and before the bringing of the action to foreclose that changed the position of any of the parties, or in any manner whatever affected injuriously the rights of the bank. It is admitted that Chevalier was perfectly able to comply with the terms of the sale, and was willing and ready to do so. It is apparent that the money to be paid by him for the amount of wine purchased would have been more than sufficient to satisfy the demands of the bank against appellants. A large part of the wine had been delivered, and there is no justifiable reason apparent why the bank should have then sought to repudiate its acts by which it consented to and induced the sale. Of course, Chevalier would not have purchased without the consent of the bank, and the appellants could have made no effectual effort to sell without such consent. That consent is clearly established, for not only does it appear from the circumstances under which the sale was made, but the cashier testified: "I was satisfied with the responsibility of Chevalier & Co., of course, or I would not have consented to the sale; and if the notes and mortgages had not been assigned, we would not have objected to Chevalier & Co. taking the wine so long as they continued to make payments to the bank as required by the contract." The bank having thus consented to the sale, and shaped the same to suit itself, and induced the parties to enter into the transaction, and encouraged the appellants to make a contract by which they incurred great pecuniary responsibilities, and to forego other attempts to dispose of the wine, and to go to the expense of delivering a large part of it,—upon what principle of fair dealing or legal right can it now, without any apparent reason or worthy motive, abandon the parties in the positions in which it induced them to take? We think that the bank is clearly estopped to deny the validity of the sale and to defeat it by means of the action to foreclose. The principle of equitable estoppel is aptly and concisely stated by the supreme court of the United States in the opinion of Mr. Justice Clifford in Swain v. Seamens, 9 Wall. 254, in language that has since been frequently quoted and approved, as follows: "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim." And the case at bar is not only within that principle, but is a much stronger case than one where a party only "tacitly encourages" an act to be done. In Dickerson v. Colgrove, 100 U. S. 580, the United States supreme court states the principle as follows: "The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." And in the opinion in that case many cases are cited and approved, in some of which the principle was applied to the extent of destroying a chattel mortgage. See, also, Van Syckel v. O'Hearn, 50 N. J. Eq. 175, 24 Atl. 1024; Daniels v. Tearney, 102 U. S. 420; Faxton v. Faxon, 28 Mich. 159, and cases there cited. In California the principle has been frequently so declared as to embrace the case at bar. Scott v. Jackson, 89 Cal. 262, 26 Pac. 898; Dolbeer v. Livingston, 100 Cal. 621, 35 Pac. 328; Hostler v. Hays, 3 Cal. 303; Mitchell v. Reed, 9 Cal. 204.

It is contended that there was no consideration for the said acts of the bank; but, in the first place, there was a consideration, for the bank was to receive all the money due it from appellants instead of relying on a forced sale of the wine; and, in the second place, the principle of equitable estoppel does not rest upon a consideration moving to the party estopped. Van Syckel v. O'Hearn, 50 N. J. Eq. 175, 24 Atl. 1024, and cases there cited. Our conclusion is that the bank and its assignee were, under the facts above stated, estopped from maintaining this action.

Respondent makes some contention, in a part of his brief which seems to be supplementary, that estoppel cannot be relied on by appellants, because it was not pleaded in the answer. There is some conflict of authorities as to whether the rule requiring estoppels to be pleaded is not confined to technical estoppels by deed or record. Hostler v. Hays, 3 Cal. 308; Caldwell v. Auger, 77 Am. Dec. 515, and notes; Clarke v. Huber, 25 Cal. 594; Davis v. Davis, 26 Cal. 823. But, assuming that the rule applies to equitable estoppels in pais, it is sufficient if "the matter"—the facts—upon which the estoppel rests be pleaded so that the opposite party may know its nature. The reason of the rule is given by the court in Davis v. Davis, supra, where it is said that "it is but just, and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel in pais should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet." This was done in the answer in the case at bar, in which the facts above stated are fully set forth. Moreover, there was no objection at the trial to evidence of the facts on the score of defective pleading; and the rule is well established that such a course is a waiver of a defect in pleading.

We have followed the course of the arguments of counsel who have discussed the real and ultimate merits of the case without particular references to the form in which the questions involved arise. With respect to the findings, it is sufficient to say that the following part of finding 7 is not supported by the evidence, viz.: "Said agreement * * * was not approved by said corporation, and said corporation did not agree to its terms, and did not consent that the defendants might deliver said wine to said Chevalier & Co., or that said wine might be removed from the county of Napa, nor was the consent or permission of said corporation to the making of said sale asked or given;" and that there is not sufficient evidence to support the findings in finding 3 that "a removal of said mortgaged property from the county of Napa would have resulted in damage and injury to the plaintiff," and that plaintiff "would have suffered irreparable injury therefrom" had it not been for the appointment of a receiver. It is unnecessary to discuss the other findings. There are quite a number of exceptions to the rulings of the court as to the admissibility of the evidence; but, under the views above expressed, it is not necessary to discuss said exceptions. It can be sufficiently gathered from this opinion what evidence should have been admitted or excluded. The order appealed from is reversed, and a new trial ordered.

We concur: HENSHAW, J.; TEMPLE, J.

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115 Cal. 689

KAHN et al. v. MATTHAI. (S. F. 490.)

(Supreme Court of California. Jan. 27, 1897.)

SERVICE OF SUMMONS—SUFFICIENCY OF SHOWING IN JUDGMENT ROLL—AFFIDAVIT FOR PUBLICATION—SUFFICIENCY.

1. Since the affidavit of service of summons and the affidavit for publication and the order of publication are part of the judgment roll (Code Civ. Proc. § 670, as amended by St. 1895, p. 45), a prima facie showing of jurisdiction over defendant, sufficient to sustain a judgment on appeal, is made where the judgment roll, though it does not contain the original summons, contains an affidavit for an order of publication which shows that a summons was issued, an affidavit of the printer containing a copy of the summons, an affidavit showing that affiant had mailed a copy of the summons to defendant, and a decree containing a recital that summons had been regularly served.

2. An affidavit for service of summons by publication, stating that plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them, with the information that they could not find defendant, and that she could not be found in the city or county, is insufficient, without showing what diligence was used to procure service on her.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Sophie Kahn and another against Mary Elizabeth Matthai to foreclose a mortgage. Judgment for plaintiffs, and defendant appeals. Reversed.

J. Brooks Palmer, for appellant. Jos. Rothschild, for respondents.

SEARLS, C. This is an appeal from a judgment of the superior court in and for the city and county of San Francisco, foreclosing a mortgage executed by the defendant upon certain real estate in said city and county, to secure the payment of a promissory note made by defendant January 17, 1891, for $2,000, payable to the plaintiff Sophie Kahn, with interest as specified, one year after date. Defendant appeals from the judgment, and brings the cause up on the judgment roll, without any bill of exceptions. The complaint was filed January 3, 1894, and a summons issued, which not being personally served, on February 20, 1894, an order for publication of summons was made, upon due proof of publication of which, and upon proof that a copy of said summons and copy of the complaint had been forwarded to defendant by United States mail, prepaid, etc., the default of defendant for failure to answer was entered May 27, 1895; and thereafter, and on January 6, 1896, judgment was entered by the court in the usual form for foreclosure of the mortgage. The original summons is not found in the judgment roll.

Two points are urged in favor of reversal: (1) That the judgment and clerk's entry of default are void, for want of return of summons; (2) that the judgment is void, because not supported by a sufficient affidavit for publication of summons.

Upon the first point made, it may be remarked that this appeal is a direct attack upon the judgment. To say that a judgment is void for want of return of the summons must be tantamount to saying that the judgment roll fails to show that the court obtained jurisdiction of the defendant, and hence that the judgment is void. The evidence on the subject of jurisdiction of the person of the defendant in the present case, as disclosed by the roll, is as follows: (1) The affidavit for publication of summons shows that a summons issued. (2) The order of publication shows the same thing. (3) The affidavit of the printer showing publication contains a copy of the summons. (4) The affidavit of Isadore Harris shows that he mailed a copy of the summons and copy of the complaint, etc., to defendant at her place of residence. (5) The decree states, among other things, "that the court having heard all the evidence and proofs, * * * and it appearing therefrom to the satisfaction of the court—First, that Mary E. Matthai, the above-named defendant, has been duly and regularly summoned to answer under the plaintiffs' complaint herein, and had made default in that behalf, and that the default of the defendant * * * has been duly and regularly entered," etc. Do these facts afford sufficient proof of service to make out a prima facie case, which will support the judgment upon a direct attack until rebutted? Under our Code as it formerly existed, the affidavit for publication of summons and the order for such publication formed no part of the judgment roll, but now, under section 670 of the Code of Civil Procedure, as amended in 1895 (St. 1895, p. 45), the affidavit or proof of service of the summons, "and, in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons, must also be included" in the judgment roll. The facts necessary to be stated therein are equally evidence of the steps by which jurisdiction of the person of the defendant is obtained as the original summons itself. It is true, the Code requires the summons to be embodied in the judgment roll, but if absent therefrom, and it appears that a summons in fact issued, with evidence of its contents, showing it to be regular and sufficient in form, and that it was duly served, such a prima facie case is made as to jurisdiction of the person of the defendant, even in the absence of the original summons, as will support the judgment upon a direct attack by appeal. If there was no original summons, the fact could easily be made to appear by a bill of exceptions. The main difference between collateral and direct attacks upon judgment and its recitals is that upon collateral attack the record alone can be inspected, and it is conclusively presumed to be correct, while on direct attack the true facts may be shown in contradiction of the record, and thus the judgment itself on appeal may be reversed or modified. But the judgment and its recitals will be presumed to be correct upon appeal, unless the contrary is made to appear. Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026; Sichler v. Look, 93 Cal. 606, 29 Pac. 220; Norton v. Railroad Co., 97 Cal. 396, 30 Pac. 585, and 32 Pac. 452; Lick v. Stockdale, 18 Cal. 219.

As to the point of the insufficiency of the affidavit for publication of summons, we are of opinion the contention of appellant must be upheld. The affidavit is full and explicit as to the cause of action, its nature, the parties, etc., but is fatally defective in failing to show with accuracy the efforts made to serve defendant with summons. It states, in substance, that plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them with the information that they could not find defendant or see her, and that she cannot be found in the city and county. This statement is but hearsay, and may be wholly untrue, in fact, without any impeachment of the truthfulness of the affiant. Where service of process upon a defendant within the county is attempted to be made by a person other than the sheriff, his affidavit should, as a rule, be required, showing the nature of the effort made to serve the party, and, where practicable, the reasons why such service cannot be had. The affidavit then proceeds to state that the affiant believes and is certain the defendant is in the city and county of San Francisco, and that, to the best of affiant's knowledge, defendant resides at 912 Seventeenth street, and that said defendant has evaded the service of summons; that affiant and her attorney have both spoken to the "two daughters of the defendant, requesting them to allow the said defendant to be served with the said copy of summons and complaint; and that said daughters, and each of them, both being of legal age, refuse to allow the defendant herein to be served with said papers, and are using every endeavor in their power to prevent said service." From this rather singular statement it cannot be determined that any duty devolves upon the daughters of defendant to permit or to aid in the service of process upon defendant, or in what manner they have thwarted such service, or that they are colluding with the defendant to evade the service of summons. We are of opinion the affidavit was insufficient to uphold the order of publication of summons, and hence that the court below failed to obtain jurisdiction of the person of the defendant. The judgment should therefore be reversed, and the cause remanded.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

115 Cal. 635

## In re PAINTER'S ESTATE. (S. F. 326.)

(Supreme Court of California. Jan. 25, 1897.)

PROBATE COURTS — HEARING OF APPLICATION FOR PARTIAL DISTRIBUTION—PROCEDURE.

On a hearing by the probate court of an application by the widow of a testator for a partial distribution of his estate, where the right of the applicant to one-half the estate, as community property, and also to take under the will, is claimed and contested, the court should act only on a full showing as to all matters pertinent, and should determine the extent of the applicant's interest in the estate, or direct suit to be brought for that purpose, as authorized by Code Civ. Proc. § 1664.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by the widow of J. B. Painter, deceased, for a partial distribution of his estate, which was contested by J. Milton Painter and Theodore P. Painter. The petition was denied, and the petitioner appeals. Reversed.

R. S. Gray, for petitioner. Edward J. Pringle, for respondents.

TEMPLE, J. This is an application for a partial distribution, made by the widow and children of deceased. J. B. Painter died testate, having by his will made many bequests and devises. Among other things he gave to his brothers, J. Milton Painter and Theodore P. Painter, his interest in the partnership of Painter & Co., of which firm he had been a member, and also devised to them a certain building, in which the business of the firm had been conducted. There were several minor children, one of whom was born after the execution of the will. The widow and the children then in being received bequests and devises by the will, as did also several other persons. The widow claims that all the property of the estate is community property, and that she is entitled to one-half thereof as surviving wife, and also to the bequests made to her in the will. Naturally, J. M. Painter and Theodore P. Painter deny that the widow is entitled to one-half the property, and claim that she cannot take under the will and still claim her rights as survivor because the testator evidently attempted, by his will, to dispose of his entire estate. The widow states in her petition that, to properly express her interest in the estate, it must be divided into 504 parts; that she is entitled to 252 parts of it for her interest in the community property, 114 parts as devisee under the will, and to 19 parts as assignee of Arthur Painter, a devisee under the will,—making 385 of said 504 parts constituting the estate. J. Milton Painter and Theodore P. Painter oppose the application. They were brothers of the testator, and to them is given, in terms, in the will, the interest of the testator in the partnership property, and also a specific piece of real estate. They are, therefore, interested in the question raised by the application. They set up, in substance, first, that the right of the widow to one-half the property as community property is not beyond question, and that an action had been brought, and was then pending, to determine the claim of the widow to take both under the will and one-half of the community property as survivor; and, second, that an action is also pending between the surviving partners of the firm of Painter & Co. and the estate to settle the accounts of the co-partnership, and to close up its business. In that suit the surviving partners contend that the deceased was indebted to the co-partnership in a large sum. At the hearing the petitioner offered no evidence whatever, but counsel agreed that the parties who appeared in opposition might first offer evidence showing the pendency of the legal proceedings alluded to in their written opposition, and submit to the court the sufficiency of such evidence to cause a denial of the petition and application for partial distribution. Thereupon counsel put in evidence the transcript of an appeal to this court in the case of J. Milton Painter against Theodore P. Painter, R. B. Dallam, and others, and it was admitted that the case is still pending. It was also stipulated that the suit brought to settle the accounts of the partnership was then pending. Thereupon the court denied the application.

The application was made under section 1663, Code Civ. Proc., which permits the application to be made at any time after the lapse of one year from the issuance of letters of administration. It is provided that notice shall be given by posting, which may be but for one or two days, and that the distribution shall be made if at the hearing it appears that the estate was but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate. Under section 1658 a similar application may be made at any time after the lapse of four months from the issuance of letters. It is evident that persons interested in the estate have very little protection in this proceeding, except in the discretion of the probate judge, and he should, therefore, proceed with the greatest caution. Although all parties interested are brought before the court by the notice given, no default can be taken against them, and a plenary showing must be made by the applicant at the hearing. If opposition is made, and the grounds of the opposition stated in writing, that cannot limit the inquiry, nor can the court take the admission of contestants, unless it clearly appears that the admission is made by all parties interested in the proceeding. There is very little in the proceeding which resembles a suit at law. There could be no plea of abatement. One question naturally presented by the application is whether the distribution should be then made. A showing that the distribution cannot be then made is a complete answer to the application. It is also obvious that the court may be called upon to determine other questions than those pertaining to the interests of creditors; as, for instance, whether the applicant is entitled to a share of the estate, and if so what share, is necessarily involved. So, too, it may be that the costs of administration may be so great that there will be no estate to distribute. There are all sorts and conditions of estates. Probably in not one in a hundred would the court be justified in ordering a distribution within four months after the issuance of letters. Yet there are estates in which it would be quite obvious that there would be no danger in so doing. Very much must, therefore, be left to the discretion of the probate judge, and, when he decides that the condition of the estate is such that the distribution cannot safely be made, his conclusion would not often be reversed here. If the distribution were denied because of some doubt upon a question of law, such as, for instance, the construction of a will, such questions could be conveniently determined in such a case. But we cannot well reverse a decision based upon the judgment of the court as to whether the condition of the estate is such as to justify the distribution, especially when the application is denied by the probate judge. The practice pursued in the probate court in this case is anomalous. Naturally, the laboring oar is always with the applicant. Whether there be opposition or not, or whatever the opposition may be, the petitioner must show that the estate is but little indebted, that he is entitled to the share he asks, and what, when the expenses of administration are paid, his share will amount to. The only office of an opposition is to rebut this showing. If, in this case, the probate judge had concluded that the facts shown by the contestants did not warrant the denial of the application, still the showing made at the hearing by the petitioner would have to be considered with the evidence offered by the contestants. Whether the widow was entitled to one-half the community property and to take under the will also could have been determined upon this application, although, if the judge saw fit, he could have deferred the distribution, and directed suit to be brought under section 1664, Code Civ. Proc., to determine the extent of her interest.

Whether the claim of the surviving partners to recover from the estate any balance which upon an accounting may be found to be due from the deceased partner to the partnership, after applying all his interest in the co-partnership to such payment, was a claim which should have been presented for allowance, has not been very fully argued, and need not be now decided. Even if it be recognized as a valid claim against the estate, still, whether it should prevent a distribution would depend upon the value of the assets of the estate, and upon that subject I find no evidence. It is averred in the petition that there is a large amount of assets over and above the property of which distribution is asked, and that the property of which distribution is asked is an inconsiderable portion of the estate. But there is no admission of the truth of these allegations, and the showing as to the condition of the estate must be made at the hearing. Upon that subject, therefore, we are in the dark. It is well to observe here that the creditors are not to be deprived of their lien upon the assets of the estate, and given a bond in lieu thereof. The court should see that sufficient assets are left after the partial distribution, to pay them without recourse to the bond. The requirement of a bond is only additional security to provide against unforeseen liabilities and against errors in judgment. The court did not elect to suspend proceedings and direct petitioner to proceed under section 1664 to ascertain the extent of the ownership of the surviving wife in the property, and, upon the showing made, it could not determine whether the distribution could then have been safely made. I think, therefore, the court should proceed with the hearing of the application, notwithstanding the opposition, and, upon the evidence then produced and that submitted by the contestants, determine whether the application should be granted or denied. The order is therefore reversed and case remanded, with directions to proceed in accordance with this opinion.

We concur: McFARLAND, J.; HENSHAW, J.

116 Cal. 17

## PEOPLE v. WHITE. (Cr. 225.)

(Supreme Court of California. Feb. 3, 1897.)

BURGLARY—DESCRIPTION OF PREMISES—VARIANCE —ATTEMPT TO COMMIT—DISCRETION.

1. Where the indictment charged a burglarious entry of a house described by number, etc., "belonging to John Doe, whose real name is unknown," proof that the house belonged to a woman was not fatally variant.

2. An objection that the court erred in failing to give sufficient instructions will not be considered where defendant neglected to ask fuller instructions at the time.

3. On trial for burglary, it was within the discretion of the court to refuse to take the jury to examine the premises.

Department 1. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

William White was convicted of an attempt to commit burglary, and appeals. Affirmed.

Wm. Hoff Cook, for appellant. Atty. Gen. W. F. Fitzgerald and Charles H. Jackson, for the People.

BEATTY, C. J. The defendant was convicted of an attempt to commit burglary in the first degree, and appeals from the judgment, and from an order denying his motion for a new trial. His first point is that there was a variance between the proof and the indictment.

1. The indictment charged a burglarious entry of a house situate at No. 45 South Park, San Francisco, belonging to John Doe, whose real name is unknown, etc. The evidence showed—or was sufficient, at least, to sustain a verdict—that defendant attempted, in the nighttime, to enter burglariously a vacant dwelling at No. 45 South Park, but

that the house was the property of Letitia Bagnall, a woman, and the precise point is that, while the indictment charges that the house belonged to some unknown man (John Doe being the name of a man), the proof shows that it belonged to a woman. The mere statement of this point is, we think, a sufficient answer to it.

2. The court denied the request of the defendant to send the jury to view the premises. Whether a view of the premises is proper in any case is a matter resting in the sound discretion of the trial judge, and we do not find in this case the slightest ground for holding that there was any abuse of discretion.

3. It is objected that the court failed to give a sufficient instruction as to attempt to commit burglary. The court instructed the jury generally that a person who attempts to commit a crime, but is prevented or interrupted or otherwise fails to accomplish it, may be punished for the attempt, and that they might convict the defendant of an attempt to commit burglary if they were satisfied beyond a reasonable doubt that he made such attempt. If the defendant thought that these instructions were not full enough, he should have requested one more specific.

4. The court, in defining a reasonable doubt, gave the same instruction commented on in People v. Paulsell (Cal.) 46 Pac. 734; and, on the authority of that case, it is contended that this judgment must be reversed. But the judgment in the Paulsell Case was not reversed on account of the instruction that was given, but because an instruction often approved by this court was refused. In this case no instruction on the subject of reasonable doubt was refused; and the one given, though perhaps not so full and clear as the oft-approved definition of Chief Justice Shaw, is, nevertheless, free from error, as was held in People v. Shaughnessy, 110 Cal. 604, 43 Pac. 2. We find no error in the record, and the judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

116 Cal. 32

## OGDEN v. DAVIS et al. (L. A. 106.)

(Supreme Court of California. Feb. 3, 1897.)

APPEAL BOND—LIABILITY OF SURETIES—WASTE—DEFICIENCY.

1. Sureties in an appeal bond against waste on certain described land cannot be held for waste on other land, on parol evidence of a misdescription.

2. Recital in an appeal bond that the penal sum named was the amount fixed by the judge of the court is conclusive of an order fixing the amount, pursuant to Code Civ. Proc. § 945; so that it need not be averred or proved in an action on the bond.

3. The penalty in an appeal bond binding the sureties "in the sum of $2,000 (being the amount for that purpose fixed by the judge of this court) that, during the possession of such property by the appellant, he will not commit * * * waste thereon, and that, if said judgment * * * be affirmed, * * * they will pay the amount of any deficiency upon said sale," applies to the deficiency, as well as to waste.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Matthew B. Ogden against E. J. Davis and another. Judgment for defendants. Plaintiff appeals. Reversed.

Purington & Adair and Collier & Evans, for appellant. W. J. McIntyre, E. B. Stanton, and Caldwell & Duncan, for respondents.

HENSHAW, J. Plaintiff had obtained a judgment in the superior court against one C. E. Packard in an action to foreclose a mortgage. Packard prosecuted an appeal to this court, and gave an undertaking for damages and costs and to stay execution, with defendants for sureties. The judgment was affirmed upon appeal (35 Pac. 642), and this action is prosecuted against the sureties upon the undertaking. Plaintiff suffered nonsuit, and appeals from the judgment.

The complaint charged in two causes of action,—the one, for damages in the sum of $2,000 for waste suffered upon the land and premises; the other, for a deficiency in the sum of $8,584.05, remaining after sale of the mortgaged premises. So much of the undertaking as is pertinent to this consideration is in the following language: "Whereas, C. E. Packard, the defendant in the above-entitled action, has appealed to the supreme court of the state of California from a final judgment made and entered against him in the said action in the said superior court, in favor of the plaintiff in said action, on the 2d day of May, 1893, for the foreclosure of a mortgage on certain lands and premises therein described, for the sum of $17,079.40, including costs of this suit, with personal judgment against the defendant for any deficiency upon sale under said judgment; * * * and whereas the appellant is desirous of staying the execution of the said judgment so appealed from in so far as relates to the sale of the lands and premises: We do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves, further, jointly and severally bound in the further sum of two thousand dollars (being the amount for that purpose fixed by the judge of this court), that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if said judgment appealed from be affirmed, or the appeal be dismissed, they will pay the amount of any deficiency upon said sale." This undertaking, for a description of the mortgaged premises, refers to the complaint. The complaint followed the mortgage, and described the land as "lot 264 of the lands of the Riverside Land & Irrigation Company, as surveyed by Goldsworthy & Higbie, according to the plat of said survey of record in the county recorder's office of the county of San Bernardino." Upon the trial it was made to appear that the description was erroneous, and that there was no lot 264 of the lands of the Riverside Land & Irrigation Company, but that there was a lot 264 of the lands of the Southern California Colony Association. The description, however, had never been reformed, and was followed throughout in the decree and foreclosure sale.

The defendants' grounds of motion for a nonsuit were that waste was not shown to have been committed upon the lands described in the bond; that no order of the court fixing the penalty for deficiency was shown to have been made; that the penalty therein mentioned is confined to waste; that, as to deficiency, the bond is not such as is required by the Code of Civil Procedure; and that the bond was without consideration, and void, in that it did not, in effect, stay execution upon the judgment during the pendency of the appeal.

The first ground of nonsuit urged, namely, that the waste was not shown to have been committed upon the lands described in the bond, was well taken. Sureties upon such an obligation, it is well settled, are entitled to stand upon the express terms of their agreement, and are never implicated beyond those terms. It is not permitted, as against them, to suffer anything to be done which will change or vary the known and definite risk which they assumed in entering upon their contract. It is frequently said that they are favorites of the law, and have a right to stand upon the strict terms of their obligation when such terms are ascertained. Pierce v. Whiting, 63 Cal. 538; People v. Breyfogle, 17 Cal. 508; People v. Buster, 11 Cal. 215; Civ. Code, § 2836; Carter v. Mulrein, 82 Cal. 169, 22 Pac. 1086; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; McMicken v. Webb, 6 How. 299. These particular defendants were sureties against waste that might be committed upon lot 264 of the lands of the Riverside Land & Irrigation Company. The effort to prove by parol evidence that a parcel of land not answering the description called for in the undertaking had suffered waste at the hands of defendants' principal was not permissible, and the evidence to that effect was properly excluded by the court. It follows, therefore, that plaintiff failed to establish a cause of action for waste under the first cause of action of his complaint, and as to that cause of action the nonsuit was properly granted.

The other grounds of nonsuit urged may be considered together. They relate more particularly to the second cause of action, by which a judgment for deficiency is sought. It is contended on behalf of respondents that, under section 945 of the Code of Civil Procedure, the penal amount of the bond to cover a deficiency should have been fixed by order of court, and that the proofs in the case fail to disclose that any such order was made. The objection is untenable. The bond names the penal sum of $2,000, and recites that this sum is the amount fixed by the judge of the court. The sureties, equally with the principal, are bound by such recital. It may be taken as true against them, and need not be averred in the complaint or proved upon the trial. McMillan v. Dana, 18 Cal. 339; Irwin v. Backus, 25 Cal. 214; Hathaway v. Davis, 33 Cal. 161; Murdock v. Brooks, 38 Cal. 596; Smith v. Fargo, 57 Cal. 157; Herm. Estop. § 162. In its form the undertaking strictly complies with the provisions of section 945 of the Code of Civil Procedure, as interpreted in Boob v. Hall, 105 Cal. 413, 38 Pac. 977. The sureties upon the undertaking bound themselves in the penal sum of $2,000 to make good, not only any damage which might arise from waste, but any deficiency judgment which might remain after sale of the mortgaged premises. If the $2,000 were consumed by a judgment against the sureties for waste, no recovery could be had against them for deficiency If, upon the other hand, no damages for waste were recovered, the full amount of $2,000 was available to make good any deficiency. Upon the trial it was shown that there was a deficiency in a sum exceeding $8,000. It was a deficiency that arose strictly within the terms and provisions of the undertaking. The land sold under foreclosure was the land described in the complaint and mortgage, whatever piece or parcel that may have been. Upon the sale of that land this deficiency resulted. For that deficiency these sureties are responsible to the extent of $2,000. The fact that plaintiff, by his action, asks judgment for the whole amount of the deficiency, does not deprive him of his right to recover that sum, which the sureties bound themselves to make good. The nonsuit upon the second cause of action was therefore improperly granted; and the judgment is reversed, and the cause remanded, with directions to the trial court to sustain the motion for nonsuit upon the cause of action for waste, and to deny the motion for a nonsuit upon the cause of action for deficiency.

We concur: TEMPLE, J.; McFARLAND, J.

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5 Cal. Unrep. 592

## MATTHEWS v. BULL. (S. F. 504.)

(Supreme Court of California. Feb. 1, 1897.)

INJURY TO EMPLOYE — PLEADING — INCOMPETENT FOREMAN—RETENTION—MASTER'S LIABILITY.

1. In an action for personal injuries, plaintiff need not allege that he was not negligent.

2. A verdict will not be disturbed where the evidence is conflicting.

3. Under Civ. Code, § 1971, providing that "an employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care," the employer is responsible

for an injury caused to one employé by the negligence of another, whom he has retained with knowledge of his incompetence.

4. A master cannot divest himself of responsibility for the selection and retention of competent servants by delegating the duty to another.

5. Where an employé is injured by the dropping of a hammer of a pile driver, at a signal by the foreman, before he was signaled by the employé putting a ring on the pile, the employer is liable, if the foreman negligently gave the signal.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by William H. Matthews against John C. Bull, Jr. From a judgment in favor of plaintiff, and an order refusing a new trial, defendant appeals. Affirmed.

S. M. Bock and F. A. Cutler, for appellant. L. F. Porter and J. N. Gillett, for respondent.

BELCHER, C. This is an action to recover damages for an injury sustained by the plaintiff while he was in the employ of the defendant. By the verdict and judgment plaintiff was awarded damages in the sum of $1,500; from which judgment, and an order refusing a new trial, the defendant has appealed.

In 1895 the defendant was engaged in constructing jetties at the entrance to Humboldt Bay. A portion of the work to be done was the driving of piles. R. T. Stone was the superintendent of the work on the south jetty, with authority to hire and discharge all the men employed on that jetty. In April he hired the plaintiff as a common laborer, and also hired Robert Astleford to act as foreman of the pile-driver crew. Plaintiff commenced at once, and thereafter continued to perform the work assigned to him, until May 7th, when he was injured. Astleford commenced at once to act as foreman of the crew, and continued to so act until May 15th, when he was discharged. On May 7th, a large pile having been put in place to be driven, Astleford directed the plaintiff to go up the driver and put a ring on the top of the pile. Plaintiff thereupon climbed up the ladder to the third staging, about 24 feet above the base, and then pulled the ring up by a rope attached to it. The ring was about 16 inches in diameter, and weighed from 40 to 45 pounds. Astleford was standing at the foot of the driver, close up to the pile, where he could not see the plaintiff, and from that point he hallooed to the plaintiff to put on the ring. Plaintiff started to put the ring on the pile, was just shoving it over with his right hand, when Astleford, having waited only from a quarter to a half of a minute after hallooing, signaled to the engineer to let the hammer fall, and he did so. The hammer struck on plaintiff's hand, and crushed it so that it had to be amputated, and this is the injury complained of. It was the custom, when a man went aloft to put the ring on a pile, for him, as soon as he had it in place, to signal to the foreman, and he then signaled to the engineer to let the hammer fall. But on this occasion the plaintiff, as he testified, gave no signal whatever. And if Astleford had stepped aside a few feet, to the place where he usually stood when such work was being done, he could have seen the plaintiff, and seen when the ring was in place. It is alleged in the complaint that Astleford was the foreman of the pile-driver crew of which plaintiff was a member; that the work of constructing said jetty was of a dangerous character, and required skill, prudence, knowledge, and carefulness on the part of those in charge thereof, and that it was the duty of defendant to provide men possessing all these qualifications; that the said Astleford, by reason of his habitual carelessness and negligence, was incompetent to have charge of such work, of which fact defendant had due notice; that he was constantly exposing those under him to unnecessary dangers and risks, which fact defendant well knew, having almost daily notice thereof; that the defendant, well knowing said Astleford to be an incompetent, careless, and negligent man in the work in which he was employed, carelessly and negligently retained him in such employment as foreman of said crew; and that the said Astleford, on the 7th day of May, 1895, carelessly and negligently caused the hammer of the pile driver to drop upon plaintiff's right hand, crushing and bruising it to such an extent that it had to be amputated. The answer denies all the averments of the complaint as to carelessness and incompetency of Astleford, and alleges that the injury to plaintiff was wholly caused by his own fault and carelessness, and was not caused by any carelessness or negligence of said Astleford.

1. The first point made for a reversal is that the complaint was fatally defective because it contained no allegation that plaintiff did not know of the incompetency of Astleford. This point cannot be sustained. In this state the law seems to be settled that in this class of cases it is not necessary to allege in the complaint that the injury was done without fault or negligence on the part of the plaintiff. When such a defense is relied upon, the burden is on the defendant to establish it. Robinson v. Railroad Co., 48 Cal. 409; Magee v. Railroad Co., 78 Cal. 430, 21 Pac. 114; Smith v. Steamship Co., 99 Cal. 462, 34 Pac. 84.

2. Under the issues raised by the pleadings, the principal questions to be determined were: (1) Was Robert Astleford a careless and negligent man, constantly exposing those under him to danger? (2) Did defendant have knowledge of Astleford's carelessness, and, having such knowledge, retain him in his employ? (3) Was the injury sustained by plaintiff caused by Astleford's carelessness or negligence? (4) Was the injury sustained by plaintiff caused by his own carelessness or negligence? These were all questions of fact for the jury, and were answered, as shown by the verdict, in favor of the plaintiff. Appellant contends that the evidence

was insufficient to justify the verdict, but in our opinion this contention cannot be sustained. The evidence in the case covers more than 100 pages of the printed transcript, and is largely quoted by counsel in their briefs. But to set it out, even in substance, would extend this opinion to great length, and subserve no useful purpose. It is true that in many respects the evidence is squarely conflicting, and some of it must have been untrue; but what part of it was true and what false was a matter for the jury to determine, and the settled rule in such cases, that the verdict will not be disturbed for want of evidence to justify it, must be followed.

3. The duties which an employer owes to his employés are said to be "to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employés as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant, so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employé by his contract of employment." Daves v. Pacific Co., 98 Cal. 19, 32 Pac. 708. The Civil Code provides that "an employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care." Section 1971. And, speaking of this section, the court, in Gier v. Railway Co., 108 Cal. 133, 41 Pac. 23, said, "Such lack of ordinary care as may well be shown by the retention of an unfit employé after knowledge of the fact, as by a failure to use due diligence at the time of his selection, and in either case the liability of the employer attaches." And see 7 Am. & Eng. Enc. Law, p. 848, where the general rule upon the subject is stated as follows: "Although an employer may have used due care and diligence in selecting his servants, if subsequently he obtains knowledge of a servant's incompetence or unfitness for his position, and retains him in his employment, he is liable to a fellow servant for any injury resulting from such unfitness," except in cases where the injured servant "knew of such incompetence, and made no complaint about it to his employer." Under the law as thus declared, and the facts as found by the jury, the plaintiff was clearly entitled to recover damages for his injuries.

4. Appellant claims that the court committed numerous errors of law in the admission and rejection of evidence. But, without taking time to discuss the several rulings complained of separately, we deem it enough to say that they all seem to have been authorized and proper; and, at any rate, we can see in them no such prejudicial error as would call for and justify a reversal of the judgment.

5. Appellant complains of some of the instructions given by the court to the jury, and particularly of the first one, which reads as follows: "I charge you, as law, that it is the duty of a master to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed. And, in this connection, I further charge you that the master cannot divest himself of liability by intrusting the performance of this duty to any other person. This duty the law imposes upon the master personally, for the safety and protection of his servants. If, therefore, the master delegates this duty to any other person, no matter what his rank may be, the person so selected becomes the representative of the master. If, therefore, you find from the evidence that defendant, John C. Bull, Jr., did not personally undertake to perform this duty, but that he delegated the same to one R. T. Stone, his superintendent at the south jetty, then I charge you that, as to such duty, the said Stone stood in the place of defendant, and any negligence or failure on the part of said Stone in relation to said duty would be the negligence or failure of defendant." This instruction stated the law correctly, as has been many times held by this court. And the instructions, as a whole, stated all the law applicable to the case with a commendable clearness and precision. Among other things, the court told the jury that "the act complained of here as being negligent was the giving of the signal to the engineer by Astleford to let the hammer fall before the proper signal had been communicated to Astleford," and that, "unless Astleford carelessly and negligently gave the signal to the engineer to drop the hammer, your verdict must be for defendant." There was no error in the giving or refusing instructions. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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116 Cal. 1

## BYRNE v. HOAG et al. (L. A. 203.)

(Supreme Court of California. Jan. 29, 1897.)

JUDGMENT—AMENDMENT.

In foreclosure on default in payment of the first of several installments of interest contracted to be paid, a decree directing a sale to satisfy said installment alone, which was signed by the judge, and entered by the clerk, could not be amended on motion of plaintiff, so as to provide for further sales on subsequent defaults.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Olive Byrne against Abraham Hoag and another, in which there was a judgment for plaintiff. An amended judgment was subsequently entered, from which defendants appeal. Reversed.

Chas. R. Gray, for appellants. Purington & Adair, for respondent.

McFARLAND, J. This is an appeal by the defendants from a judgment against them, entered on the 28th day of November, 1895. The facts of the case, as they appear upon the record, are as follows: In 1893 the plaintiff commenced this action against the defendants to foreclose a mortgage given by the latter to the former to secure a promissory note for $2,000, dated April 27, 1892, payable in three years from date, with interest at 12 per cent. per annum, payable annually. At the time of the commencement of the suit the first installment of interest was due, and it was alleged in the complaint "that no sum either on the account of the principal or interest on the said note has been paid"; and the prayer is for judgment for the said sum of $2,000 and interest, and that the usual decree be made for the sale of the mortgaged premises, the application of the proceeds thereof to the satisfaction of the whole amount of the note, and for a deficiency judgment. In the answer the defendant denied that there was anything more due than the one year's interest, and prayed that the plaintiff have no greater relief than a decree with respect to said interest. The court rendered a judgment for the sum of $240, with interest thereon at the rate of 7 per cent. per annum from the 27th day of April, 1893, and for an attorney's fee of $100 and costs, and decreed that the mortgaged premises be sold to satisfy that amount. This was all that the judgment embraced. The decree was signed by the judge of the superior court in which the action was pending, and was entered on the 27th day of November, 1893. Findings were waived. On the 15th day of August, 1895, more than a year and a half after the entry of said judgment, plaintiff's attorneys served upon defendants and their attorneys a notice that on the 30th day of September, 1895, or as soon thereafter as a hearing could be had, they would move the court, "on all the papers on file in this action, and the records of said case," for leave to amend the said judgment, entered on the 28th of November, 1893, so that it should read in accordance with the form of judgment annexed to said notice, and marked "Exhibit A." This notice was accompanied by an affidavit of one of plaintiff's attorneys, the substantial part of which is as follows: "That judgment in said action was inadvertently entered, failing to comply with the decision of the court in this action in this: That said decree did not provide for the payment of the principal or interest thereafter to become due on the note sued upon in this action; that, by inadvertence, the clerk was allowed to enter said defective judgment; that the defect in said judgment was not noticed by the plaintiff's attorneys until May, 1895"; and that the pressure of business, etc., had prevented the discovery of the defect of the judgment. This motion was opposed by the defendant; and on the hearing of the motion, against the objection of defendants, there was introduced a paper indorsed "Opinion," signed by the said judge of the court, in which it is said: "In this action plaintiff is entitled to judgment only for the interest on the mortgage note now due and unpaid. I am satisfied that under the wording of the note and mortgage, which are to be construed together, that section 728 [Code Civ. Proc.] should govern the foreclosure proceedings, and that the rule as laid down in the cases of Bank v. Johnson, 53 Cal. 99, and Yoakam v. White, 97 Cal. 286, 32 Pac. 238, should apply. Attorney's fee, $100." This paper was not marked "Filed," and there was no evidence that it ever was in the possession of the clerk of the court, and no evidence as to where it was obtained. After the hearing of the motion, the court made an order as follows: "It is ordered that the judgment entered in this action on the 28th day of November, 1893, be amended to read as set forth in said notice of motion, and that the same be entered as of date the 28th day of November, 1893." This order was dated December 17, 1895, and the judgment prepared by counsel for plaintiff, and annexed to his said notice of motion, was then entered. This judgment then so entered differed slightly from the first judgment in the amount found due, and then proceeded at length to provide that when, at any time thereafter, any installment of interest secured by the note should become due, and also whenever the principal should become due, an order be made for the sale of the residue of the mortgaged premises not theretofore sold, etc.

It is quite clear that the court had no jurisdiction to enter this second judgment. The failure to enter such a judgment as the plaintiff desired in the first instance, in 1893, was not the result of any inadvertence, or the misprision of the clerk. The case does not come within any of the authorities cited, which hold that where the clerk has failed to enter the judgment ordered by the court, or has failed to enter any judgment after a decision rendered by the court, and the record shows what judgment should have been entered, then such a judgment may be entered as will conform to the actual decision of the court. In the case at bar it is not necessary to inquire whether the paper marked "Opinion" was properly allowed in evidence, or what the meaning of that paper is. The decree, as entered in 1893, was signed by the judge; and, under any view, it was his last direction to the clerk, and was the decision of the case. It has been held that it is unnecessary for a judge to sign a judgment, although it has been the almost invariable custom in this state for decrees in equity to be so signed; but, where the judge does sign the decree, his signature, as was said in Re Cook's Estate, 77 Cal. 227, 17 Pac. 923, and 19 Pac. 431, is intended "to give the clerk a surer means of correctly entering what has been adjudged." In this case, therefore, the judgment was entered by the clerk exactly as the court ordered it to be entered, in the surest way in which the judge could express his intention. There was, therefore, no mistake or misprision of the clerk; and, if there was any error committed in rendering the judgment, it was a judicial error, which could be remedied only by appeal or motion for a new trial. To allow a judgment to be radically changed on mere motion, a year and a half after it had been entered, for no other reason than that contended for in the case at bar, would be to destroy that certainty and stability which are the main characteristics of final judgments. The judgment appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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(115 Cal. 697)

## McFADDEN v. DIETZ. (L. A. 219.)

(Supreme Court of California. Jan. 29, 1897.)

APPEAL.

Where an uncontradicted affidavit shows that the appeal was taken for delay, on dismissing the appeal damages will be allowed respondent. Duncan v. Grady, 34 Pac. 112, 99 Cal. 552, and Koelling v. Rutz, 41 Pac. 781, 108 Cal. 664, followed.

Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by A. W. McFadden against A. C. Dietz. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Granted.

Shepherd & Eastin, for appellant. Thos. O. Toland, for respondent.

McFARLAND, J. This case is now before us on a motion of the respondent to dismiss the appeal for failure of the appellant to file his points and authorities within the time specified by the rules of this court, and also upon a motion that respondent be allowed damages upon the dismissal of the appeal, upon the ground that the same was taken merely for delay, etc. The motion to dismiss the appeal must clearly be granted, for the transcript was filed on the 23d day of April, 1896, and at the time the motion was submitted, which was several months afterwards, no points and authorities had been filed by the appellant. When the respondent served his notice to dismiss the appeal and for damages, he made and served upon the appellant an affidavit which showed that appellant, according to his own statements and declarations, had taken the appeal for delay, and the statements of this affidavit have in no way been denied by the appellant. It has been held here that, upon a motion to dismiss the appeal and for damages, this court will not, in considering said motion, look into the record to see if the appeal be frivolous, and that damages would not be awarded upon that ground until the final disposition of the appeal; but it has also been held that, where an uncontradicted affidavit shows that the appeal was taken for delay, damages will be allowed on the dismissal of the appeal. This was expressly held in Duncan v. Grady, 99 Cal. 552, 34 Pac. 112, and in Koelling v. Rutz, 108 Cal. 664, 41 Pac. 781. The same ruling seems to have been made in Buckley v. Stebbins, 2 Cal. 149, and in Pacheco v. Bemal, Id. 150. It is not necessary to determine here how far we would look into conflicting evidence as to the delay, if there had been such evidence; for, as in the cases above cited, the statement in the affidavit filed by the respondent is not controverted. The case at bar, we think, clearly calls for the imposition of damages. The appeal is dismissed, with $100 damages as part of his costs of appeal.

We concur: TEMPLE, J.; HENSHAW, J.

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(116 Cal. 6)

## N. P. PERINE CONTRACTING & PAVING CO. v. CITY OF PASADENA. (L. A. 195.)

(Supreme Court of California. Jan. 30, 1897.)

MUNICIPAL IMPROVEMENTS — BIDDER'S CERTIFIED CHECK—FORFEITURE—CONTRACT—ILLEGAL PROCEEDINGS.

1. The street law (St. 1891, p. 199, § 4), which, in reference to competitive bids for public improvements, provides that, if the bidder fails to enter into the contract, "then the certified check accompanying his bid, and the amount therein mentioned, shall be declared to be forfeited," authorizes a forfeiture only where the failure is to enter into a contract based on legal proceedings of the municipal authorities.

2. On the letting of a construction contract, the municipal authorities must determine the extent of the improvement, the items of material and work, ascertain the total expense, and definitely fix the price in the contract. Bolton v. Gilleran, 38 Pac. 881, 105 Cal. 244, followed.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by the N. P. Perine Contracting & Paving Company against the city of Pasadena. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. E. Arthur, for appellant. Parker & Eells and Ben. Goodrich, for respondent.

HENSHAW, J. Plaintiff submitted to the defendant a bid for the performance of certain street work, and with the bid deposited its certified checks in the sum of $3,000. Plaintiff was awarded the contract, but, becoming convinced that the proceedings were illegal, it refused to proceed, declined to enter into the contract, and made demand for the return of its checks. Defendant refused to comply with the demand, cashed the checks, and retained the money under a claim of forfeiture. This action was instituted for its recovery. From the judgment rendered against it, and from the order denying it a new trial, defendant appeals.

Appellant contends that its demurrer should have been sustained, and its motion for a nonsuit granted, upon the ground that plaintiff, having become a successful bidder, suffered absolute and unconditional forfeiture by its refusal to enter into the contract. The street law in terms declares that if the bidder "fails, neglects or refuses to enter into the contract, * * * then the certified check accompanying his bid, and the amount therein mentioned, shall be declared to be forfeited." St. 1891, p. 199, § 4. It is upon this language that the claim above mentioned is based. The argument is not tenable. Plaintiff averred and proved facts fully establishing the illegality and invalidity of the proceedings which led up to and were to have culminated in a contract. By entering into such a contract it would have received nothing. It could have looked neither to the city nor to the property owners for recompense for its labor. The street law contemplates a forfeiture for a failure to enter into a contract based upon legal proceedings of the municipal authorities, not for a failure to enter into a contract which, so far as the contractor is concerned, is mere waste paper, and under which he would expend money and labor without the possibility of remuneration. In such a case the promise of the contractor, accompanied by his certified check, is a naked offer, met and supported by no consideration. There is no estoppel. The contractor has received no benefit. The city has sustained no injury. Upon such a total failure of consideration, a promise resting upon expected benefits which can never be received is no longer binding, and a deposit of money accompanying such a promise is recoverable at law. Hayes v. Los Angeles Co., 99 Cal. 74, 33 Pac. 766; 1 Pars. Cont. (7th Ed.) p. 462.

The court in its findings specified certain particulars in which the street law had not been complied with, and concluded therefrom that the proceedings were invalid. These findings are attacked. It is not necessary to consider all or many of the points raised. One of the findings is unquestioned, and its facts are decisive of the case. The specifications contain the following: "But the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate. For all such extra concrete the contractor shall be paid at a pro rata of contract price for the actual quantity laid." Here there is left to the superintendent of streets and the city engineer power to increase the cost of work to an indefinite extent. A discretion lodged in the board alone is sought to be devolved upon these officers, and all means are withheld from the property owner of determining what may to him be the ultimate cost of the finished work. The case comes squarely within the principle enunciated in Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881. The judgment and order are affirmed.

We concur: TEMPLE, J., McFARLAND, J.

115 Cal. 517

## VERDELLI v. GRAY'S HARBOR COMMERCIAL CO. (S. F. 492.)

(Supreme Court of California. Feb. 4, 1897.)

In bank. Petition for rehearing. For former opinion, see 47 Pac. 364. Rehearing denied.

PER CURIAM. A rehearing is denied. The opinion heretofore rendered is modified by striking therefrom the words commencing "the defendant could not have been prejudiced," down to and including the words "plaintiff was injured," and inserting in lieu thereof the following: "The defendant could not have been prejudiced by this action of the court, for the reason that the instruction given, though brief, was in effect the same as that refused."

116 Cal. 39

## GALE v. BRADBURY. (S. F. 541.)

(Supreme Court of California. Feb. 4, 1897.)

TRIAL—SUFFICIENCY OF FINDING.

A general finding by the jury that "all the allegations of the complaint are true," and that "none of the denials contained in the answer is true," is sufficient as a finding of facts.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by John Gale against W. B. Bradbury. There was judgment for plaintiff, and defendant appeals. Affirmed.

Darwin C. Allen, for appellant. Reinstein & Eisner, for respondent.

McFARLAND, J. This is an appeal by the defendant from a money judgment, in favor of plaintiff, in the sum of $523.82, with interest, etc. The only point made by appellant for a reversal of the judgment is that the findings are insufficient, because they merely find generally "that each and all of the allegations of the plaintiff's complaint are true, and are sustained by the evidence," and "that none of the denials contained in defendant's answer herein is true, or is sustained by the evidence." The answer contained only denials. Such findings have been held to be sufficient by this court by a long line of decisions upon the subject, commencing with McEwen v. Johnson, 7 Cal. 260. In Johnson v. Klein, 70 Cal. 186, 11 Pac. 606, the court said: "It has been so often held here that a finding that all the averments of the complaint are true is a sufficient finding of facts that an appeal grounded on its alleged insufficiency must be held to have been taken for delay;" and in that case the judgment was affirmed, with damages. Since then the same rule has been frequently restated. Gwinn v. Hamilton, 75 Cal. 266, 17 Pac. 212; Williams v. Hall, 79 Cal. 607, 21 Pac. 965; San Diego Co. v. Seifert, 97 Cal. 594, 32 Pac. 644. In the cases cited by appellant, the finding was held to be defective, because it did not clearly state that all the averments of the complaint were true, and all of the denials in the answer untrue, but left the matter in uncertainty, as, for instance, by a finding that the "material" averments were true, or that certain allegations were untrue "except only so far as the same accord with the foregoing facts." But in the case at bar the findings are the same as those heretofore frequently held to be good. The judgment is affirmed, with $50 damages, to be entered by the court below as part of the costs of this appeal.

We concur: HENSHAW, J.; TEMPLE, J.

116 Cal. 20

## McHENRY et al. v. DOWNER, Tax Collector.

(Sac. 158.)

(Supreme Court of California. Feb. 3, 1897.)

TAXATION OF NATIONAL BANK SHARES—STATUTES CONSTRUED—INEQUALITY IN TAXATION.

1. Shares of stock in national banks are proper subjects of state taxation, subject to the restrictions imposed by Rev. St. U. S. § 5219.

2. Const. Cal. art. 13, § 1, providing that all property not exempt "shall be taxed in proportion to its value, to be ascertained as provided by law," is not self-executing, but leaves the machinery for ascertaining the value of all property for the purposes of taxation to be provided by the legislature.

3. A shareholder in a national bank is not taxable on his stock under Pol. Code Cal. § 3608, prescribing the method for taxing corporate property, which provides that "all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

4. Under the restriction contained in Rev. St. U. S. § 5219, that the shares of stock in national banks shall not be taxed by a state at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, such shares are not taxable under the statute for the taxation of personal property generally; the owner of "other moneyed capital" invested in credits, whether by a corporation in which he is a stockholder, and which is assessed under Pol. Code Cal. § 3608, or by himself individually, being entitled by Id. § 3629, to a deduction from his assessment for debts due to bona fide residents of the state, while the owner of bank stock, which is property, and not a credit, cannot obtain such deduction.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Controversy, submitted on agreed statement, between O. McHenry and others and W. A. Downer, tax collector, to determine the validity of a tax levied on plaintiffs, as the owners of shares of stock in a national bank. Judgment for defendant, and plaintiffs appeal. Reversed.

Lloyd & Wood, for appellants. L. W. Fulkerth, Dist. Atty., and P. H. Griffin, for respondent.

SEARLS, C. This is a controversy without action, submitted upon an agreed statement to the superior court in and for the county of Stanislaus, under the provisions of section 1138 of the Code of Civil Procedure, to determine the legality of a tax imposed upon the plaintiffs, and the right of the defendant as tax collector to enforce payment thereof. By the judgment in the case, the validity of the tax, and the right of the defendant to collect the same, were upheld. Plaintiffs appeal from the judgment, and the cause comes up on the judgment roll.

It appears from the agreed statement: (1) The First National Bank of Modesto is a banking corporation, created under and pursuant to the laws of the United States in relation to the creation and organization of national banks, with a paid-up capital stock of $100,000, divided into 1,000 shares of $100 each, and located and having its place of business at Modesto, in the county of Stanislaus, state of California. (2) The plaintiffs, and each of them, were at the several dates herein mentioned the holders and owners of certain of the shares of stock in said national bank. The number of shares owned and held by each of the plaintiffs is stated in the agreed statement, but is unimportant here. (3) For the years 1894 and 1895, or for either of said years, said plaintiffs, or any of them, or the corporation or its officers, did not furnish to the assessor of the county a statement showing the respective interests or property of said plaintiffs, or any of them, in or to the paid-up capital stock of said First National Bank, or in or to any of its personal property or the shares of the capital stock owned by them in said corporation, and did not furnish any statement showing the amount of any debt or debts due from them, or any of them, or from the corporation to bona fide residents of this state, or to firms or corporations doing business in this state. (4) For the years 1894 and 1895 the assessors of said Stanislaus county assessed the said First National Bank, upon its real estate and mortgage interests in real estate, and upon the furniture and fixtures of its banking office only, at the full cash value of such real estate, mortgage interests, furniture, and fixtures, said bank claiming that its other property was not subject to taxation under state authority. For the years 1894 and 1895 all the several banking corporations and other corporations located in said county, other than national banking corporations, were assessed upon all their real and personal property at its full cash value; but the shareholders in state banks and state corporations were not assessed upon their shares of stock therein, such shares of stock being treated as exempt from assessment under the provisions of section 3608 of the Political Code of the state of California. (5) J. F. Campbell, county assessor for said Stanislaus county for the year 1895, assessed to each of the plaintiffs herein the shares of stock by them severally held in said First National Bank of Modesto. He ascertained that said shares were of the cash value of $100 per share over and above the real estate, etc., assessed to the bank. The assessor pursued the following course in arriving at the value of the stock, viz.: He ascertained that the paid-up capital stock was $100,000; undivided profits, $4,140; surplus, $20,000,—total value, $124,140. He deducted therefrom, value real estate assessd to bank, $6,305; value mortgage interest to bank, $5,596; value office furniture, etc., to bank, $800,—thus leaving a balance of $111,439. From this sum he deducted 10 per cent. for bad debts. He further ascertained that the capital stock was divided into 1,000 shares of $100 each, and thus determined that they were of the value of $100 each. He also found that said shares had not been assessed for the purposes of taxation for the year 1894, and thereupon doubled the assessment of 1895, and assessed said shares at $200 each. The state board of equalization reduced the value of all property assessed for taxation in said county for the year 1895 10 per cent., and upon the property as so reduced taxes were levied. Plaintiffs have tendered to the tax collector all sums due from them for taxes for the year 1895, save and except the tax imposed upon said shares of stock so by them held and owned, which said last-mentioned tax they claim is contrary to law, and therefore illegal and void; and said tax collector, the defendant herein, claims that the same is lawful, and therefore a good and valid claim. As before stated, the superior court adjudged that the taxes imposed upon the shares of stock are legal and valid, and that defendant has a right to collect the same. The plaintiffs appeal.

The points made by appellants for reversal are: (1) The taxes in question were not assessed in pursuance of the provisions of section 1 of article 13 of the constitution of this state. (2) The taxes in question are illegal, because the property assessed is not subject to assessment for the purposes of taxation, and is exempt therefrom by the provisions of section 3608 of the Political Code. (3) The taxes in question are illegal, because they were levied in violation of the provisions of the national bank act. For the sake of greater brevity we shall consider the propositions involved in the several contentions of appellants not in the order of their sequence, but together.

Section 1 of article 13 of the constitution of this state is as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership: provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state." It will appear at a glance that the foregoing constitutional provision is not, and does not pretend to be, self-executing. All property not exempt shall be taxed in proportion to its value, but that value is to be "ascertained as provided by law." The constitution fixes the liability of property to taxation, and the standard upon which it is based, viz. in proportion to its value; but the duty of prescribing the machinery by which to ascertain such value is confided to the legislature. "Taxes are the enforced proportional contribution of persons and property, levied by the authority of the state, for the support of the government, and for all public needs." Cooley, Tax'n, p. 1. The power of taxation is lodged with the legislative branch of our government. "The legislature must therefore determine all questions of state necessity, discretion, or policy involved in ordering a tax, and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns; and must decide upon the agencies by which collections shall be made." Cooley, Tax'n (2d Ed.) p. 43.

The question presented seems to divide itself under two heads: (1) May the legislature of the state tax the stock of national banks? And, if yea, (2) has it provided adequate means for so doing?

The first query is of easy solution. National banks are agencies of the federal government, selected as a necessary or convenient means to the exercise of its functions, and are not, except by its consent, subject to the taxing power of the states. Were it otherwise, it is said a state dissatisfied therewith could tax them out of existence, and thus indirectly hamper and thwart the operations of the general government. McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank, 9 Wheat. 738; Van Allen v. Assessors, 3 Wall. 573; Austin v. Boston, 14 Allen, 359; Flint v. Boston, 99 Mass. 141; State v. Mayor, etc., of Newark, 39 N. J. Law, 380. The general government has, however, consented that, subject to certain restrictions, the states may tax the stock or shares of national banks. By the act of congress of June 3, 1864, as amended February 10, 1868 (Rev. St. U. S. § 5219), it is provided as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." It will thus be seen that, subject to the two restrictions enumerated in the act of congress, shares of stock in national banks are proper subjects of state taxation. In the present instance the shares were taxed in the county and city or town where the bank is located, and, as none of the shareholders appear to be nonresidents of the state, no violation of the restriction as to the place of taxation appears.

This brings us to a consideration of the second question, viz.: Has the legislature of this state provided the means for the taxation of the stock in harmony with the requirement of the act of congress, which requires that the rate of taxation shall not be in excess of that imposed upon other moneyed capital in the hands of citizens of the state? Prior to 1881, section 3640 of our Political Code read as follows: "Each person, firm or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association or joint stock company shall be assessed therefor. If the corporation, association or joint stock company has its principal place of business in this state, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations and joint stock companies whose principal place of business is not within the state must be individually assessed for such stock," etc. The section provided, further, that shareholders, in their statements to the assessor, should designate the number of shares held by them, and the name of the corporation, and that they should present a certificate as to the amount or value of property assessed to the corporation in order to secure a deduction on account thereof. Under the law as it then stood, the shares of stock held by Nancy Miller in the National Gold Bank of D. O. Mills & Co. were assessed to her for the purposes of taxation, in the same manner substantially as in the case at bar. An agreed statement was made, involving the same facts substantially as here. The case came before this court in Miller v. Heilbron, 58 Cal. 133, whereupon it was held that the attempted taxation of the shares in the national bank was in violation of the permission and limitations contained in section 5219 of the Revised Statutes of the United States, and therefore void. It was held in that case that the fact that shares in the national bank were assessed the same as shares in state banks was not sufficient; that the clause in the United States statute that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., "means something more than that there should be no discrimination with respect to the percentage or any valuation which might be made; but that, taking the assessment, rate of assessment, and valuation together, the taxation on shares of national banks should not be greater than on other moneyed capital." Then, as now, under our constitution and laws, "other moneyed capital" invested in credits entitled the holder thereof to deduct therefrom all debts due by the party assessed to bona fide residents of the state. As national bank shares are property, and not credits, the assessor is not authorized to deduct from the value thereof debts due by the owner to others; hence it was held that there was a clear discrimination in favor of other moneyed capital, and against the holders of such bank shares. People v. Weaver, 100 U. S. 543, is referred to and relied upon in support of the conclusion reached, and, we think, supports such conclusion. So in Van Allen v. Assessors, 3 Wall. 573, where a statute of the state of New York provided for the taxation of national bank shares at the same rate as was imposed upon other moneyed capital in the hands of the other individuals of the state, but did not impose a tax upon the shares of state banks, although a tax was levied upon the capital of such state banks, it was held under the act of congress of 1864, which contained a provision, in addition to the present restrictions, that the rate of taxation imposed upon such shares should not exceed that imposed upon state banks; that a tax upon the capital of state banks was not the equivalent of a tax upon the shares of national banks, not exceeding their par value, for the reason that the capital of state banks may consist of the bonds of the United States which are exempt from state taxation, etc.; and that the tax was hence invalid.

After the transaction arose out of which Miller v. Heilbron, supra, grew, and in 1881, section 3608 of the Political Code was amended so as to read as follows: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." The constitutionality of this section was drawn in question in the case of People v. Badlam, 57 Cal. 594, which was an application for a writ of mandate to compel Badlam, as assessor, to assess to various holders certificates of stock by them held in corporations, etc. The court upheld the section of the Code, placing its opinion upon the ground that, where all of the property of a corporation was assessed to the corporation, to again assess the shares of stock to the shareholders would be double taxation, which is inhibited by our constitution. Assuming then, as we must, that section 3608 of the Political Code is constitutional, this difference is presented in the method of valuation for the purposes of taxation between state banks and the shareholders of national banks: The shares of stock in the former are not assessed. In lieu thereof, all the property of the corporation is assessed. But this does not include government bonds or other nonassessable property, and all solvent creditors unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing are to be assessed subject to a deduction for all debts (not secured as above) due and owing by the corporation to bona fide residents of the state. Pol. Code, § 3629. In the latter—that is to say, in the case of shares of national banks—the stock is assessed at its value after deducting only the property actually assessed to the corporation; that is to say, its real estate and debts secured by mortgage, trust deed, etc. As before stated, the assessor is not authorized to deduct debts owing by the owner of the shares, for the reason that shares of stock are property, and not credits, from which, under the law, debts can be deducted. The disparity in the mode of valuation becomes more apparent when we consider that one-third of the paid-up capital stock of every national bank must be invested in nonassessable property, viz. in the registered bonds of the government of the United States, which are required to be deposited with the treasurer of the United States as security for its notes, before it can be authorized to do business. No method is provided in our statute for deducting from the value of the shares anything on this account, and in the case at bar it was not done.

Waiving, then, the fact that shares in state banks are not assessed at all, and assuming that the assessment of all the property of a state bank may be the equivalent of the assessment of the shares of stock in a national bank, and the stubborn fact still remains that under our law it is not such equivalent, but militates most grievously against the owners of stock in the national banks. Exact equality, from a mathematical standpoint, may not be attainable in the matter of taxation; but a system which of necessity, and not from accident or error of judgment, discriminates against the owners in national banks to a large extent, is in violation of the restriction imposed by congress upon the privilege granted to the states to tax shares in national banks. In other words, as was said in Boyer v. Boyer, 113 U. S. 689, 5 Sup. Ct. 706, the expression used in the United States statute, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., refers not simply to the rate of taxation, but to the whole process of assessment and valuation, and that a state law which "establishes a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital," etc., is in violation of the restriction contained in the act of congress. The paramount object of the restriction by the act of congress upon the taxation of shares in the national banks by the several states is aptly stated by Mr. Justice Mathews in Mercantile Bank v. New York, 121 U. S. 138, 7 Sup. Ct. 826, in which case, after stating the doctrine of previous cases, he added: "The main purpose, therefore, of congress, in fixing limits to state taxation on investments on shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy."

Keeping steadily in view this policy and purpose, many of the cases which at first blush seem irreconcilable become plain, and are referable to patent sources of distinction. It is contended by counsel for respondent that the cases of Miller v. Heilbron and Van Allen v. Assessors, supra, have been virtually overruled by the later cases in the supreme court of the United States. We have examined such later cases with some care, and while it must be conceded that some of them restrict the broad reasoning of those cases, and point out numerous exceptions to the general rules therein enunciated, we see no expression of dissent from the principles decided. It has been held that savings banks and trust associations are not within the reason of the rule provided by congress, and hence that the restriction does not apply to them (Mercantile Bank v. New York, 121 U. S. 138, 7 Sup. Ct. 826); also, that "it could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt" (Hepburn v. School Directors, 23 Wall. 480; Bank v. Ayers, 160 U. S. 660, 16 Sup. Ct. 412); also, that "the act of congress was not intended to curtail the state power on the subject of taxation." It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the legislature chose so to do. Adams v. Nashville, 95 U. S. 19. We think the spirit breathed in all the later cases is this: The several states may exempt certain personal property from taxation; may provide a different mode of taxation for property, the use of which produces no competition with capital invested in national banks. These exceptions, however, must not operate as an unfriendly discrimination against investments in national bank shares. In view of this doctrine and of the condition of our law, we are of opinion: (1) That, under section 3608 of our Political Code, shares of stock in national banks are not subject to assessment for the purposes of taxation. (2) If it be conceded that this section has no application to the shares of stock in national banks, and that they may be assessed as other personal property, then the machinery provided therefor works such a discrimination in favor of state banks, and against shares of national banks, that it is violative of the restrictions of the act of congress, and that the assessment and tax in the case at bar are null and void. We recommend that the judgment of the court below be reversed, and the court directed to enter judgment in favor of the plaintiffs.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the court below is reversed, and the court directed to enter judgment in favor of the plaintiffs.

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5 Cal. Unrep. 598

## WILLIAMS v. SUPERIOR COURT OF LASSEN COUNTY. (S. F. 297.)

(Supreme Court of California. Feb. 6, 1897.)

JUSTICES OF THE PEACE—NOTICE OF APPEAL—EVIDENCE OF FILING.

The marking of the filing of a notice of appeal by a justice is not the only competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed.

Department 1. Petition by one Williams for a writ of certiorari to the superior court of Lassen county. Writ dismissed.

Spencer & Raker and F. C. Spencer, for petitioner. Shinn & Shinn, for respondent.

PER CURIAM. The court is unanimously of the opinion that the writ ought to be dismissed. The fact, impliedly found by the court in exercising jurisdiction, that the notice of appeal had been filed, was, under the circumstances, entirely justified. The marking of the filing is not the exclusively competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed. Writ dismissed.

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116 Cal. 9

## BANK OF BRITISH COLUMBIA v. FRESE et al. (S. F. 377.)

(Supreme Court of California. Feb. 1, 1897.)

RIGHTS OF PLEDGEE—EXPENSES—EVIDENCE.

1. A bank authorized drafts on it to pay for goods bought by a certain firm, provided they were accompanied by invoices and bills of lading. It paid the drafts, and held the invoices, etc., as security. After the sale by the firm or part of the goods, which the bank delivered, and failure of the firm, the bank disposed of the balance through brokers. *Held*, that the bank was entitled to add to the amount paid on the drafts the reasonable charges for storage, insurance, cartage, brokerage, etc.

2. The bank was also entitled to an allowance of discounts for cash on sales made by it, where the discounts were not more than the interest on time sales, or unusual, or more than equaled the risk of loss if the sales had been on credit.

3. It was entitled to any sum paid for "customhouse drayage to warehouse."

4. The bank, as against a surety of the firm, was not entitled to commissions which the firm agreed to pay on the amount of the drafts.

5. Where an account of one party is put in evidence by the adverse party, the latter must call for any required explanation of an item of the account, and the item will not be disallowed because it does not indicate what it was for.

6. Where an objection was sustained to a question asking a witness if he had learned a certain fact, and no offer was made to show that the witness had learned it, prejudicial error did not appear.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Bank of British Columbia against William Frese and others on a promissory note. From a judgment in favor of defendants, and from an order denying its motion for a new trial, plaintiff appeals. Reversed.

Sidney V. Smith, for appellant. Naphtaly, Freidenrich & Ackerman and Page, Eells & Wheeler, for respondents.

HAYNES, C. On November 3, 1891, the plaintiff made and delivered to William Frese & Co., a co-partnership doing business at San Francisco, a letter of credit directed to Bullock Bros. & Co., of Rangoon, authorizing them to draw on plaintiff, at London, drafts at six months' sight, for any sum or sums not exceeding in the aggregate £13,000 sterling, for the invoice cost of merchandise to be shipped from Rangoon to San Francisco on account of said Frese & Co., and agreed to pay said drafts at maturity, provided they were accompanied by invoices and bills of lading purporting to be of the required value and shipped as above stated. Under said letter of credit, Bullock Bros. & Co. drew drafts upon the plaintiff at London amounting in all to $61,892.91, and the same were accompanied by invoices and bills of lading as required by the letter of credit. On March 28, 1892, none of said drafts having matured or been paid, the defendants Roth, Blum & Co., at the request of William Frese & Co., executed with said last-named firm a promissory note of that date, at one day, for the sum of $10,000, and delivered the same to the plaintiff as collateral security for the payment of drafts to be drawn under said letter of credit, said note to be canceled and returned to Roth, Blum & Co. as soon as the drafts under said letter of credit should be paid. The cargo of rice purchased under said letter of credit arrived at San Francisco September 17, 1892. Frese & Co. failed in business some time between June 20th and August 21, 1893. Up to the time of their failure they made sales of portions of the rice, and the bank delivered the rice so sold. After their failure the bank disposed of the rice through brokers. Plaintiff's account, as rendered, shows a balance due the bank of $7,981.85. This action is upon said promissory note. Frese & Co. pleaded their discharge in insolvency. Roth, Blum & Co. set out in their answer the circumstances under which the note was made, and alleged that the aggregate amount of drafts drawn was $61,892.91; that plaintiff held, as security for the payment of said drafts, the invoices and bills of lading of said merchandise, and had received on account of said drafts a sum largely in excess of their aggregate amount. The court found that plaintiff had received the proceeds of said cargo, and that "said cargo realized a sum in excess of the aggregate amount of all the drafts drawn under said letter of credit, to wit, in excess of the sum of $61,892.91." Judgment was entered for the defendants, and the plaintiff appeals therefrom, and from an order denying its motion for a new trial.

Appellant contends that said finding is not justified by the evidence. Upon the trial the discharge in insolvency of Frese & Co. was admitted by the plaintiff, and Roth & Blum admitted the incorporation of the plaintiff, and the making and delivery of the note set out in the complaint, and then put in evidence said letter of credit, and plaintiff's acknowledgment in writing that said note was held by it as collateral security for the payment of said drafts. It was also admitted by all parties that drafts were drawn under said letter of credit to the amount of $61,892.91, all of which were paid by the plaintiff. Defendants then called as a witness Walter Powell, manager of the Bank of British Columbia, in San Francisco, by whom said letter of credit was issued, who testified that the total amount received by the bank for the rice was $74,689. Two accounts were made by the bank,—the first from the arrival of the cargo down to the failure of Frese & Co., during which time the sales were made by them and the deliveries by the bank, and the second covered the remainder of the sales, which were made by the bank through brokers; and these accounts were put in evidence by the defendants, from the face of which it appears that the sales were closed July 31, 1894, and at that date there was a balance due the bank of $7,981.85. The sole controversy is as to whether the bank was entitled to charge against the proceeds of sales freight, insurance, customs duties, drayage, broker's commissions, discounts, interest, etc. Of course it was only necessary for the defendants in the court below to establish improper debit items, in the account as rendered, to equal the balance shown by the account to be due to the bank, in order to defeat the plaintiff. It is said by counsel for appellant, in his brief, that the court below adopted the defendants' view, that the expenses of the cargo, consisting of freight, duty, weigher's fees, drayage, and storage, amounting to $15,602.79, could not be charged by the bank, and deducted from the proceeds, as against Roth, Blum & Co., who are sureties to the extent of $10,000, the amount of their note. If such holding is correct, the judgment must be affirmed, as a matter of course, though if it be wrong, and it be shown that other items appearing on the debit side of the account, equaling the balance claimed by the bank, were improper, an affirmance must follow, notwithstanding the error.

It should first be observed that the burden of proof to establish their defense that the bank had been repaid by the proceeds of the cargo rested upon the defendants. A full and detailed account had been rendered by the bank to the defendants Roth, Blum & Co., and they called as their witness the manager of the bank, and examined him as to various items of the account, and put the entire account in evidence without reservation or qualification, except such as may be inferred from his examination as to particular items; and therefore all other items, unless they appear on the face of the account to be improper, should be allowed. Their answer alleged, and the court found, that plaintiff held, as security for the payment of said drafts, the invoices and bills of lading of the cargo; and if the plaintiff had refused or neglected to obtain possession of the cargo, so that its proceeds were lost to the bank, there can be no question that Roth, Blum & Co. would have been released from liability as sureties, unless upon the clearest showing that the cargo, if received and properly disposed of by the bank, would have been insufficient to reimburse it. It is not shown that the bank could have obtained possession of the cargo, and thus availed itself of that security, without the payment of the freight and other charges above mentioned. It held the invoices and bills of lading, and was the apparent owner, holding the legal title, and prima facie liable for these charges. It is true, the manager of the bank, upon his examination by the defendants, testified that Frese & Co. drew checks payable to John Livingston for freight charges amounting to $11,603.40, and which, when presented, were paid by the bank, and charged in the books to the ordinary account of Frese & Co., but the error was discovered the next morning, and corrected by charging them to the rice account. He further testified, however, that prior to that time Frese & Co. had an account at the bank, but that they did not at the date of the arrival of the cargo, or at any time afterwards, have any moneys to their credit in said bank. The correction of the charge was therefore proper. The first item of the account is a charge of $1,573 for marine insurance upon the cargo, paid by plaintiff upon the arrival of the vessel, September 17, 1892; and this charge, appellant concedes, is improper, and should be deducted from the balance of $7,891.85. It may be further said, without entering into details, that reasonable charges for storage, insurance upon the rice while stored, cartage, brokerage, etc., properly incurred in caring for, preserving, and selling the rice, are properly deducted from the gross receipts. No question is made as to the necessity or propriety of any of these acts, or as to the prices for which the rice was sold, or the manner of sale; but some special objections are made to particular items, which remain to be noticed.

It is contended by defendants that various charges of interest on overdrafts at different dates from September 30, 1892, to June 19, 1893, are improper. Prior to and including September 30, 1892, plaintiff had paid for freight and customs duties $12,306.40, and on October 11th it had paid on the draft drawn under the letter of credit $35,157.74, and on October 14th, balance of draft, $26,735.17; in all, $74,199.31,—a sum exceeding the receipts by over $24,000. It is not questioned that, as between the bank and Frese & Co., the interest charged had not been earned or properly charged; and, if so, we fail to see upon what ground the defendants Roth, Blum & Co. can object. The account shows, however, that nearly if not the whole of the interest so charged was in fact paid by Frese & Co., and these charges of interest are balanced by the credits of money paid by them; and therefore, so far as the charges and credits balance each other, the account as to Roth, Blum & Co. is not affected, even if it be conceded that they are not liable for the interest so charged.

In the account certain entries appear on a given quantity of rice sold at a price stated, amounting to a given sum, "less discount" of a stated amount, the balance being carried out as the amount received from the sale. These items of discount amount to $226.14, and respondents contend that these should be deducted. It is said that these discounts were made for cash, and that the bank should have waited for its pay. It does not appear, however, that the discounts were more than the interest on time sales, or were unusual, or more than equaled the risk of loss if the sales had been made on credit. Respondents' contention upon this point cannot be sustained.

On the debit side of the account is an item, "To Pac. M. S. S. Co., $758.35"; and this entry, it is said, does not indicate what it was for, and should be disallowed. But it was part of the account put in evidence by defendants, and, if it required explanation, they should have called for it.

It is further objected by respondents that in the sums charged on October 11 and 14, 1892,—which were in payment of the drafts, —there was included a commission of 1 per cent., amounting to $618.92, and that they are not chargeable therefor, and that that amount should be deducted. Said sums so charged were the precise amounts of the drafts drawn at Rangoon by Bullock Bros. & Co., under the letter of credit, "for the invoice cost of merchandise," and did not include any commission. The answer of defendants Roth, Blum & Co. alleged that the drafts were so drawn, and were for the sum of $61,892.91 (and the court so found), and said charges above mentioned only equaled the said sum. The contract between the bank and Frese & Co. did provide that a commission of 1 per cent. should be paid the bank upon the amount of drafts drawn under said letter of credit, but it is not included in said items, nor anywhere in the account. If it did, it should be excluded, as defendants are not liable under their contract for profits made by the bank, but only for the liability it incurred.

On the record before us, we find but two items which should be deducted from the balance claimed by the plaintiff. One of these—the item for marine insurance upon the cargo, $1,573—is conceded by appellant. The other is a charge dated "October 6th. To Popper (customhouse drayage to warehouse), $470.75,"—concerning which Mr. Powell testified that it "was paid by the check of W. Frese & Co. on the bank," from which we infer that it was paid with the funds of Frese & Co., and not out of the proceeds of the rice. If it was not paid by Frese & Co., it should stand.

We have not verified the footing of the accounts, but have taken the balance as stated; and deducting the above charges, which, as the evidence now stands, should be disallowed, there would appear to remain due to the plaintiff from respondents $5,938.10. It follows that the finding that "said cargo realized a sum in excess of the aggregate amount of the drafts drawn under said letter of credit" is not justified by the evidence.

But one exception to ruling upon evidence is specified. Mr. Powell was asked the following question: "Did you ever learn from Mr. Blum whether his firm was interested with Frese & Co. in this cargo of rice?" The objection that the question was incompetent and irrelevant was sustained. No offer was made to show that the witness had been so informed, and hence it does not appear that plaintiff was prejudiced, even if it be conceded that the ruling was erroneous.

We are asked by appellant to enter judgment for the plaintiff for such amount as appears to be due it, the facts being before us. But the findings would not support such a judgment, and this court cannot make findings of fact. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

116 Cal. 41

**SUMAN v. ARCHIBALD et al. (No. 19,465.)**

(Supreme Court of California. Feb. 10, 1897.)

APPEAL—SUBSTITUTION OF PARTIES—DISMISSAL—WHO MAY MOVE—FAILURE TO FILE POINTS AND AUTHORITIES.

1. Where judgment is rendered against plaintiff in foreclosure, and one of the defendants, who recovers on a counterclaim, assigns his judgment after appeal, the assignee cannot be substituted as appellee.

2. A corporation which has purchased the interest of one of the appellees in the judgment may join the other appellee in a motion to dismiss the appeal.

3. Appellant's failure to file his points and authorities in time is not excused by the fact that one of the appellees, pending the appeal, was adjudged insolvent, and that no assignee had been appointed.

Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by John V. Suman against Melville Archibald and another to recover on a note, and to foreclose the mortgage security. Judgment for defendants, and plaintiff appeals. Dismissed.

Paris & Allison, for appellant. Curtis, Oster & Curtis, for respondents.

McFARLAND, J. There has been submitted in this case a motion on behalf of the Abstract & Title Company, a corporation, for the substitution of said corporation as defendant and respondent in the place of Melville Archibald; and also a motion by said corporation and the defendant and respondent Fannie Archibald to dismiss the appeal herein, upon the ground of a failure of appellant to file his points and authorities within the time prescribed by the rule of this court.

The motion to substitute said corporation as defendant and respondent must be denied. The action was brought to foreclose a mortgage against the defendants Melville and Fannie Archibald, executed to secure a promissory note given by said defendants to plaintiff for $1,000. The Archibalds (defendants) set up a counterclaim; and, after trial, the court denied any judgment for plaintiff upon the note and mortgage, and rendered judgment in favor of Melville Archibald against the plaintiff for $155.44, with interest and costs, and also rendered judgment for both Melville and Fannie Archibald against plaintiff for their costs. It is quite apparent that if the judgment should be reversed, and the cause sent back for a new trial, the said corporation would not be a proper party defendant, and it would be entirely unjust to substitute said corporation for the said Melville Archibald, against whom alone a judgment could be rendered on the said note and mortgage. Therefore the said corporation should not be substituted as such defendant.

But it appears that the said Melville Archibald sold and assigned all his interest in said judgment to the said corporation; and we think that the motion to dismiss the appeal may be considered as a motion made by the respondent Fannie Archibald, and the said corporation, as the successor in interest of the said Melville Archibald. And as the transcript was filed in March, 1894, and no points and authorities have been filed, the motion to dismiss, under the rule, should be granted. There is an affidavit on file on behalf of the appellant that on the 8th day of December, 1894, the said Melville Archibald filed a petition in insolvency, and was adjudged insolvent, and that no assignee in insolvency has been appointed; but this fact did not excuse the appellant for not filing his points and authorities in time. Stewart v. Spaulding, 72 Cal. 264, 13 Pac. 661; Merritt v. Glidden, 39 Cal. 564; O'Neil v. Dougherty, 46 Cal. 576; Hestres v. Brennan, 37 Cal. 388. The motion for substitution is denied; and the motion to dismiss the appeal is granted, and the appeal is dismissed.

We concur: HENSHAW, J.; TEMPLE, J.

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(116 Cal. 62)

## TURNER v. KEARNEY. (S. F. 188.)

(Supreme Court of California. Feb. 12, 1897.)

Contracts—Harvesting of Grain—Use of More than One Machine—Construction.

Plaintiff contracted to harvest all of defendant's grain during the "current season," of 1893, in a thorough and farmer-like manner, "without waste or unnecessary loss"; to begin harvesting as soon as any of the grain was ripe, and work continuously until the harvest was completed; and to "use one or more eighteen-foot combined harvesters." It was admitted that in that locality weeds began to grow up among the grain at harvest time, and that high winds, which shell out the overripe grain, were then frequent. *Held*, that plaintiff was bound to use more than one harvester, should the condition of the grain make this necessary for its proper preservation. McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by R. M. Turner against M. Theodore Kearney. From a judgment in favor of plaintiff, defendant appeals. Modified.

Chickering, Thomas & Gregory and Gerstle & Sloss, for appellant. Freeman & Bates, for respondent.

TEMPLE, J. This is an action to recover balance due on a contract for harvesting grain for the defendant. Judgment was for plaintiff, and defendant contends that there should be a deduction of $800 from the judgment, on the ground that plaintiff did not harvest the grain in a good and farmer-like manner, as he had contracted to do, and the evidence and a stipulation made to serve in lieu of evidence show that there resulted an unnecessary loss to that amount. It was stipulated in the contract that plaintiff "will harvest, thresh, and sack all of the grain now growing on the Fruit Vale estate, in Fresno county, and belonging to the said Kearney, during the current season of 1893; that he will harvest all of said grain in a thorough and farmer-like manner, without waste or unnecessary loss; that he will begin such harvesting as soon as any of said grain is thoroughly ripe and fit for harvest, and will thereafter work continuously until the entire harvest is completed; that, for the purpose of performing said work, he will use one or more eighteen-foot combined harvesters, which shall be, and be maintained, in thoroughly good working condition." A great deal of testimony was taken at the trial on both sides upon the question as to whether the grain ought not to have been sooner harvested, and whether, in consequence of delay, there was not unnecessary loss resulting from the grain being shelled out by the wind or the growth of weeds, which prevented an efficient harvesting thereof. Many of the facts were then agreed upon by a stipulation made at the trial, as follows: "It is hereby stipulated and admitted by the parties hereto, for the purposes of the present action: That the plaintiff entered upon the performance of the contract referred to in his complaint and annexed to defendant's answer, to wit, on or about the 12th day of June, 1893, and as soon as defendant's grain was ripe and fit for harvesting; and that the plaintiff harvested the grain on defendant's land in a thorough and farmer-like manner, without waste or unnecessary loss (except such loss as may have resulted from the delay hereinafter specified); and that the plaintiff worked continuously with an eighteen-foot harvester and its appliances and crew until the work was completed, to wit, August 29, 1893; and that on August 12, 1893, he brought another harvester to work, and both harvesters and their crews and appliances were thereafter continuously engaged in the work until it was completed, and both harvesters were maintained in a thoroughly good and working condition. That, after grain is fully ripe and fit for harvesting in the neighborhood in which defendant's grain was, it is liable to be shelled out by wind and other causes, and thereby lost. The defendant's ground was subirrigated, on which there was a tendency for weeds to grow in and among the grain; and, the longer they were permitted to grow, the greater was the probable loss in harvesting, by reason of such weeds growing as high or higher than the grain, and interfering with the threshing and cleaning of the grain while passing through the harvester. That, by reason of all the grain not being harvested within forty days after it was fit for harvesting, there was a loss through its shelling out and by reason of such weeds interfering with the harvesting and cleaning of the grain, and such loss, the parties agree, amounted to eight hundred dollars, and no more; and if, as a matter of law, under said contract, it was the duty of the plaintiff to have provided sufficient means to have threshed all the defendant's grain without waste or unnecessary loss, then it is agreed that the damages resulting from his not furnishing other machines and appliances than those hereinbefore indicated amounted to eight hundred dollars, and no more; and if, on the other hand, it is found, as a matter of law, that it was not the duty of the plaintiff to avoid waste or unnecessary loss, then that the defendant is not to be allowed any damages in this action."

The contract itself must be construed in view of the surrounding facts as shown in the stipulation. It is there expressly admitted that there were special reasons why the grain should be harvested as soon as possible after it was ripe, and that the grain was not harvested within 40 days after it was fit to be harvested, and that not to so harvest it entailed waste and unnecessary loss to the extent of $800; and it is further stipulated that, if it was the duty of the plaintiff under the contract to harvest the grain so as to avoid waste and unnecessary loss, then defendant is entitled to the said amount as damages, otherwise not. The stipulation cannot, of course, be construed to mean by the phrase "unnecessary loss" any loss which it would be possible to avoid by the greatest possible care and diligence, and by the best possible appliances. Such interpretation would make the stipulation a farce or a trick. One party was contending that the agreement to harvest the grain in a good and farmer-like manner required that it should be harvested in time to avoid unnecessary loss,—that is, such loss as would not be suffered if it had been so harvested in proper time; and the stipulation must be held to mean also that the loss was $800 more than would have occurred if the grain had been so harvested.

I think we may start out with the proposition that no one would be likely to contract for the harvesting of his grain in a manner which would entail unnecessary loss in that sense, and much less would he in such a contract provide that the harvest may be so gathered as to cause such loss. Plaintiff contends that two conditions in the contract do have that effect, and, in substance, he contends that they were put in the contract for the express purpose of saving plaintiff from liability for such loss, provided he commenced the harvest in due time with one harvester, and continued the work without cessation until it was finished, and, while at work, did good work. In other words, the contract provides the test of due diligence, and that, if at least one harvester is used, it shall be deemed enough. The two stipulations in the contract referred to are that plaintiff will harvest all the grain now growing during the current season of 1893, and that he will use one or more harvesters, and keep it or them in good working condition. It is difficult to give any meaning to the phrase "current season" which shall indicate a time within which the work must be done. If it means the time within which that grain should be harvested, it is favorable to defendant. If it alludes to the time of harvest generally, it is very indefinite. We all know that grain ripens at different times on different kinds of soil and in different localities. No practical meaning can be given to it other than the harvesting season for that crop. The necessity for a quick harvest must depend greatly upon the season. The contract covered 2,300 acres of growing grain. In that locality high winds are frequent at that time of the year, and it seems that early harvests are essential to good harvests in a farmer-like manner, not only because of prevailing winds which cause overripe grain to shell, but also because at that time weeds begin to grow, which interfere with harvesting and entail loss. These facts were known to the parties when the contract was made. Now, the parties could not know that the season would not be such that grain would be almost wholly lost unless unusual exertions were made for a quick harvest. On the other hand, they did not know but it would ripen slowly, so that one harvester would suffice. I think it part of the common knowledge that combined harvesters are comparatively a recent improvement. By this stipulation the parties agreed that it should be harvested with a combined harvester, and that one or more should be used as the condition of the grain should indicate, and as would be necessary, that it might be done in a good and farmer-like manner, and without waste and unnecessary loss. If there is any doubt as to the purpose of the clause in regard to the use of one or more harvesters, it must, if possible, be construed so as to effectuate the general intent manifest in the contract. The construction given by the respondent seems unreasonable, and makes the contract such as no one in his senses could have deliberately made. See, on this subject, section 1650, Civ. Code. The case is remanded, with directions to modify the judgment by deducting $800, with interest on that sum from August 29, 1893.

We concur: HARRISON, J.; HENSHAW, J.; VAN FLEET, J.

McFARLAND, J. I dissent. It will be observed that appellant's real contention is that respondent should have finished harvesting within 40 days after the first grain was ripe; that for this purpose he should have used more than one harvester; and that because he did not use more than one harvester, and did not complete the harvesting within the 40 days, therefore he failed to "harvest all said grain in a thorough and farmer-like manner, without waste or unnecessary loss." But respondent did not contract to harvest the grain at any particular time, except that it should be done "during the current season of 1893," and it is clear that it was done within that season. He did not contract that he would use more than one 18-foot combined harvester. He began to harvest, as soon as the grain was ripe and fit for harvest, with an 18-foot combined harvester, and thereafter worked "continuously until the entire harvest was completed." While he was so engaged, he did the work "in a thorough and farmer-like manner, without waste or unnecessary loss." He therefore complied with his contract. No doubt, it would have been to appellant's advantage if respondent had put on two or three or a dozen 18-foot combined harvesters, and had completed the work of harvesting within a week or two. But he did not contract so to do, and appellant did not require or ask any such a covenant. There is no provision in the contract that respondent should finish the work at any particular time other than during the current season; and the only other provision as to "delay" is that respondent should commence as soon as the wheat should be fit to cut, and should continuously prosecute the work until the harvesting was finished. This he did. Therefore, in my opinion, the court below properly construed the contract, and the judgment and order should be affirmed.

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5 Cal. Unrep. 601

## SYKES v. ARNE. (L. A. 123.)

(Supreme Court of California. Feb. 12, 1897.)

CHATTEL MORTGAGES.

When a mortgagor in default as to an installment tenders the amount due before the mortgagee elects to treat as due the entire debt, as the mortgage authorizes him to do on default, the right of election is lost.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Flora Sykes against W. H. Arne. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

B. F. Thomas, for appellant. A. E. Putnam, for respondent.

VAN FLEET, J. We regard this action as without any foundation in merit in its inception, and as manifestly vexatious and oppressive; and the appeal which is here prosecuted as frivolous. The action was to foreclose a chattel mortgage given to secure eight several promissory notes, amounting in the aggregate to $675, made by defendant to plaintiff, falling due at different dates; and was prosecuted upon the theory that by defendant's default in the payment of the note first due plaintiff was entitled to treat defendant as in default on all, and recover the entire debt, under a clause of the mortgage which provided: "That if the mortgagor shall fail to make any payment as in the said promissory notes provided, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell in the manner provided by law, and from the proceeds pay the whole amount in said notes specified." The first note, which was for $100, fell due January 1, 1895, but allowed 10 days' grace. At the maturity of this note plaintiff placed it in the hands of an agent for collection, who, on the 10th of January, presented it for payment at defendant's office in Santa Barbara. Defendant at this time paid $80 on the note, and asked for time to collect in some outstanding accounts before paying the balance. This request was granted. The agent called again on January 12th, when defendant paid the interest accrued on the note to that date, but asked further time to pay the balance of $20 due on the principal. Mr. Harsh, the agent, having to return to Los Angeles the following day, told defendant he would leave the note in the hands of Mr. McNulta, a local attorney, and desired defendant to pay the balance by the following Monday. Defendant did not pay the balance on that date, and on January 21st was notified by Mr. McNulta that he must pay the balance on the next day, January 22d. On the latter date defendant went to the office of Mr. McNulta, and handed him the balance due on the note, which the latter received, and was about to receipt for, but, on the objection of one Elliott, who claimed to represent plaintiff, Mr. McNulta refused to receive the money, and, although earnestly solicited by defendant to accept the payment, returned the money to defendant. Thereafter, on January 25th, plaintiff notified defendant of plaintiff's election to declare all of said notes due, and demanded their payment. This was refused by defendant, and on January 31st this action was commenced. Defendant set up these facts in his answer, and therein again tendered, and deposited in court, the balance due on the note for principal and interest, amounting to $21. The court found substantially in accord with the averments of the answer, and gave judgment for plaintiff for $21 without costs.

Plaintiff claims that the evidence does not sustain the findings; that the evidence shows that the agent had no authority to extend time to defendant in which to pay the note; that McNulta's authority to receive payment for plaintiff had been revoked before the tender was made to him on January 22d; that defendant was, therefore, in default, and plaintiff had a right to declare the entire debt due, and proceed to foreclose. None of these contentions find support in the record. The evidence shows that the action of the agent was fully within his authority, and that the tender to McNulta was at a time when he was still authorized to act for plaintiff. The clause in the mortgage gave plaintiff the election, upon defendant's default, to proceed at once for the whole debt, but plaintiff did not see fit so to do. The first default was waived by the failure of plaintiff to take advantage of the right to so proceed, and, before plaintiff elected to proceed, defendant had made a tender of all that was actually due; and plaintiff's right to sue for the unmatured notes was thereby lost. "When the entire debt may be treated as due upon any default in payment of interest or other installment, at the election of the mortgagee or trustee, the whole debt is nevertheless not due until the election has been exercised." 8 Am. & Eng. Enc. Law, 192, 193, and cases there cited. There were no errors in the rulings on evidence. The whole case would seem to indicate a disposition on the part of the plaintiff to vex and annoy defendant, as the evidence clearly shows that defendant was ready and anxiously desirous of meeting his obligation before the bringing of the action. We think that such litigation should be discouraged. The judgment and order are affirmed, with $100 damages to defendant.

We concur: HARRISON, J.; GAROUTTE, J.

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116 Cal. 47

## STORKE v. STORKE. (L. A. 206.)

(Supreme Court of California. Feb. 12, 1897.)

DIVORCE—SETTING ASIDE DECREE.

1. Where a husband has been granted a decree of divorce, and thereafter is ordered to pay a certain sum to defray costs of transcript on application of his wife for a new trial, and is unable to do so, the court cannot, under Civ. Code, § 140, authorizing it to enforce such an order by any remedy applicable to the case, set aside the decree.

2. Under the express provisions of Code Civ. Proc. § 473, the authority of a court to vacate a judgment on motion is limited to six months.

Department 1. Appeal from superior court, Santa Barbara county; John L. Campbell, Judge.

Action by C. A. Storke against Yda A. Storke for a divorce, in which there was a decree for plaintiff. From an order setting aside the decree, plaintiff appeals. Reversed.

B. F. Thomas and A. A. Oglesby, for appellant. Grant Jackson, Thos. McNulta, and S. E. Crow, for respondent.

HARRISON, J. The superior court rendered a judgment herein, which was entered January 18, 1895, by which it was decreed "that the marriage between the said plaintiff and the said defendant be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony, and all obligations thereof; and it is further ordered, adjudged, and decreed that the plaintiff pay to the defendant the sum of two hundred and fifty dollars alimony, and two hundred and fifty dollars counsel fees." February 12, 1895, the court, upon the application of the defendant, setting forth that she desired to move for a new trial, and to appeal from the order denying the same, if it should be denied by the court, and that it was necessary to have the testimony written out, and that she had no means to pay for the same, ordered that the plaintiff pay to the defendant on or before the 18th day of February, 1895, the sum of $350, to defray the cost of transcribing said testimony. The defendant gave notice of her intention to move for a new trial February 12th, and on March 28th, within the time allowed therefor by the court, presented and served upon the plaintiff her proposed statement on motion for a new trial. Amendments thereto were proposed by the plaintiff, and the judge before whom the cause was tried designated May 8th as the day on which he would settle the statement. On that day the matter came on for settlement, and the judge continued the same until July 8th, reciting in his order of continuance the previous order requiring the plaintiff to deposit with the clerk $350, and that, "through his inability to comply with said order," the plaintiff had not deposited the same. No further proceedings appear to have been taken towards a settlement of the statement, and on November 6th the defendant presented her petition to the superior court, setting forth the foregoing facts, and stating that she has been advised by her counsel that she has substantial grounds upon which to make a motion for a new trial, but that she has not the means to defray the expense thereof, or to procure a transcription of the reporter's notes, and "that plaintiff is now, and at all times since the 18th day of February, 1895, has been, unable to pay her the money necessary to procure the said testimony," and asked that said judgment be vacated and set aside. Notice of this application was given to the plaintiff, and, after hearing the parties thereon, the court made an order that "the said decree and judgment in favor of plaintiff, C. A. Storke, and against defendant, Yda Addis Storke, filed and entered January 18, 1895, decreeing a divorce between said plaintiff and defendant, be, and each of them are, hereby vacated and set aside." From this order the present appeal has been taken. The court, also, at the time of making its order, made certain findings of fact as the basis thereof, in which it found "that the statement on motion for a new trial prepared by defendant's attorney, and presented and served as in the preceding finding mentioned and found, represented as correctly as possible the proceedings had on the trial of said cause," but that the judge was unable to settle the said statement without having the testimony written out, and also "that the plaintiff is now, and at all times since the 18th day of February, 1895, has been, unable to pay defendant the money necessary to procure the said testimony."

The authority of the court to direct the plaintiff to pay to the defendant such money as it might deem necessary to enable her to prosecute her motion for a new trial or for an appeal is well settled. Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732. And it may enforce its order by any remedy "applicable to the case." Civ. Code, § 140. After the court had rendered judgment in favor of the plaintiff upon the issues presented in the case, and such judgment had been entered in the records of the court, it could not be vacated or set aside except by such proceedings as would authorize a court to vacate or set aside a judgment in any other action. The plaintiff had thereby acquired a right of which he could be divested only in the mode provided by law. When the court had found that, by reason of acts of cruelty on the part of the defendant, the plaintiff was entitled to a judgment of divorce from her, and had caused such judgment to be entered in its records, it had no jurisdiction to vacate or set aside that judgment, unless it should determine that it had been rendered through some error, either of law or fact, or by reason of some inadvertence or excusable neglect. It could not disturb or change the rights of the parties, as thus determined, by reason of any facts or transaction occurring subsequent to the rendition of the judgment. And, while it had authority to direct the plaintiff to pay further alimony pending a motion for a new trial, an order vacating the judgment would not be a remedy "applicable" for the enforcement of such order, for the reason that the rights of the parties as fixed by the judgment could be changed only in the mode prescribed by the statute. The authority of the court to vacate a judgment on mere motion is limited by section 473, Code Civ. Proc., to six months after its entry (Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344), whereas in the present case more than nine months had elapsed before the present motion was made. When the court found that the statement which had been prepared by defendant's counsel represented "as correctly as possible the proceedings had on the trial of said cause," its proper course was to settle the same accordingly. The motion for a new trial could then have been heard, and, if the court should have been of the opinion that its former judgment was incorrect, it could have acted accordingly. The order is reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

116 Cal. 43

## UNITED STATES v. CROOKS et al. (No. 9,613.)

(Supreme Court of California. Feb. 10, 1897.)

NEW TRIAL—NOTICE OF MOTION—APPEAL—NOTICE —TIME OF TAKING.

1. Under Code Civ. Proc. § 659, requiring notice of motion for new trial to be served on the "adverse party," a defendant whose land, together with that of his co-defendants, is condemned, must serve the latter with notice of such motion.

2. Where a defendant whose land, together with that of his co-defendants, is condemned, appeals, the latter are "adverse parties," on whom notice of appeal must be served.

3. An appeal taken more than one year after the entry of the judgment will be dismissed.

In bank. Appeal from superior court, Alameda county; N. Hamilton, Judge.

Action by the United States against M. Crooks, A. A. Cohen, and others to condemn land for a canal. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant Cohen appeals. Appeal from judgment dismissed, and order affirmed.

Garber, Thornton & Bishop, for appellant. Samuel G. Hilborn, Walter Van Dyke, Wm. Craig, and H. S. Foote, U. S. Dist. Atty., for respondent.

HARRISON, J. The United States brought the present action against the appellant and many other defendants for the condemnation of a strip of land lying between the San Leandro and San Antonio Estuaries, for the purpose of constructing a tidal canal by which to turn the water from San Leandro Bay or Estuary into the head of San Antonio Estuary. The complaint contains a description of the strip of land sought to be condemned, and also separate descriptions of the portions thereof belonging to each of the defendants, of which three are alleged to be claimed by the appellant. The superior court rendered a judgment in favor of the plaintiff for the condemnation of the entire strip, and awarding damages to each of the defendants for the value of their respective parcels of land so condemned. The appellant moved for a new trial, and the same was heard upon a statement of the case, and denied. From this order, and also from the judgment, he has appealed.

The appeal from the judgment was taken

more than one year after its entry, and must therefore be dismissed.

The appellant's notice of intention to move for a new trial was served upon the plaintiff alone, and his notice of appeal from the order denying a new trial was also served upon the plaintiff alone, and was not served upon any of his co-defendants. In Herriman v. Menzies (Cal.) 44 Pac. 660, it was held that a failure to serve the adverse party with the notice of intention to move for a new trial is attended with the same results before the superior court as attend the failure to serve the adverse party with a notice of appeal when the matter is brought before the supreme court. It was said in that case: "Section 659, Code Civ. Proc., requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz. every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it." The "adverse party" is every party to the action, whether plaintiff or defendant, whose interests may be injuriously affected by a reversal or modification of the judgment or order appealed from.

By the judgment in the present case the lands of each of the several defendants, as well as those of the appellant, were condemned for the use of a tidal canal between the two estuaries, and this judgment has become final as to all the lands condemned, and also as to the amount of damages which each defendant is entitled to receive, except as to the appellant. The effect of a reversal of the order appealed from would be to set aside the judgment against the appellant, but would leave it in force as between the plaintiff and the other defendants. This would result in rendering futile the condemnation of the lands of the other defendants, since, unless the lands of the appellant are also condemned, the public use for which the judgment of condemnation was rendered, —the construction of the tidal canal,—and the defendants' right of passage through the same, could not be made available. The judgment for the condemnation of the strip of land described in the complaint was an entirety, and each defendant is interested in maintaining it as an entirety. A reversal as to a part would impair the rights therein which the other defendants have acquired, since, unless all the lands within this strip can be made available for a tidal canal, the plaintiff would have no right to divest any of the owners of their lands, or the defendants to receive damages therefor. Each of these defendants is therefore an adverse party, who should have been served with the notice of intention to move for a new trial. As they were not before the court at the hearing of this motion, the court had no jurisdiction to grant a new trial, and the motion therefor was properly denied. In Butte Co. v. Boydstun, 68 Cal. 189, 8 Pac. 835, a judgment was given for the condemnation for a public highway of a strip of land belonging to several defendants. Boydstun appealed therefrom, but did not serve his notice of appeal upon his co-defendants. This was held to be fatal to his appeal, since, by a reversal of the judgment, his co-defendants might be injuriously affected, and they were therefore to be considered as adverse parties. The appeal from the judgment is dismissed. The order denying a new trial is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 598

## DE WITT v. SUPERIOR COURT OF FRESNO COUNTY. (S. F. 556.)

(Supreme Court of California. Feb. 10, 1897.)

CONTEMPT OF COURT—WHAT CONSTITUTES.

An attorney for defendant, in an action in which judgment is rendered that defendant restore possession of premises, who thereupon notifies the sheriff that he is the owner, and in exclusive possession, of the premises, and that defendant is not in possession, and that he will, by all lawful ways, resist any attempt to take possession from him, is not thereby guilty of contempt, though his notice deters the sheriff from serving the writ.

Department 1. Certiorari by H. G. De Witt to review judgment of the superior court of Fresno county. Judgment annulled.

L. L. Cory, for petitioner. Geo. B. Graham, for respondent.

BEATTY, C. J. This is certiorari to review the judgment of the superior court of Fresno county adjudging the petitioner guilty of contempt of court. The affidavit upon which the petitioner was cited was as follows: "[Title, Court, and Cause.] State of California, County of Fresno—ss.: [Affidavit of Graham.] Geo. B. Graham, being duly sworn, deposes and says: That he is now, and at all times since the commencement of the above-entitled action has been, the attorney of the plaintiffs in said action. Affiant now gives this honorable court knowledge and information that said defendant, H. G. De Witt, has committed and is guilty of contempt of this court in the unlawful interference with the process of this court in defying the judgment, process, and officer of this court, and by attempted intimidation of such officer, committed as follows, to wit: On the 18th day of April, 1896, said court rendered its decision in said action, and on the 21st day of April, 1896, in writing, made, signed, and filed its findings and judgment in said action. That, among other things, said court in said action found as follows: 'That on the 23d day of November, 1895, the plaintiff, Sarah I. Foulke (H. A. Foulke, her husband, joining her therein), made a lease, and leased, demised, and let to Stephen Arthur, the said defendant, the premises situate, lying, and being in the county of Fresno, state of California, described as follows, to wit: Lots 15 and 16 in block 21 in the town of Clovis, as the same appears on the map or plat of said town now on file and of record in the office of the county recorder of the said county of Fresno, for the term of one year from the first day of December, 1895, for the total rent or sum of six hundred dollars, payable fifty dollars in advance on the first day of each and every month during said term. That said defendant, Arthur, was let into and took possession of said premises under said lease, and still continues to hold and occupy the same, as tenant thereof, by virtue of said lease.' Also the further finding, to wit: 'That said defendant, Arthur, holds over and continues in possession of said premises after default in the payment of rent, as aforesaid, without plaintiff's permission, and against her will and consent, and after three days' notice in writing to surrender possession of the same.' That thereupon said court ordered and adjudged that the said defendant, Stephen Arthur, restore to plaintiff, Sarah I. Foulke, the possession of said premises within five days from the date thereof, and that a writ of restitution be, and the same was, awarded. That after the rendition of said judgment, and after the making and filing of said findings and judgment, on, to wit, April 22, 1896, said H. G. De Witt served on Jay Scott, sheriff of the said county, whose duty it was to execute any and all writs in said action, a certain written document signed by him, the same being in the words and figures as follows, to wit: 'To Jay Scott, Sheriff of Fresno County: You will please take notice that I, the undersigned, am the owner of, and in the sole and exclusive possession of, all that certain real property, with the improvements thereon, situated in the town of Clovis, in the said county of Fresno, particularly described as follows: Lots 15 and 16 in block 21 in the town of Clovis, according to the map of said town of Clovis on file and of record in the office of the county recorder of said county of Fresno. That Stephen Arthur is not, nor has he been for some time past, in any manner in the occupancy or possession of said property, or any part thereof, and that in the event, in any manner, you attempt to take possession of said property, or any portion thereof, under or in pursuance of any writ in any judgment rendered in the superior court of the county of Fresno, state of California, in an action therein pending by S. I. Foulke and H. A. Foulke against the said Stephen Arthur, that I will resist any such attempt to take possession thereof, and will treat you as a trespasser, and will hold you responsible on your bond for any invasion of my rights, if you attempt to take possession of said property, or any portion thereof, under or in pursuance of such writ, or otherwise. And that I will resist by all lawful ways and means, and by all reasonable force, any attempt on your part to take the possession of said property from me, or any attempt on your part to place the said H. A. Foulke and Sarah I. Foulke, or either of them, in possession of said property, or any part thereof. Dated April 21, 1896. Yours, etc., H. G. De Witt. Due service by a copy of the foregoing notice is hereby admitted this 22nd day of April, 1896. Jay Scott, Sheriff, by L. A. Spencer, Under Sheriff.' That by reason of the false statements and threats contained in said notice, said Jay Scott, sheriff, as aforesaid, has been obstructed, deterred, and intimidated in the execution of said writ of restitution issued upon said judgment in said action by the clerk of said court under his hand and the seal of said court on April 28, 1896, and delivered on the same day to said sheriff to execute, and by reason of said threats said sheriff has not and will not execute the same. Wherefore, affiant prays this honorable court to take cognizance thereof, to the end that said H. G. De Witt may be justly dealt with and adequately punished for said contempt. [Signed] Geo. B. Graham. [Properly subscribed and sworn to.]"

Every court in matters of contempt is a court of special and limited jurisdiction. It has power only to punish those acts which are contempts of its authority, and the question whether the facts alleged amount to a contempt is always jurisdictional.

The facts alleged in the affidavit above quoted do not constitute a contempt of court, and the judgment founded upon it is necessarily void. Said judgment is hereby annulled.

We concur: HARRISON, J.; VAN FLEET, J.

(116 Cal. 71)

## GRANT v. LOS ANGELES & P. RY. CO. et al. (L. A. 194.)

(Supreme Court of California. Feb. 13, 1897.)

APPEALABLE ORDERS—RECEIVERS—ESTOPPEL.

1. An order substituting parties is not appealable under Code Civ. Proc. §§ 939, 963.

2. An order fixing the compensation of a receiver, and taxing it as costs as against all

parties, and directing the receiver to appropriate in payment a fund in his hands as receiver, is appealable, "as a final judgment upon a collateral matter arising out of the action." Grant v. Superior Court, 39 Pac. 604, 106 Cal. 324, followed.

3. A receiver having been appointed by consent of plaintiff creditor and defendant debtor, other creditors intervened, and obtained the appointment of a different receiver. *Held*, that one who subsequently purchased plaintiff's interest in the action, and was substituted as plaintiff, was not estopped to deny the validity of the latter appointment.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the California Bank against the Los Angeles & Pacific Railway Company. From an order fixing the compensation of a receiver, and an order refusing to vacate an order substituting L. A. Grant as plaintiff, said Grant appeals. Dismissed as to the order of substitution, and reversed as to the order fixing compensation.

White & Monroe and John S. Chapman, for appellant. A. W. Hutton and Anderson & Anderson, for respondents.

VAN FLEET, J. The record embraces appeals from two orders of the superior court, —the first, an order fixing the compensation of one Silver as receiver in the action; and the other, an order denying an application of the appellant, Grant, to vacate a former order substituting him as plaintiff in the action in place of the California Bank, the original party plaintiff. Respondents object that the orders are not appealable, and that both appeals should be dismissed, and ask that such disposition be made. As to the order of substitution, this objection is well taken. The statute gives no appeal from such an order, and it is subject to review only on appeal from a final judgment. Code Civ. Proc. §§ 939, 956, 963; Welsh v. Allen, 54 Cal. 211. As to the order fixing the receiver's compensation, while not nominally one from which the statute authorizes a direct appeal, and while it sufficiently appears that it is not a special order made after final judgment, it is, nevertheless, an adjudication from which an appeal will lie. The order not only fixes the compensation of the receiver, but taxes such compensation as costs in the action, as against all the parties, and directs and authorizes the receiver to apply towards its payment the balance of a fund remaining in his hands as such receiver. Such an order, however it may be designated, is, in legal effect, "a final judgment upon a collateral matter arising out of the action," and is "appealable by any party interested in the fund." Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, and cases there cited. The appellant has such an interest.

Appellant contends that the order appointing the receiver in the action was absolutely void upon its face, for want of jurisdiction in the court to make it; and that the order fixing the compensation of the receiver, being founded thereon, is equally void. That the order appointing the receiver was void is not denied by defendant, and has been so held by this court in two cases in which that particular order was under review (Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; Smith v. Railroad Co. [Cal.] 34 Pac. 242), where it was held that the action was not one in which a receiver could be competently appointed. Respondents contend, however, that, notwithstanding the absolute nullity of the order appointing the receiver, the appellant is not at liberty to urge that objection, nor to plead the invalidity of the present order; that the receiver was appointed at the request of the California Bank, the original plaintiff in the action, thereby estopping said bank from questioning the regularity of said appointment; and that appellant, having been substituted for said bank as plaintiff, is likewise estopped. But, assuming that the bank would be estopped (which is not to be here determined), we do not think that appellant can be held to rest under any such incapacity. The record discloses that on the commencement of the action, on the application of the then plaintiff, the California Bank, and by the consent of the defendant, the Los Angeles & Pacific Railway Company, one Spillman was appointed receiver. A few days subsequently, certain other creditors of said defendant intervened in the action, and at once interposed objections to the continuance of Spillman as receiver; that thereupon the latter resigned, and the present receiver was appointed at the request of said interveners. Appellant was not then a party to the action, and did not become such until some considerable time thereafter. He had nothing to do with such appointment, and has not, so far as appears, ever done anything looking to an affirmation or ratification of the action of the court in appointing said receiver, other than the mere fact of taking an assignment of the notes sued on by the bank, and thus making himself a party to the action. This of itself is not sufficient to estop or preclude him from making the objection now urged. Smith v. Railroad Co., supra. In that case it appeared that Smith had made himself a party to the present action in the court below, by intervening as a judgment creditor of the defendant, the Los Angeles & Pacific Railway Company, and asking that his claim be allowed and paid, with those of other creditors, from the sale of certain of defendant's property. Subsequently, he moved the superior court to be allowed to issue execution on his judgment against the property in the hands of the receiver, on the ground that the appointment of the receiver was void and of no effect. The application was denied, and Smith appealed. It was objected that making himself a party to the action was a ratification of the appointment of the receiver therein, and estopped him from attacking the order. It was held that his acts did not have such effect, and that he was not thereby estopped. "It is doubtless true," say the court, "that one may so conduct himself as to be estopped from repudiating the action of a receiver, although the order by which the receiver was appointed is void. But in this case mutuality, which is one of the essential elements of estoppel, is wanting. The plaintiff herein could not, by simply intervening in the other case, receive any benefit; and no one, certainly, was prejudiced by his action therein. The receiver was not appointed upon his suggestion. If there be any act tending to validate the order appointing the receiver, such act is the act of the court, and not of this plaintiff; but, as we shall see, the order was void." The same want of mutuality exists here. The appellant did not procure the appointment of the receiver, nor has he reaped any benefit therefrom; while it would seem from the record that his attitude towards said order has been one of hostility from the first.

In purchasing the interest of the bank in the litigation, appellant did not assume the liability of the bank to the receiver, if any such rested upon it, nor can he be presumed to have so intended. The order appointing the receiver being void, the presumption would be that appellant took the assignment of the notes with knowledge and in view of that fact. Indeed, that order had, by the judgment of this court, been declared void more than three months prior to the date when appellant was substituted as a party to the action. That order being void, the present order must, of necessity, be held, as to appellant, likewise void.

It is urged by respondent that the receiver should be paid for his services by some one; but, if so, that obligation should rest upon those who sought and procured his appointment. The appeal from the order of substitution is dismissed. The order fixing the compensation of the receiver is reversed.

We concur: HARRISON, J.; McFARLAND, J.

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(120 Cal. 156)

## PIERCE v. SOUTHERN PAC. CO. (L. A. 184.)[1]

(Supreme Court of California. Feb. 17, 1897.)

LIMITATIONS—CARRIERS OF GOODS—NEGLIGENCE—DAMAGES—CONTRACTS—VALIDITY.

1. The burden on a foreign corporation urging the statute of limitations to show the bar (Code Civ. Proc. § 458) is not sustained without proof that it has designated one on whom process against it may be served (St. 1871–72, p. 826), on its doing which the right to avail itself of the statute is made to depend.

2. When from point of shipment to destination there are two customary routes, one through a cold country and one through a warm one, and the latter route becomes obstructed, the carrier is negligent in sending over the cold route, without notice to shipper or consignee, goods which it is bound to know are destructible by frost.

3. A stipulation in a bill of lading releasing the carrier from liability for its negligence is void as against public policy.

4. A stipulation freely entered into, in consideration of a lower freightage, fixing the measure of damages in case of loss at a certain sum, is valid, though loss be caused by the carrier's negligence. Hart v. Railroad Co., 5 Sup. Ct. 151, 112 U. S. 331, approved.

5. Where trees cultivated by the shipper were delivered to the carrier on the agreement that the "actual invoice cost" should be the measure of damages in case of loss, "invoice cost" meant "value."

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by R. W. Pierce against the Southern Pacific Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

A. B. Hotchkiss, for appellant. Chapman & Hendricks and Curtis, Oster & Curtis, for respondent.

SEARLS, C. Appeal by defendant, the Southern Pacific Company, a corporation, from a judgment in favor of plaintiff for $8,965, interest and costs, and from an order denying its motion for a new trial. In February, 1891, the plaintiff, R. W. Pierce, shipped from Apopka, county of Orange, Fla., by the Florida Midland Railway, two car loads of orange trees, consigned to Gulick Bros., Riverside, Cal. The first car load of trees was shipped February 19, 1891, and was received at New Orleans by the Southern Pacific Company February 25, 1891. The other car load was shipped February 24, 1891, and was received by the Southern Pacific Company at New Orleans, March 1, 1891. Each car load was shipped under a bill of lading signed by plaintiff, R. W. Pierce, and by the agent of the Florida Midland Railway. A copy of the bills of lading was given to plaintiff. They were upon printed forms, with blanks, filled in with the names of the consignors, etc., in substance as follows: "Marked and consigned to Gulick Bros., Riverside, California, one car load of orange trees, via Southern Pacific, 20,000 weight, car initialed, N. & L. No. ——," etc. In the printed form it was provided that "the articles and packages" (contents unknown) were in "their nature perishable, fragile, or otherwise susceptible to damage," were shipped at a rate "lower than the regular tariff charges of said railway company and connections," and it was agreed that the shippers should "insure said Florida Midland Railway Company and all lines over which said shipment may pass, between points of shipment and destination, against claims by loss or damage incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents or servants (gross negligence excepted), incident to the shipment, and 'that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable,' and that 'claims for loss, damage, or overcharge arising out of this shipment shall be presented to agents of delivery lines within one week after arrival of the property at its destination.'" The rate of freightage on the trees was $1.97¾ per 100 pounds. The Southern Pacific had a direct through line of railroad, owned or operated by it, and by others in connection with it, from New Orleans, across Texas, New Mexico, and Arizona, via El Paso and Yuma, to Colton, Cal. When the freight reached New Orleans this line was broken by severe storms and washouts in Arizona, and was not likely to be available for the transportation of freight for some time. Under these circumstances, by order of its general agent, the trees in question were sent north through Texas to Denver, Colo., thence to Ogden, Utah, thence over its Central Pacific road, etc., to Colton, Cal., where the cars were delivered to the Southern California Railway, and by it hauled to Riverside, a distance of some six or eight miles, arriving at the latter point March 12 and March 16, respectively, 1891. While in transit by the northern route, the trees were entirely destroyed by freezing.

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[1] Rehearing granted.

Plaintiff avers in his complaint, among other things, in substance: (1) That there was no invoice of the cost of the trees; that they had been grown by him in Florida, and were shipped to California for sale. (2) That they were delivered to defendant at New Orleans, to be shipped to Riverside by its direct and usual route. (3) That the defendant violated the contract by shipping through a northern climate, where, at that season of the year, intensely cold weather was common, and hence that defendant was guilty of gross negligence, etc., whereby the trees were frozen and destroyed. These allegations are substantially denied by the answer. Defendant also set up the provisions of subdivision 1 of section 339 of the Code of Civil Procedure (two years) in bar of the action.

1. The contention of appellant is that the evidence showed without contradiction that more than two years elapsed between the negligence complained of and the bringing of the suit, and hence that the finding of the court against defendant's plea of the statute is contrary to the evidence. We think this contention cannot be maintained. Under our Code of Civil Procedure (section 458) the statute of limitations is sufficiently pleaded by alleging the bar and referring to the section and subdivision thereof (if so divided) relied upon. But the section continues: "If such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." The allegations of the answer are to be deemed controverted. Code Civ. Proc. § 462. It therefore devolved upon the defendant to establish the facts necessary to support the plea. The complaint avers, and the answer admits, that defendant "is a corporation organized under the laws of the state of Kentucky, and engaged in the business of operating a railroad as a common carrier of freight and passengers in the state of California and elsewhere, and was so engaged in the said business during all the time hereinafter mentioned." A statute of this state approved April 1, 1872, entitled "An act in relation to foreign corporations" (St. 1871–72, p. 826), requires all corporations created by the laws of any other state to designate some person residing in the county in which its principal place of business in this state is, upon whom process issued by authority of or under any law of this state may be served, and must file such designation in the office of the secretary of state, and a copy of such designation, duly certified, shall be evidence of such appointment. The second section of the act provides that a failure to comply with such requirement shall preclude such corporation from "the benefit of the statutes of this state limiting the time for the commencement of civil actions." Section 3 of the act confers the right of corporations organized under the laws of other states which have complied with the foregoing requirement to avail themselves of the benefits of our statutes of limitation. It being admitted that defendant was a corporation organized under the laws of another state, compliance with the foregoing statute became a necessary fact to be proven as a predicate to its right to avail itself of the benefit of the statute of limitation. This it failed to do, and hence the court did not err in its finding against its defense of the statute of limitations. We may observe that the general rule is that foreign corporations, although having agents and transacting business in a state, come within the provisions of statutes limiting the time for the commencement of actions and making a saving as against absent debtors. It is only by comity that they are permitted to transact business in another state than that of their creation. They are citizens, so to speak, of the state of their creation, and are, in contemplation of law, absent from all other states than the one of their situs. Wood, Lim. p. 599. The statute, then, is not a limitation upon the right of foreign corporations to avail themselves of our statutes of limitations, but it confers that right, subject only to the condition prescribed.

2. Appellant contends that its general demurrer to the complaint upon the ground "that said complaint does not state facts sufficient to constitute a cause of action against this defendant" should have been sustained. The complaint, as we think, in giving, as it does, a history of the whole transaction, including the contract made with the Florida Midland Company to ship the orange trees to Riverside, Cal., via the Southern Pacific Company; the transportation of the trees to New Orleans, and delivery to defendant under the

contract; its failure to forward them by its usual route, with a statement of the route by which defendant shipped the goods; the objections to such route, and the result of the deviation, etc.,—sets out a cause of action, either sufficient to hold defendant as for a breach of the contract, or, failing in that, under its common-law liability as a common carrier. It may well be that a demurrer to the complaint upon the ground of ambiguity or uncertainty would have been good; but no such objection was presented.

3. The contention of defendant that it cannot be held liable for the reasons (a) that the bill of lading described the packages as "contents unknown"; (b) that it was not furnished with the bill of lading, or with an opportunity to inspect the property, so as to inform itself of the character thereof, or its liability to injury,—cannot be maintained. It is true, the printed portion of the bills of lading uses the following expression: "The following articles and packages (contents unknown), marked and consigned as below, to wit [then follows the description in each bill of lading in writing, which is in part as follows]: 1 car orange trees." Again, the evidence shows without contradiction that the cars were marked on the outside with the names and residence of the consignees, and "orange trees," marked in big plain letters. In addition to this, the cars had open ventilators at each end, affording an opportunity to see and examine the contents. Defendant must, therefore, be held to have known the contents of the cars, or, at least, to have had the means of knowledge at hand. "It is the duty of the carrier to transport the goods by the usual direct route, and for any loss which a departure from such route may occasion to them he is liable." Hutch. Carr. § 312. It is said, however, that where there are two or more customary routes, and the carrier is left free to choose between them, he may take his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe. Express Co. v. Kountze, 8 Wall. 342; Maghee v. Transportation Co., 45 N. Y. 514. Judging from the testimony, it can hardly be said that the route by which defendant shipped the goods in this case was one of its customary routes. With a through route of its own through Texas, New Mexico, and Arizona, it sent the goods many hundred miles to the north, over roads operated by other companies, to meet its Central Pacific road at Ogden, in the state of Utah. Conceding, however, that the route was a usual one, there were special reasons for not sending goods which were liable to destruction by frost over this northern route in winter, where defendant might reasonably have expected the result which followed. When, therefore, defendant's through route via Ft. Yuma was obstructed by stress of weather, it became its duty to hold the goods until that or some other safe avenue was opened, or to notify the consignees or consignor, and take their directions in the premises. The evidence shows that they did this with another car of like orange trees at a date a little earlier, and by direction of the consignees shipped them safely through by the Atlantic & Pacific Railroad. Where goods are marked in such a way as to indicate their character, or as to give notice to the carrier that their safety requires that they must be carried in a particular manner, such marks must not be disregarded. Hutch. Carr. § 310. In view of all the surrounding circumstances, we are of opinion that the defendant, by a failure to adopt one or the other of the foregoing courses, erred in judgment, and became liable to plaintiff for the results which followed. The evidence fails to establish a case of gross or wanton negligence; but still does, we think, show a want of that extraordinary care imposed upon common carriers of goods.

4. A carrier is not relieved from responsibility under a contract that he shall not be responsible if he has been guilty of negligence. Railroad Co. v. Pratt, 22 Wall. 123. It is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants. Hutch. Carr. § 260, and cases there cited; Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool & G. W. Steam. Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469.

5. As to the measure of damages. The court below awarded damages up to the full value of the goods at the point of destination, although the uncontradicted evidence tended to show that the value at the shipping point was about one-half of that given. It will be observed that the contract between the plaintiff and the Florida Midland Railway was for a through shipment of the goods to Riverside. We repeat that portion essential to the matter in hand: "Whereas, said railway company has agreed that the cost of transportation * * * shall not exceed * * * $1.97¾ per 100 lbs., said rates being lower than the regular tariff charges of said railway company and connections: Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Midland Railway Company and all lines over which said shipments may pass between points of shipment and destination. * * * It is further agreed that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable." There is a wide distinction between a contract for exemption from liability in case of negligence which is usually held in derogation of public policy because tending to encourage negligence, and a contract fairly made, whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped in case of its loss. Hutchinson, at section 250,

after discussing the question of total exemption in case of negligence, adds: "To be distinguished from these cases, however,—though the distinction is not always observed,—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon. When such is the case, the supreme court of the United States and many of the state courts hold, to use the language of Mr. Justice Blatchford in Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151: 'That where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.'" In the same case the learned justice further said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. * * * There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." We understand full well that there are many cases holding a contrary doctrine to that enunciated in Hart v. Railroad Co., supra, but we think that case, which is cited as a leading one, is founded upon reason and justice, and that the trend of judicial opinion is to the doctrine there enunciated. See cases cited in Hart v. Railroad Co., 112 U. S., at page 342, 5 Sup. Ct. 156. Respondent objects, and urges that, as the trees in question were cultivated by the plaintiff, there was not and could not be any "invoice price." The evident answer is that by the term "invoice price" was meant the cost or value of the property at the shipping point. That it had a fixed value at that point was attested by the evidence. One of the definitions of an invoice is: "A writing made on behalf of an importer, specifying the merchandise imported, and its cost or value." Black, Law Dict. Plaintiff sued upon his special contract, and averred that defendant received the goods thereunder. Defendant averred in its answer "that it duly performed its duty under the contract set out in the complaint." We think the demand for damages from defendant was in due time, and sufficiently specific, in the absence of any demand by defendant of an invoice, to comply with the contract. We think the court erred in overruling the objection of defendant to proof of the market value of the trees at Riverside, instead of confining the inquiry to the cost or value of the trees at the point of shipment in Florida, as per contract, which, with the freight paid, was the true measure of damages. For this error we recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

116 Cal. 56

## WILLIAMS et al. v. BERGIN. (S. F. 487.)

(Supreme Court of California. Feb. 12, 1897.)

STREET ASSESSMENT—SUPERVISORS—JURISDICTION—LIMITATIONS—DEMURRER—PRELIMINARY ACT—PERFORMANCE BY PLAINTIFF—REASONABLE TIME.

1. An order "that granite curbs be laid on F. street, between M. and T. streets, where not already laid, and that the roadway thereof be paved with basalt blocks, where not already so paved," sufficiently describes the work, since nothing is left to the discretion of the superintendent of streets.

2. Code Civ. Proc. § 458, providing that, if the plea of limitations is controverted, the party relying on it "must establish, on the trial, the facts showing that the cause of action is so barred," does not apply to a demurrer to a complaint on the ground that the facts alleged therein show that the cause of action is barred.

3. A demurrer to a complaint on the ground of limitations can be sustained only where it affirmatively appears from the complaint that plaintiff's cause of action is barred.

4. Where a statute in reference to municipal public improvements does not prescribe any particular time after the acceptance of the work within which the superintendent of streets shall issue the assessment and warrant therefor, the mere lapse of time for more than the period fixed as the duration of the lien is not a bar to their issuance.

5. When plaintiff's right of action depends upon some preliminary act which he has to perform, and the time within which such act must be performed is indefinite, a reasonable time will be allowed therefor, after which limitations will begin to run.

6. What is a reasonable time will depend upon the circumstances in each case.

7. Where a right of action depends upon an official act to be performed by a public officer, there is no presumption that any delay in the performance was unreasonable.

8. In an action, commenced February 26, 1896, on a street assessment, where the complaint shows that the work was completed May 1, 1892, and that the superintendent made and issued the assessment October 21, 1895, and

the averments are as consistent with holding that the delay in issuing the assessment was owing to the superintendent as to plaintiff, the complaint is not demurrable on the ground that it is barred by limitations.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by one Williams and others against one Bergin. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

J. C. Bates, for appellants. Thos. I. Bergin, in pro. per.

HARRISON, J. Action upon a street assessment. The board of supervisors of San Francisco ordered "that granite curbs be laid on Francisco street between Mason and Taylor streets, where not already laid, and that the roadway thereof be paved with basalt blocks, where not already so paved"; and a contract therefor, awarded to the plaintiffs, was on March 1, 1892, entered into between them and the superintendent of streets. The time fixed for the completion of the contract was 60 days from its date. It is alleged in the complaint that the work was completed according to the terms of the contract within this time, and was accepted by the superintendent, "who thereupon, on the 21st day of October, 1895, made and issued an assessment therefor," and on the same day issued a warrant for its collection. The present action was commenced February 26, 1896. The defendant demurred to the complaint upon the grounds that it does not state facts sufficient to constitute a cause of action, and that it appears upon its face that the supposed cause of action alleged therein is barred by the statute of limitations. The demurrer was sustained, and the plaintiffs have appealed.

1. The description of the work was sufficient to give to the board jurisdiction to order the improvement. Whether granite curbs had been laid on any part of the street, or any part of the roadway had been paved with basalt blocks, as well as the extent thereof, was capable of exact ascertainment, and did not depend on the arbitrament or discretion of the superintendent of streets. If the assessment should include any expense for paving or for curbs that were laid at the date of the order, it should be corrected on an appeal therefrom. Assessments in which the work has been similarly described have been frequently sustained. McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585.

2. The demurrer sufficiently presented the defense of the statute of limitations. Brennan v. Ford, 46 Cal. 7. The provisions of section 458, Code Civ. Proc., have reference to cases in which the statute is pleaded in the answer as an affirmative defense. It is in an answer, and not in a demurrer, that "facts showing the defense" would be proper, and the provision that "the party pleading must establish on the trial the facts showing that the cause of action is so barred" clearly indicates that the section has no reference to a demurrer to a complaint upon the ground that the facts alleged therein show that the cause of action is barred. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer. A demurrer upon this ground can be sustained, however, only when it affirmatively appears from the complaint that the plaintiff's cause of action is barred. The defendant cannot, in support of the demurrer, invoke other facts which might be introduced in his defense.

3. The grounds urged by the defendant in support of the demurrer are that, inasmuch as the statute provides that the superintendent shall make the assessment and issue the warrant thereon "after the contractor has fulfilled his contract" to his satisfaction, a delay in making the same of more than three years after his acceptance of the work is unauthorized, and the assessment and warrant issued by him are incapable of enforcement. As the statute does not prescribe any particular time after the acceptance of the work within which the superintendent shall issue the assessment and warrant, the mere lapse of time for more than the period fixed as the duration of the lien is not of itself a bar to their issuance, since the issuance may have been delayed by circumstances sufficient to justify the delay. Whether they were sufficient therefor was to be considered by the officer before making the assessment, and, as he is presumed to have regularly performed his official duty, his act in making the assessment is entitled, prima facie, to be considered valid, if there could have been any circumstances under which an assessment would, after such lapse of time, have been authorized. If there are any facts or reasons why the lapse of time was such as to deprive him of the right to make the assessment, they should be presented as affirmative matter in defense thereto.

4. It is further contended by the defendant that, inasmuch as the plaintiffs were entitled to demand the assessment and warrant from the superintendent immediately upon his acceptance of the work, they could not, by their delay in making such demand, suspend the running of the statute in favor of the property owner. The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and that, if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin to run after the lapse of such reason-

able time. What is a reasonable time will depend upon the circumstances of each case. A party cannot by his own negligence, or for his own convenience, stop the running of the statute. Palmer v. Palmer, 36 Mich. 487; Railroad Co. v. Burlingame, 36 Kan. 628, 14 Pac. 271; Ball v. Railroad Co., 62 Iowa, 751, 16 N. W. 592; High v. Commissioners, 92 Ind. 580; Bills v. Mining Co., 106 Cal. 21, 39 Pac. 43; Thomas v. Beach Co. (Cal.) 46 Pac. 899. The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action. The reason of the rule, however, ceases when the right of action is not under his control, but depends upon the act of another; and when the act upon which his right to maintain an action depends is an official act, to be performed by a public officer in the line of his official duty, there is no presumption that any delay in its performance was unreasonable. In the present case the plaintiff had no right of action until after the issuance and return of the warrant, and there is nothing in the complaint from which it can be inferred that there was an unreasonable delay in the issuance of these documents. If it had appeared therein that the plaintiffs had neglected to make a demand therefor for an unreasonable time, or greater than the period during which the assessment would have been a lien upon the property, there might have been ground for holding them barred from enforcing the assessment; but, since the averments in the complaint are quite as consistent with holding that the delay in issuing the assessment was owing to the superintendent as to the plaintiffs, it must be held that it does not appear therefrom that the plaintiffs' cause of action is barred by the statute. If in fact the delay resulted from such neglect or other conduct of the plaintiffs as should deprive them of the right to enforce the assessment, such defense can be fully set forth in the answer. The judgment is reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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116 Cal. 75

## PEOPLE v. BOSQUET. (Cr. 191.)

(Supreme Court of California. Feb. 15, 1897.)

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — PROSTITUTION — INSTRUCTIONS — IMPEACHING WITNESS—SUFFICIENCY OF FOUNDATION.

1. Act March 31, 1891 (St. 1891, p. 285), providing that a husband who "connives at, consents to, or permits" the placing or leaving of his wife in a house of prostitution, shall be convicted for felony, does not deprive him of his liberty without due process of law, on the ground that it makes criminal a mere operation of the mind.

2. In a prosecution under Act March 31, 1891 (St. 1891, p. 285), making it a felony for a husband to place or leave, or to consent to the placing or leaving of, his wife in a house of prostitution, an instruction that defendant's consent could be shown by some "omission," as well as by his act or declaration, is correct.

3. Asking a witness whether he remembers "telling A., at one time, in a conversation on L street, in this city, about three months ago,—within the last five months,—that," etc., sufficiently identifies time, place, and person, as required by Code Civ. Proc. § 2052, to lay a foundation for impeaching the witness.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. C. Hinkson, Judge.

Eugene Bosquet was convicted of a felony, and appeals. Affirmed.

E. C. Hart and C. T. Jones, for appellant. W. F. Fitzgerald, Atty. Gen., C. N. Post, Dep. Atty. Gen., and Frank D. Ryan, Dist. Atty., for the People.

SEARLS, C. Defendant was informed against in the county of Sacramento, under a statute approved March 31, 1891, entitled "An act to prevent the placing or keeping or leaving of married women in houses of prostitution, and to punish persons therefor." St. 1891, p. 285. He pleaded not guilty, and, upon a trial, was convicted. He thereupon moved in arrest of judgment, and also for a new trial, both of which motions were denied, and defendant was sentenced to five years' imprisonment in the state prison. Defendant appeals from the judgment, and from the orders above specified.

The statute above referred to, and upon which the prosecution is based, reads as follows:

"Section 1. Any man who by force, fraud, intimidation, threats, persuasion, promises or any other means, places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution, or connives at, consents to or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein, shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than three years nor more than ten years.

"Sec. 2. In all prosecutions under this act the wife shall be a competent witness against the husband."

The first point made by appellant for reversal is that that portion of the statute of March 31, 1891, which permits a conviction of a husband for felony "for conniving at, permitting, or consenting to the placing or leaving of his wife in a house of prostitution," is in violation of section 13 of article 1 of the constitution, "in that it deprives a man of his liberty without due process of law; it makes criminal a mere conviction, act, or operation of the mind." Section 20 of our Penal Code only enunciated a familiar principle of law when it declared that "in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." The "connivance," "consent," "permission," of the husband, spoken of in the statute, are used to characterize the substantive act of the wife in being, remaining, or living in a house of prostitution. The fact of the wife being in a place of that character is the central and essential fact or predicate, just as, in murder, the death of the person charged to have been murdered is an essential fact. This being admitted or proven, the consent, permission, or connivance of the defendant is to be proven by such declarations, acts, or omissions as outwardly manifest the intention. We fail to appreciate the force of appellant's objection, or to see any violation of the constitutional provision referred to, in the information against, trial and conviction of, the defendant.

It is next urged that the court erred in adding the words inclosed in parentheses to the following instruction asked by defendant, and given with such addition by the court: "Even though the testimony should show that the defendant was married to Lucy Bosquet, his wife, and that she is a prostitute and lived in a house of prostitution, that is not enough of itself to warrant his conviction on this charge, but you must be satisfied by the evidence, beyond all reasonable doubt, that he allowed or permitted her to be placed in or to remain in a house of prostitution by some act or declaration (or omission) of his; that is, that she was in a house of prostitution by his consent." The pith of the instruction is contained in the last sentence, viz.: "That is, that she was in a house of prostitution by his consent." Now, consent may be evinced in a variety of ways. A failure to object to a transaction, with a full knowledge of all the facts and circumstances, and where it becomes the duty of one to dissent, although an omission, is evidence from which consent may properly be inferred. There was ample evidence in the case to give point to the instruction as modified, and hence we think it was proper. The instructions on the part of the defendant are too lengthy to be repeated here. They were full, explicit, and quite as favorable to the defendant as the facts warranted.

It is further urged by appellant that "the trial court erred in permitting the prosecution to impeach the testimony of Lucy Bosquet, under an insufficient foundation." Lucy Bosquet was the wife of the defendant, and was a witness in his behalf. She testified that she lived in a house of prostitution at 229½ L street, Sacramento, which she rented, and in which she plied her vocation as a prostitute; that she had followed that business prior to her marriage to the defendant; that she had promised to reform, but preferred to follow her former calling; that her husband always objected to her doing so,—never in any way consented thereto; that he expostulated with her as to her meretricious conduct; and much more to the same effect. Upon cross-examination, counsel for the prosecution put to her the following question: "You remember of telling her [Amelie De Longe, of whom she had spoken], at one time, in a conversation on L street, in this city [Sacramento], about three months ago,—within the last five months,—that Eugene was very good to you; that he wanted you to live in the crib six or seven months more, or six or seven months longer, in order that you could earn money enough for he and you to go to Paris?" To this question she answered, "No; I never said that to anybody." In rebuttal, Amelie De Longe was called, and, in answer to the question put to Lucy Bosquet, answered that the latter did so state to her (the said Amelie) at the time and place mentioned. Was the foundation sufficient? Section 2052 of our Code of Civil Procedure enunciates the rule as it previously existed in this state and most of the states of the Union. It is in part as follows: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them." The time and place of the conversation, and the person with whom had, should be specified with sufficient definiteness to enable the witness clearly to identify it. The identification of the occasion and the person to whom the statement is made are of prime importance in directing the attention of the witness to the subject-matter. Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178; Koehler v. Buhl, 94 Mich. 406, 54 N. W. 157; People v. Devine, 44 Cal. 452; Birch v. Hale, 99 Cal. 299, 33 Pac. 1088. In People v. Turner, 65 Cal. 540, 4 Pac. 553, the question was: "Did you not state, in the month of September, in the presence of William Knowles and James Robinson, on the way between town here and the race track, that you would go into court?" etc.; and it was held that the question was sufficiently definite to lay the foundation for an impeachment of the witness. If the circumstances stated in the question are such as to describe the occasion with reasonable certainty, a variance as to the time has been held unnecessary. Jones, Ev. § 849. In Nelson v. Iverson, 24 Ala. 9, where the time was designated as in the spring of a given year, when it was in fact February, it was held sufficient. In Lawler v. McPheeters, 73 Ind. 577, it was held that, where the impeaching witness could not recollect the date, it was sufficient that he was about to speak of the declaration or conversation to which the attention of the principal witness had been called. In the present case the question put to the principal witness was accurate and explicit as to the statement made, the person to whom made, the place where made, and, we think, sufficiently explicit as to time, to entitle the prosecution to contradict the statement by the witness. The evidence was conflicting. Both defendant and his wife, while admitting that the latter lived in a house of prostitution, denied that it was by the procurement or consent of the former. On the other hand, there was sufficient testimony on the part of the prosecution, if credited by the jury, as it must have been, to warrant the verdict as rendered. Finding no reversible error in the record, we recommend that the judgment and orders appealed from be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

116 Cal. 108

## PEOPLE ex rel. SPENCER v. KNIGHT.

(S. F. 396.)

(Supreme Court of California. Feb. 20, 1897.)

ATTORNEY FOR STATE BOARD OF HEALTH — APPOINTMENT.

St. 1891, p. 209, § 1, provides that the attorney for the state board of health shall be appointed by the governor, and hold his office for four years, and until his successor is "elected" and qualified. *Held*, that the person appointed to fill it during the first term was not entitled to hold it until his successor was "elected," a successor being appointed and having qualified.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Quo warranto by the people of the state of California, on the relation of Dennis Spencer, against George A. Knight. From a judgment in favor of relator, defendant appeals. Affirmed.

Denson & De Haven, for appellant. W. W. Foote and Garret McEnerney, for respondent.

HARRISON, J. The appellant was appointed attorney for the state board of health, by virtue of the provisions of an act authorizing such appointment (St. 1891, p. 209), June 13, 1891. July 11, 1895, the governor appointed the relator to succeed the appellant in the said office, and a commission therefor was duly issued to him. After qualifying for the office, the relator presented to the appellant his commission, and notified him that he had filed his oath of office, and demanded to be let into the possession and enjoyment of said office; but the appellant refused, and has ever since refused, to let the relator into the possession of said office, or to permit him to hold and exercise the same. The present action was brought under the provisions of section 803, Code Civ. Proc., for the purpose of having the appellant excluded from said office, and establishing the right of the relator thereto. Judgment was entered in favor of the relator, from which the present appeal has been taken.

Section 1 of the act above named is as follows: "Section 1. The office of attorney for the state board of health, and the board of health of the city and county of San Francisco, is hereby created; such attorney shall be appointed by the governor, and shall hold his office as such attorney for the term of four years, and until his successor is elected and qualified." The proposition contended for by the appellant, and upon which he claims the right to retain the office, is that, by reason of the last clause in the foregoing section, his successor is to be elected by the people, and that, until such election has been had, there is no vacancy in the office, and, by virtue of section 879 of the Political Code, he is entitled to retain possession of the office. This construction of the section fails, however, to give effect to the provisions therein, which are declared with definiteness, and attributes a controlling effect to a provision which is merely subsidiary and incidental to the purpose of the act. There is no provision in the section, or elsewhere upon the statute book, that this office shall be filled by an election. On the contrary, the office is created by the act, and the provision that "such attorney shall be appointed by the governor" is an express legislative declaration of the mode in which the office shall be filled. The appointment of the officer is not limited to the first appointment, but includes every "such attorney." By the succeeding clause his term of office is fixed at four years, and at the expiration of that term the right of the governor to appoint the successor of the first incumbent was the same as for the original appointment. The additional words "until his successor is elected and qualified" cannot have the effect to overcome the previous declaration that the officer is to be "appointed," or justify an inference that the legislature intended that the office should be elective. That the provision in the act that "such attorney shall be appointed by the governor" was intended by the legislature to apply to future incumbents of the office is corroborated by the fact that no provision has been made for an election of the officer, or declaring the constituency by which he should be elected. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; GAROUTTE, J.

116 Cal. 69

## O'NEAL v. HART et al. (S. F. 489.)

(Supreme Court of California. Feb. 13, 1897.)

MORTGAGES—COUNSEL FEES—DEFICIENCY.

1. A provision in a mortgage that counsel fees shall be part of the costs of foreclosure, and that the decree shall retain them, authorizes the court to include them in the decree as part of the obligation secured by the mortgage.

2. The court need not of its own motion direct that, if the proceeds of the foreclosure sale are insufficient to pay the judgment against the mortgagor, the deficiency shall be docketed against not only the mortgagor, but also against his grantee, who assumed the mortgage.

3. The grantee of a mortgagor having assumed the mortgage, and having defaulted, and a deficiency judgment having been entered against the mortgagor, the mortgagor was not entitled, until he had paid such judgment, to a judgment against the grantee for the deficiency.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by one O'Neal against one Hart and another. From a judgment for plaintiff, defendants appeal. Affirmed.

T. W. Nowlin and A. A. Moore, for appellants. J. K. Peirsol and C. T. Johns, for respondent.

PER CURIAM. 1. The mortgage which is foreclosed herein was given to secure the payment of a promissory note of the defendant Hart, and contained a clause which provided that in a suit for its foreclosure "a decree may be had to sell the said premises in the manner prescribed by law, and out of the money arising from such sale to retain the principal and interest, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees, at the rate of five per cent. upon the amount which may be found due for principal and interest by the said decree." This express provision that counsel fees are to be regarded as a part of the costs of a suit for foreclosure, and that, if such suit be brought, there shall be entered therein a decree to retain said counsel fees, created an obligation for their payment upon the mortgagor of the same nature as his obligation to discharge other costs of foreclosure, and authorized the court to include them in its decree as a part of the obligation secured by the mortgage.

2. The court did not err in refusing to direct that, if the proceeds of the sale are insufficient to pay the amount of the judgment against Hart, the deficiency should be docketed against the defendant Burdick as well as Hart. Hart had conveyed the mortgaged premises to Burdick after the execution of his mortgage to the plaintiff, and his grantee had assumed the mortgage and agreed to pay the same. This would have authorized the court, at the request of the plaintiff, to enter a judgment that any deficiency be docketed against both Burdick and Hart; but, as the plaintiff declined to make such request, the court was not required to include it in the decree. Hart, by virtue of the provisions of his mortgage from Burdick, was entitled to a judgment against Burdick, not only for the amount of Burdick's note, but also for such an amount as he might pay in satisfaction of his mortgage to the plaintiff. He could not, however, claim any judgment therefor until after he had made such payment, and the decree provides that, for whatever deficiency he shall pay upon the judgment in favor of the plaintiff, judgment therefor shall be docketed in his favor against Burdick. The judgment is affirmed.

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116 Cal. 81

## FIRST NAT. BANK OF SANTA ANA v. ERRECA et al. (L. A. 147.)

(Supreme Court of California. Feb. 15, 1897.)

CHATTEL MORTGAGE OF SHEEP.

A mortgage of sheep does not extend the lien thereof to wool thereafter growing on them, or lambs in gestation at its date.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the First National Bank of Santa Ana against Erreca and others. Judgment for plaintiff. Defendant Bruschi and others appeal. Modified.

Gibson & Titus, J. C. Hizard, and J. W. Ballard, for appellants. Victor Montgomery, for respondent.

HARRISON, J. The plaintiff brought this action for the foreclosure of a chattel mortgage upon 2,330 sheep, that had been executed to its assignors January 18, 1894, by the defendants Erreca and Barrandeguy. In April, 1895, the mortgagors had sold to the defendant Bruschi 14,000 pounds of wool that had been grown upon the sheep described in the mortgage, after its execution, and sheared therefrom by the mortgagors; and in May, 1895, they sold to the defendant Cassou 815 lambs that had been born from the mortgaged sheep subsequent to its execution. The court held that the wool and the lambs thus sold were covered by the mortgage, and rendered judgment directing their sale. From this judgment, Bruschi and Cassou have appealed.

In Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487, it was held that in this state the lien of a chattel mortgage upon domestic animals does not cover the increase of the animals, unless expressly mentioned therein. The provision in section 2955, Civ. Code, authorizing the execution of a chattel mortgage upon "sheep, and the increase thereof," does not extend the lien of a mortgage upon "sheep" to the "increase" of the sheep, but implies that, unless the increase is covered by the terms of the mortgage, it is not included therein. In that case it was also said: "If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee." In Simpson v. Ferguson, 112 Cal. 180, 40 Pac. 104, and 44 Pac. 484, it had been held that the mortgagor of real property was entitled to whatever crops might grow upon the mortgaged property prior to a foreclosure, and it was also said in Shoobert v. De Motta: "If, in the case of sheep, the use to which the mortgagor puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs." The present case presents a question which was not involved or decided in that case,—i. e. whether the lien of the mortgage includes lambs in gestation at its date; but, upon the principles of that case, it must be held that they are not so included. As the lien of the mortgage extends only to the property described therein, and as the mortgagor remains the owner of the property mortgaged, he has an unrestricted right to sell or dispose of its fruit or increase. His right to dispose of lambs in gestation at the date of the mortgage is the same as his right to dispose of oranges which were on the trees, or wheat which was in the ground or standing in the field when the mortgage was made.

It is but just to counsel and to the court below to say that the decision in Shoobert v. De Motta had not been rendered when the present case was tried, or the appeal therefrom taken to this court. The superior court erred in holding that the wool sheared from the sheep and their increase was covered by the mortgage, and subject to its lien, and it is directed to modify its judgment in accordance with this opinion.

We concur: VAN FLEET, J.; GAROUTTE, J.

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116 Cal. 91

## SCHART v. SCHART et al. (L. A. 197.)

(Supreme Court of California. Feb. 17, 1897.)

SERVICE OF PROCESS—NOTICE OF MOTION.

1. Service by publication on nonresidents whose address is known is not complete until copies of the summons and complaint are mailed to them, as required by the order for publication.

2. A defendant mortgagor need not be served with notice of motion to set aside a default judgment in foreclosure proceedings against her and her co-defendant, a prior mortgagee, under which judgment the property was sold to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Henrietta Schart against Freda Schart and Louis J. Bock to foreclose a mortgage. From an order setting aside a judgment by default against defendants, plaintiff appeals. Affirmed.

Donnell & Howland, for appellant. H. O. Collins, for respondents.

SEARLS, C. This is an appeal from an order of the court below setting aside a judgment by default, rendered against the defendants, on the ground that the summons was served by publication, and that no copy thereof was served upon the defendants by mail or otherwise, although the defendants were nonresidents of the state, and their residence, as shown by the affidavit for publication, was known, and although the order for publication required copies of the summons to be forwarded to said defendants by mail. The motion to set aside the default was made within one year after the entry of default and judgment, as provided by section 473, Code Civ. Proc. The moving affidavits show that defendant Bock is the holder and owner of a prior mortgage upon the property covered by plaintiff's mortgage, which was foreclosed in the action. The substituted service was not complete unless a copy of the summons and complaint were deposited in the post office, directed to the defendant, as required by the order of the judge. It became, therefore, not only the right, but the duty, of the court, to set aside the default and judgment inadvertently entered.

Appellant objects that the notice of motion by defendant Bock should have been served upon his co-defendant, Freda Schart. Bock is not seeking any relief against his co-defendant here, but only against the plaintiff. If he shall file a cross complaint, it will be time enough to serve her therewith. Where the direct legal effect of an order determines the right of a party, he must have notice of the application therefor. This is illustrated in a case where a motion is made to set aside a judgment under which property has been sold, and purchased by a third party, where it has been held that such third party must have notice. In the present instance the property was sold, and bought in by plaintiff, who had notice; and the direct legal effect of the order appealed from does not in any way operate for or against the defendant Freda Schart. We recommend that the order appealed from be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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116 Cal. 94

## WIGMORE et al. v. BUELL. (L. A. 175.)

(Supreme Court of California. Feb. 17, 1897.)

SET-OFF.

Damages for trespass committed by plaintiff in ejectment on land of defendant contiguous to the premises in suit neither arise out of "the transaction set forth in the complaint" nor "upon contract," within Code Civ. Proc. § 438, and hence cannot be set off.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Ejectment by John Wigmore and another against R. T. Buell. From a judgment for plaintiffs, defendant appeals. Affirmed.

Thos. McNulta and Grant Jackson, for appellant. Boyce, Taggart & Kellogg, for respondents.

SEARLS, C. This is an action of ejectment to recover possession of a tract of land situate and being in the county of Santa Barbara, damages for the detention thereof, and for the value of the rents and profits. Plaintiffs had judgment for possession of the land and $400 damages. Defendant appeals from the judgment. The only error assigned is based upon the refusal of the court, pending the trial, to permit defendant to file an amendment to his answer. The complaint is in the ordinary form in ejectment, and the answer consisted in denials of the allegations of the said complaint. At the trial, and after plaintiffs had rested their case, defendant sought to prove that plaintiffs' cattle had ranged and pastured upon his (the said defendant's) land. Upon an objection being sustained to this and similar evidence, defendant presented and asked to be permitted to file an amendment to his answer, which amendment, omitting the title and merely formal part, is as follows: "(2) The defendant further alleges that during the times mentioned in the complaint, up to 1893, the cattle and stock of plaintiffs ran in common in large numbers with the cattle and stock of defendant on the Rancho San Carlos de Jonata, then and now owned by defendant; that said Rancho San Carlos de Jonata adjoins the lands of plaintiffs, which lands of plaintiffs are part of the Laguna Rancho; that, in consequence of the cattle and stock of plaintiffs running and grazing upon the lands of defendant above mentioned, defendant was and has been damaged in the sum of $9,000." Plaintiffs' counsel objected to the amendment, and the objection was sustained, to which ruling defendant, by his counsel, excepted.

Waiving the fact that this was a jury trial, that the amendment came after the plaintiffs had closed their case, and that amendments in such cases are within the discretion of the court to grant or refuse, and only subject to revision in cases of an abuse of discretion, we still perceive no error in the ruling. The action, as before stated, is one of ejectment. The proposed amendment did not constitute a defense to the action. It was in the nature of a counterclaim for a trespass committed by plaintiffs upon land of defendant contiguous to the demanded premises. A counterclaim may consist of: "(1) A cause of action arising out of the transaction set forth in the complaint as a foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising upon contract; any other cause of action arising also upon contract, and existing at the commencement of the action." Code Civ. Proc. § 438. The cause of action, the trespass set up in the amendment, did not, in contemplation of law, arise out of the transaction set forth in the complaint, and was not connected with the subject of the action, and hence is not included in the first ground specified in the statute. It does not come within the second subdivision of section 438, for the reason that neither plaintiffs' cause of action nor defendant's amendment is a cause of action arising upon contract, but is a tort, pure and simple. MacDougall v. Maguire, 35 Cal. 274; Lovensohn v. Ward, 45 Cal. 8; Demartin v. Albert, 68 Cal. 277, 9 Pac. 157; Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314; James v. Center, 53 Cal. 31. The case of Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671, contains a clear exposition of the principles involved in cases arising under the first subdivision of section 438. We recommend that the judgment be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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## VAN SLYKE v. BROADWAY INS. CO.
(S. F. 542.)

(Supreme Court of California. Feb. 26, 1897.)

In bank. On rehearing. Denied.

For report on appeal, see 47 Pac. 689.

PER CURIAM. A rehearing is denied. The opinion heretofore filed herein is modified by striking out the sentence: "The case presented is one of a patent ambiguity, which cannot be 'holpen by averment.'"

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5 Cal. Unrep. 606

## PERES v. CROCKER et al. (S. F. 96.)

(Supreme Court of California. Feb. 23, 1897.)

DEED, WHEN A MORTGAGE—EXCLUSION OF EVIDENCE.

1. In an action to declare a deed absolute in form a mortgage, a judgment for defendant cannot be set aside where, in confirmation of the presumption of the deed, there was evidence from the conduct of the grantor, and from his pecuniary condition at the time of its execution, and his declarations before and after, that the deed was in fact absolute.

2. Where plaintiff had already testified as to what he told his grantee certain lands conveyed by him "ought" to have been worth at the time, exclusion of his estimate of their value was harmless.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Louis Peres against Mary Ives Crocker and others. Verdict for defendants. From an order denying a new trial, plaintiff appeals. Affirmed.

N. Hamilton, Geo. H. Maxwell, R. M. F. Soto (Rodgers & Paterson, of counsel), for appellant. Wilson & Wilson and A. L. Rhodes, for respondents.

BRITT, C. Plaintiff claims that certain deeds of land, absolute in form, by him executed to one Charles McLaughlin, whose interest defendants have acquired by devise, were intended by the parties thereto to operate virtually as a mortgage; and he prosecutes this action to obtain an accounting of the rents and profits of the land, and to redeem the same from the effect of the deeds, or compel a reconveyance of the residue after apportioning to defendants enough thereof at its present value to satisfy any indebtedness ascertained to be due from him on such accounting. The court found that the deeds were intended to be absolute, according to their purport, and the chief contention of plaintiff on appeal is that this conclusion was not justified by the evidence at the trial. While acknowledging the presumptions attending the findings, he yet insists that, "resolving every conflict of testimony in favor of the respondents, the whole evidence taken together, in its legal effect, is counter to the decision of the court, and justly demands a reversal of its action." Invited by the apparent candor with which this contention is urged on behalf of appellant, we have attentively examined the voluminous statement of evidence brought up in the record. We are thus informed that for many years prior to May 12, 1881, an action entitled "Blum v. Sunol and others" was pending in the courts of the state, in which claim was laid by Blum to an undivided two-thirds interest in and to the Rancho de los Vaqueros, more commonly called in the record here the "Basco Ranch," containing about 17,700 acres, situated in Alameda and Contra Costa counties, and in the possession of Louis Peres, the plaintiff in the present action. The latter had undisputed title in one-third of said rancho, and claimed to be owner of seventeen-eighteenths thereof as purchaser under sundry defendants in Blum v. Sunol, in whose name he defended that suit. In 1879 judgment was rendered in Blum v. Sunol in Blum's favor. Subsequently an order was made granting a new trial. Blum appealed from such order, and his appeal was pending in the supreme court on said May 12, 1881. Peres' interest in the rancho was then incumbered by two mortgages,—the first in favor of one Dupuy for the principal sum of $70,000, the second in favor of one Arsiniega for $10,000; both mortgage debts being then due, and together amounting, with accrued interest, to above $95,000. These mortgages were in course of foreclosure in a suit against Peres then recently instituted, and a contract had been made between said Dupuy and Blum for an adjustment of their conflicting interests when by means of the foreclosure the title of Peres should be extinguished. Peres was also under contract with his attorneys in Blum v. Sunol to give them 1,000 acres of the rancho as their fee contingent upon success in that litigation. At the same time he owned free of any incumbrance a tract of 880 acres in the near vicinity of the rancho. Such smaller tract was of the value of $4,400, and his seventeen-eighteenths of the rancho was worth, had the title been clear, say $170,000. In this posture of his affairs Peres executed to McLaughlin, on said May 12, 1881, the deeds mentioned at the outset of this opinion; one purporting to be a grant, bargain, and sale of the Basco rancho, the other of said tract of 880 acres. McLaughlin at once took possession of the lands, paid off the said mortgages, and assumed the defense of Blum v. Sunol, himself or his successors in estate paying as expenses of that action about $17,000, exclusive of attorney's fees. He died December 13, 1883, and his wife, Kate D. McLaughlin, who became his executrix, was sole devisee under his last will. She died on March 16, 1888, leaving a will whereby she devised her whole estate to the defendants in this action. The order granting a new trial in Blum v. Sunol was affirmed (63 Cal. 341). The second trial, had in 1884, resulted adversely to Blum. He again appealed, but in July, 1889, a compromise was effected whereby, in consideration of $8,500 paid by the executors of Mrs. McLaughlin, he released his claims to the rancho. Peres began the present action, July 9, 1890. The lands involved were then worth some $350,000.

Peres is the only surviving person professing to have actual knowledge of the terms of the oral agreement between himself and McLaughlin which led to the deeds in question. His testimony at the trial was, in effect, that McLaughlin agreed to treat the deeds as a mortgage; and to reconvey the land to Peres when the Blum suit should be won and Peres had repaid him "in money or in land" for his advances to discharge the mortgages and resist the suit of Blum, with interest; also to account for the rents and profits received meanwhile. As tending to corroborate the statements of Peres, we note that the tract of wholly unincumbered land was included in the conveyance; that the land was worth (with clear title) nearly twice the sum necessary to pay off the mortgages of Dupuy and Arsiniega, and besides yielded under the McLaughlin management a gross return in rents, etc., of about $14,000 per year; that Peres rendered some assistance in procuring testimony for the second trial of the Blum case; also certain evidence of parol declarations by McLaughlin in disparagement of his apparent title. It was testified that he stated to one witness: "It [the rancho] is not mine; if Peres wants it back, I expect to give it to him;" that he took "the fight off Peres' hands to beat Blum"; to another, that he had taken the deeds as security for money advanced to pay off two mortgages, and for money "that I may give him in the future to help him out in his lawsuit"; and to a third, that he had loaned some money on the rancho. Appellant lays stress also on a promise made to him by McLaughlin that in case of his success in the litigation he would be generous or liberal to him (Peres). It seems to us, however, that this matter has very equivocal significance in the case.

But the court below was of opinion that the lands were conveyed to McLaughlin in consideration of his engaging to discharge the debts of Peres secured by said mortgages, and that he contracted no other obligation to Peres; and tending to uphold this finding there was evidence, besides the matters already stated, that Peres was without money to pay off the mortgages, and expected besides that the future litigation with Blum would necessitate large expense; that when Dupuy insisted on payment of his mortgage Peres threatened to settle with Blum, and allow Dupuy to take what would be left; that when Dupuy forestalled such action, and himself made an alliance with Blum and began suit for foreclosure, both Peres and his counsel in the case of Blum v. Sunol were greatly perturbed, and considered the situation desperate; that the transaction with McLaughlin occurred in this emergency; that the value of Peres' undisputed interest in the land was then far below the sum McLaughlin was required to pay for the release of the existing mortgages, while for any purpose of raising money the value of that part claimed by Blum was greatly impaired; that, according to Peres' own statement, no rate of interest to be paid by him to McLaughlin was mentioned between them; that Mr. E. J. Pringle, a gentleman of character and repute as the parties agree, who for many years had been attorney and counsel for Peres, and under whose direction the deed of the rancho to McLaughlin was drawn, had, as he testified, no intimation from Peres that the deed was to serve as a mortgage, but believed it to be absolute, and on that assumption thenceforward conducted the litigation with Blum in the interest of McLaughlin (as he had done previously for Peres), at length compromising the suit without consultation with or objection from Peres; that Peres accepted a lease of part of the rancho from McLaughlin, and paid rent therefor, afterwards assigning his lease with McLaughlin's consent and removing from the land; that he made no arrangement for payment of taxes; these were paid by McLaughlin and his successors, to whom, after 1881, the land was assessed; that Peres never sought an inspection of the accounts of the business of the rancho, nor after the execution of the deeds had or claimed any part in its management. In 1885 Peres owed the executrix $700 for rents, and a larger sum for cattle he had bought of McLaughlin. The second trial of Blum v. Sunol had then been had, and Peres preferred a request for consideration at the hands of the executrix because of her deceased husband's promise to be liberal with him if that suit should be won. She refused, and required payment of his said account for rents and cattle, and thereupon to settle the same he transferred to her a certificate of purchase of 120 acres of state land adjoining the rancho. There was, besides, the testimony of several witnesses to divers statements of Peres inconsistent with the theory that he yet retained interest in the title; in substance, that his mortgages became due and he could not hold his land any longer, that he had sold it out to McLaughlin, that McLaughlin was the owner, had got it all, etc. We have endeavored to exhibit only more prominent features of the evidence, omitting matter touching mainly the credit of witnesses, and much besides which may have influenced the court below.

Counsel differ little as to the law of the case. That the evidence to sustain such an action must be cogent and clear has been often remarked. Thus it has been said that "the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail." Henley v. Hotaling, 41 Cal. 27. "Unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument which in form is a deed was intended by all the parties thereto as a mortgage, the finding should be against the plaintiff." Mahoney v. Bostwick, 96 Cal. 58, 30 Pac. 1020. So, Ahern v. McCarthy, 107 Cal. 383, 40 Pac. 482; Cline v. Robbins, 112 Cal. 584, 44 Pac. 1023; and numerous other cases. The trial court is the appropriate tribunal to weigh the evidence, and determine whether it is convincing and satisfactory in the sense of these cases, and its conclusion must be accepted on appeal unless obviously to the view of this court its deductions have no adequate support. In the present instance it cannot be discerned that the findings are without such support. In confirmation of the presumption attaching to the deeds themselves, we think the court might conclude upon the evidence, without straining the inference, that the conduct of Peres from and after the execution of the deeds was much more consistent with the character of a vendor, having some vague expectation of possible benefit in case success attended the speculation on which his grantee had purchased the estate, than of a mortgagor expecting to be reinstated in the rights and dominion he had temporarily resigned to a mortgagee; while, if adequate motive for the conveyance was essential to be found, it might be discovered in the difficulties of Peres' situation and the contingency which confronted him, that a sale of his property under foreclosure, in the embarrassed condition of his title, would not raise funds sufficient to pay the debts secured on the same.

Peres, called as a witness on his own behalf, was asked by his counsel, "What did you estimate to be the value of those lands at the time of your negotiation with McLaughlin for this money?" The court sustained an objection to the question, and it is insisted that here was error. If it be conceded that the evidence sought by the question was within the rule which allows the motive, belief, or intent of a person to be testified by himself directly, and was therefore legally competent, yet we think its rejection could not have prejudiced the plaintiff. He had already testified that he told McLaughlin he had 16,500 or 16,600 acres in the rancho, and it "ought to be worth eighteen or twenty dollars an acre"; also that he would not sell it to him for less than $350,000. Subsequently it was stipulated between counsel that the value of the rancho at the time in question was $170,000, this having reference, it seems, to the seventeen-eighteenths thereof owned by Peres. Further, to sustain plaintiff's case, it was necessary to show that not only himself, but McLaughlin also, considered or was bound to consider the transaction as a mortgage and not a sale; and no estimate of the value held in the mind of Peres could shed light on the intent of McLaughlin, except that which was communicated to the latter. It is therefore manifest that the result could not have been affected by any answer to the question asked of the witness, and the action of the court excluding it worked no injury. The order denying plaintiff's motion for a new trial should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying plaintiff's motion for a new trial is affirmed.

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(5 Cal. Unrep. 604)

## BOWERS RUBBER CO. v. BLASDEL.
(S. F. 428.)

(Supreme Court of California. Feb. 19, 1897.)

SALE—WARRANTY.

The fact that a buyer paid part of the price did not preclude him from relief, in an action for the balance, on account of the worthlessness of part of the goods, where at the time of payment he had no knowledge of the defects.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Bowers Rubber Company against H. G. Blasdel. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Morris M. Estee (Arthus G. Fisk, of counsel), for appellant. Ryland B. Wallace, for respondent.

PER CURIAM. This action was brought to recover the sum of $4,588, alleged to be the balance due from defendant to plaintiff for 100 "rubber concentrator belts," manufactured by plaintiff for defendant between January 3, 1893, and December 20, 1893. The defense was that a large number of the said belts were not of good quality, and were not reasonably fit for the purposes for which they were intended. The case was tried by the court without a jury, and, among other things, the court found that 16 of the belts, "by reason of the inferior quality used in the body of said belts, and the improper manner in which the flanges thereof were molded to the sides or edges thereof, were not fit for the purposes for which they were to be used and were of no value," but that the other 84 belts were all "of good quality and fit for the purposes for which they were intended, and the reasonable value of the material used and labor employed in the manufacture thereof was the sum of $6,862," of which sum defendant had paid to plaintiff on account $3,600, leaving a balance due to plaintiff from defendant of $3,262, which on March 2, 1894, defendant promised in writing to pay to plaintiff, with interest thereon. In accordance with the findings judgment was entered on September 19, 1895, that the plaintiff recover the sum of $3,615.28 and costs; from which judgment and an order denying a new trial the defendant has appealed.

It is claimed by appellant that the finding that 84 of the said belts were all of good quality, and fit for the purposes for which they were intended, was not justified by the evidence, but that, on the contrary, 66 of them were badly manufactured, and therefore practically worthless and of no value. Whether the finding referred to was justified or not is the only question which need be considered. To set out the evidence bearing upon the question, even in substance, would make this opinion quite lengthy, and subserve no useful purpose. We have carefully examined the record, and, in our opinion, there was uncontradicted evidence quite sufficient to show that a considerable number of the belts, other than the 16 which were found to be of no value, were badly manufactured, because of "the improper manner in which the flanges thereof were molded to the sides or edges thereof," and were therefore practically of no value. It was also proved that, when defendant paid the $3,600 on account, he did not know of the defects in the belts. That part of the finding to the effect that on March 2, 1894, defendant promised in writing to pay plaintiff $3,262, with interest thereon, is based upon a letter written by defendant on the day named to plaintiff's president, in which he simply says: "I should have paid a portion of the indebtedness some time since, and I will be glad to pay you a good rate of interest on my overtime." The judgment and order appealed from must be reversed, and the cause remanded for a new trial. It is so ordered.

116 Cal. 97

## LEE v. SOUTHERN PAC. R. CO. (L. A. 107.)

(Supreme Court of California. Feb. 19, 1897.)

ACTIONS AGAINST CORPORATIONS—WHEN AUTHORIZED—RAILROADS—OPERATION BY LESSEE—LIABILITY OF LESSOR FOR PERSONAL INJURIES—PLEADING AND PROOF—VARIANCE.

1. Const. art. 12, § 10, prohibiting any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from liabilities contracted in the operation of such franchise, does not give the employé of a corporation's lessee a right of action against the corporation for injuries through the wrongful acts of the lessee in the use of the leased property.

2. Though St. 1880, p. 21, authorizes one railway corporation to lease its franchise and property to another, the lessor company is liable to an employé of the lessee for injuries caused by the improper construction of the road.

3. In an action against a railroad company for personal injuries, plaintiff alleged that he was defendant's employé, and that the injury was caused by the improper construction of the road. The proof showed that plaintiff was an employé of defendant's lessee. *Held*, that the variance was immaterial, since he was entitled to recover, though not an employé of either company, not being a trespasser.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Charles C. Lee against the Southern Pacific Railroad Company, in which there were special findings of facts, and a general verdict in favor of plaintiff. From a judgment for defendant, notwithstanding the verdict, plaintiff appeals. Reversed, and judgment on the verdict directed.

Cole & Cole, for appellant. Bicknell & Trask, for respondent.

HENSHAW, J. Plaintiff brought this action against the Southern Pacific Railroad Company to recover damages for personal injuries sustained by him. He pleaded that the defendant was the owner of a certain railroad in the county of Los Angeles, and of its roadway, tracks, and appurtenances; that, at the time of the injuries complained of, he was employed by the defendant as a brakeman; and that while in the performance of his duties as brakeman, at a siding called Honby, on the line of the road, he was thrown from an engine upon which he was riding, and sustained serious injuries. The cause of the accident was alleged to be the negligence of the defendant in imperfectly constructing the rails and track of the road at Honby, and in allowing this defectively constructed track to remain out of repair, inadequate, and unsafe. The answer admitted the ownership by defendant of the road in question, denied that defendant was engaged in the business of operating the road, denied that plaintiff was or ever had been in its employ as a brakeman, or in any other capacity, and denied the imperfect construction and want of repair of the rails and track. The jury returned a general verdict in favor of plaintiff in the sum of $8,000. It likewise made special findings of fact upon certain interrogatories presented. These findings, with certain other facts agreed to by counsel under stipulation, may thus be summarized: The defendant was the owner of the railroad upon which the accident complained of occurred, but, prior to the time of the accident, it had leased the road and all the rolling stock and property of every kind used upon or in connection with it to the Southern Pacific Company of Kentucky. The Southern Pacific Company was at the time of the accident in the exclusive operation of said railroad under the lease. The side track upon which the accident occurred had been constructed by the Southern Pacific Company as an aid or adjunct to the main line. The plaintiff at the time of the accident was in the employ of the Southern Pacific Company, and not of the Southern Pacific Railroad Company. The trial court determined that a conflict existed between the special findings and the general verdict, and holding that, under the special findings, defendant was entitled to judgment, rendered its decision accordingly.

Section 10 of article 12 of the constitution declares: "The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." Upon this language, appellant contends that the constitution gives one a right of action against the corporation which has owned property for an injury which has resulted to him in the use of such property in the hands of a lessee or grantee of the original owner, and from this he insists that his right of action against the defendant is established by the constitution itself. The section in question was adopted by the constitutional convention without debate. It is a provision peculiar to this state. It has not so far received judicial interpretation; yet we think no difficulty need be experienced in arriving at its true meaning. It is not to be construed as a grant of authority to lease, but as a restriction upon the power of the legislature to make such grant of authority. Abbott v. Railroad Co., 80 N. Y. 27; Railway Co. v. Morris, 68 Tex. 49, 3 S. W. 457. It declares: (1) That, if a lease or sale shall be made of the franchise or property of a corporation, the lessee or grantee shall take such franchise or property cum onere, subject to any of the liabilities of the grantor at the time existing and enforceable against the franchise or property. This provision is for the very obvious purpose of preventing a corporation, by selling or assigning its franchise or property, from saving harmless the franchise or property, and leaving remediless one who but for the lease or sale could have enforced against the property a judgment which he might recover. It is designed, further, as a declaration that the forfeiture of a franchise for an act committed or omitted by the charter corporation while it owned such franchise may be enforced after transfer of the franchise by sale or lease. (2) That, in the hands of the lessee or grantee, the franchise or other property shall be subject to the liabilities which may be incurred in its occupation, use, or enjoyment. Thus, the corporation owning the property will not be allowed to save it harmless by conveying it to another corporation. In the hands of the operating corporation, the franchise and property will still be liable,—the one to forfeiture at the instance of the state, the other to execution levy at the instance of any individual who has sustained loss or injury by reason of the wrongful acts of the operating corporation. But it will be noted that the section does not attempt to give, and is not intended to give, a personal action against a corporation where none existed before. It is designed to subject the franchise and property of a corporation, whether the franchise be exercised or the property be used by the corporation itself or by another, to liability for breach of duty. Otherwise, a corporation might own a fully-equipped railroad; it might convey the road and the property used upon and with it to a lessee corporation owning no property whatsoever, and leave the conduct and operation of its property entirely to the lessee. A judgment creditor seeking to make good his claim against the operating company would find no property owned by it upon which it could levy. To prevent this and many other such evasions as might be instanced, the constitutional provision in question was adopted. So far as the case at bar is concerned, it can have but this application, and no more. It would enable the plaintiff injured by the negligence of his employer, the lessee company, to make good his judgment under appropriate procedure out of the leased property; but it would not operate to give the plaintiff, an employé of the lessee company, a right of action against the lessor company, upon the fiction that it was his employer.

Respondent contends that, having made a valid lease of all its railroad property to the Southern Pacific Company, it is absolved from all liability to plaintiff. Upon the part of the appellant it is contended that the lease is without sanction from the constitution and laws of the state, and is therefore void. The question of the validity or invalidity of the lease is thus collaterally presented, but a decision upon it is not necessary to a determination of the rights of the parties hereto. If the lease were made without legislative sanction, it would be void, and, under all of the authorities, the lessor would continue liable for all the negligence of the lessee affecting the public, the latter being treated as operating the road as the mere agent of the lessor. Arrowsmith v. Railroad Co., 57 Fed. 165; Thomas v. Railroad Co., 101 U. S. 83; Railroad Co. v. Winans, 17 How. 30; Railroad Co. v. Brown, 17 Wall. 445; Frazier v. Railroad Co., 88 Tenn. 138, 12 S. W. 537; Railway Co. v. Dunbar, 20 Ill. 623; Railroad Co. v. Morris, 68 Tex. 50, 3 S. W. 457; Nelson v. Railway Co., 26 Vt. 717. But, conceding all that respondent claims as to the validity of the lease, it does not follow that respondent is relieved from liability to this plaintiff. The act which it is insisted affords legislative authority for the lease in question is entitled "An act permitting and authorizing railway and other corporations organized under the laws of this state, or of any state or territory of the United States of America, or any act of congress of the United States of America, to do business in this state on equal terms." It is found in the Statutes of 1880, at page 21. No terms of the act afford exemption in any respect to the lessor company. Where a statute authorizing leases contains no clause exempting the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses, etc.

In Railway Co. v. Curl, 28 Kan. 622, a railway company constructed its track, and in the construction omitted to make sufficient cattle guards where the track entered and left an unfenced field. Thereafter the railroad was leased to another company, which, at the time of the injury complained of, was in the full possession and use of the track, and, by the terms of its lease, had contracted to discharge all statutory obligations and duties imposed upon the lessor company. The owner of land adjacent to the railroad brought his action against the lessor company to recover damages for injuries sustained to his crops by straying cattle. Justice Brewer, in delivering the opinion of the court, said: "Defendant contends that, where the statute authorizes the lease by one railroad company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and, in support of that doctrine, cites some authorities. To a certain extent this proposition is true. If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road,—matters in respect to which the lessor company could, in the nature of things, have no control,—then the lessee company will alone be responsible; but, when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance,—something connected with the building of the road,—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company. Thus, for instance, in the case at bar the defendant was charged with the duty of placing sufficient cattle guards before it either used this track which it constructed, or permitted any one else to use it; and it cannot divest itself of responsibility for injuries resulting from such omission by leasing its track to some other company. The injury resulted directly from its own wrong, and not from any mere negligence on the part of the St. Louis & San Francisco Railroad Company. It cannot relieve itself by contracting with some other party to discharge its statutory duty. * * * The defendant omitted this duty, and, by the statute, is responsible for all damages sustained by reason of such omission." In Nugent v. Railroad Co., 80 Me. 62, 12 Atl. 797, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg road sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: "Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its roads, station houses, etc., the chartered company cannot, in the absence of statutory exemption, discharge itself of legal responsibility." In Arrowsmith v. Railroad Co., 57 Fed. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of Railway Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employé of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: "It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its employés by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road."

In all cases where a valid lease is found (or, as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employé under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employé of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employé of the operating company by reason of the negligence of a fellow servant, or of want of skill and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But, where injury has resulted to an employé of the operating company by reason of a failure of the lessor to perform its public duty, as in its failure to construct a safe road, as is here charged, the injured employé may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employé and employer, or any relation of contractual privity, exists. As is said in Nugent v. Railroad Co., supra, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company: "Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station house of the defendant, which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant having resulted in a personal injury to the plaintiff, without fault on his part, he is entitled to maintain this action therefor." So, here, the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and track of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it.

As has been indicated, the plaintiff in this case has averred that he was an employé of the defendant corporation. The proofs in this regard disclose that he was in the employ of the Southern Pacific Company. The variance we think to be immaterial. The averment could be eliminated, and a cause of action would still remain. Plaintiff has pleaded and shown to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met with his injury, but that he was there under lawful employment; that, in pursuit of his vocation, he met with an injury occasioned by defendant's defective construction of its roadbed, for which injury the defendant is, in law, responsible. It follows that there is no irreconcilable conflict between the special findings and the general verdict of the jury, and the court should therefore have entered judgment for plaintiff. The judgment is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of plaintiff and appellant, under the general verdict of the jury.

We concur: TEMPLE, J.; McFARLAND, J.

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116 Cal. 84

## GARDNER v. SAMUELS et al. (S. F. 336.)

(Supreme Court of California. Feb. 15, 1897.)

LEASE—CLAIM FOR IMPROVEMENTS—MISJOINDER OF DEFENDANTS—DEMURRER.

1. A demurrer for misjoinder of parties, merely stating that demurrant was improperly joined with the other defendants, is sufficient.

2. Provision in a lease that "it is * * * covenanted and agreed" by and between the parties that the lessee may make improvements, and the lessor, for himself, his heirs, administrators, and assigns, agrees to pay the lessee therefor at expiration of lease, gives the lessee no claim therefor against one to whom the land is conveyed after termination of lease and surrender by the lessee, and no lien on the premises, but merely a personal claim against the lessor.

3. A lessor sued by his lessee for improvements cannot demur for misjoinder of defendants because of joinder of his grantee, against whom no cause of action is stated.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Gardner against Samuels and another. Judgment for defendants. Plaintiff appeals. Reversed.

Henry C. Gesford and H. M. Barstow (Dinkelspiel & Gesford, of counsel), for appellant. F. E. Johnston, for respondents.

HARRISON, J. The plaintiff leased from the defendant Samuels, November 18, 1886, a tract of land in Napa county, for the term of three years from May 2, 1887, and entered into possession of said land at the commencement of the term, and at its expiration, May 2, 1890, surrendered the premises to the defendant. The lease contained the following agreement: "It is further mutually covenanted and agreed by and between said parties that said party of the second part may at any time prior to the going into effect of this lease go upon said premises to make such improvements as he shall deem necessary, and said party of the first part, for himself, his heirs, administrators, and assigns, agrees to pay unto said party of the second part, at the expiration of this lease, for any and all improvements placed upon said premises by said party of the second part, not to exceed the sum of $1,500," with provision for the determination of the value by agreement or by arbitration. In pursuance of this agreement the plaintiff made certain improvements of a permanent nature upon the land, which at the expiration of the term were of the value of $2,200. The defendant Morris became the owner of the land on the 10th day of November, 1891, and since that time has been the owner and in possession thereof, and before he purchased the same had full notice that the plaintiff had made these improvements, and also of the agreement by Samuels to pay him therefor, and of his failure to make such payment. At the expiration of the term Samuels refused to agree with the plaintiff upon the value of the improvements, or to pay him anything therefor, and in April, 1894, the plaintiff requested Samuels, and also the defendant Morris, to submit the determination of their value to arbitration, as provided in the lease, and named an arbitrator therefor, but they each refused either to submit the same to arbitration, or to pay for said improvements. Plaintiff thereupon brought the present action to recover from Samuels the sum of $1,500, and that it be decreed to be a lien upon the land so leased, and for a sale thereof in satisfaction of said lien. The defendants severally demurred to the complaint for want of facts to constitute a cause of action, and also for a misjoinder of parties defendant; each specifying in his demurrer that he was improperly joined with the other. The court sustained the demurrers, and from the judgment entered thereon the plaintiff has appealed.

1. The demurrer was sufficient in form. Each of the defendants distinctly specified therein that the ground of his demurrer for misjoinder of parties defendant was that he was improperly joined with the other defendant. It was not necessary to incorporate into the demurrer an argument in support thereof, or to state therein the reasons why such misjoinder was improper. A demurrer couched in the language of the statute would have been insufficient (O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269); but a demurring party, by designating the defendants who are improperly joined with him, sufficiently calls the plaintiff's attention to his objection to the complaint.

2. The demurrer of the defendant Morris was properly sustained. The agreement of Samuels to pay the value of the improvements was not a covenant which could be enforced against one who purchased the land after the breach of such agreement. There was no covenant on the part of the plaintiff to make any improvements. He was merely given the permission to do so, and the agreement of Samuels was only for the payment of money therefor. Such an agreement is personal, and does not bind the assignee of the reversion. Bream

v. Dickerson, 2 Humph. 126. Section 1466, Civ. Code, declares: "No one merely by reason of having acquired an estate subject to a covenant running with the land is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits." See, also, Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910. Upon the breach of this agreement the plaintiff had merely a right of action against Samuels which was purely personal, and which was not assumed by Morris when he subsequently became the owner of the land. Nor did the agreement of Samuels have the effect to give to the plaintiff a lien upon the land for the security of this payment. It was held in Ecke v. Fetzer, 65 Wis. 55, 26 N. W. 266, in an action of ejectment, that a covenant by which the lessor agreed that at the expiration of the term he would pay for improvements that should be placed upon the land by the tenant during the term, bound an assignee of the lease, "who took the assignment of the lease during the term, and received rent as such assignee during said term," and that the tenant was entitled to retain possession of the leased premises until such payment should be made. This right in the tenant exists, however, not by virtue of a lien on the land for the value of the improvements, but upon the principle that the landlord, having agreed to pay for the improvements, cannot maintain ejectment and compel their delivery until such payment is made. If the tenant surrenders the possession, he cannot afterwards claim a lien thereon as against a subsequent purchaser from the landlord. In Fowler v. Insurance Co., 28 Hun, 195, the trustees of a trust estate made an agreement with their lessee that at the expiration of the term he should be paid for certain improvements which he might make upon the property, but did not bind themselves for its payment, and it was held that, as the trustees made the agreement only in their representative capacity, the trust estate was bound therefor, and the lessee was entitled to have the amount decreed to be a lien upon the trust estate. This was the application of a well-known rule of equity, and differs essentially from the principles governing the present case. The parties could have inserted in their lease an agreement that the value of the improvements should be a lien upon the land to be secured thereby, but their omission to do so implies that such was not their intention, and the plaintiff is therefore deprived of the right to such lien. In the absence of an agreement to that effect, a tenant has no lien upon the leased land for improvements placed thereon under an agreement with the landlord to pay for the same at the expiration of the term. Hite v. Parks, 2 Tenn. Ch. 375; Taylor v. Baldwin, 10 Barb. 582; Coffin v. Talman, 8 N. Y. 465; Beck v. Birdsall, 19 Kan. 550.

3. The complaint sufficiently states a cause of action against the defendant Samuels. It is urged by the respondent, however, that the demurrer of Samuels was properly sustained by reason of the misjoinder of Morris with him as co-defendant. The provision authorizing a demurrer for the misjoinder of parties defendant is taken from the system of equity pleading which formerly prevailed. Under that system such demurrer could be interposed only by the party who was improperly made a defendant. A defendant against whom there was a sufficient complaint could not object that others who had no interest in the subject-matter of the suit were made defendants, unless it also appeared that his interests were affected thereby. Story, Eq. Pl. § 544; Beach, Mod. Eq. Prac. §§ 80, 254; Cherry v. Monro, 2 Barb. Ch. 618. This ground of demurrer is authorized by the Code of Missouri, and it is held in that state that the former rule in equity is to be followed. Ashby v. Winston, 26 Mo. 210. Another rule of pleading prescribed by the Code, which is also taken from the equity system, is the provision of section 379, Code Civ. Proc.: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." The "controversy" here named is the claim for relief made by the plaintiff against the defendants, which he sets forth in his complaint. In the present case this claim is to have the amount of his demand against Samuels for the value of the improvements placed upon the land declared to be a lien thereon, and to have the land sold for its payment. As Morris is alleged to have an interest in the land, he is a necessary party to the determination of such an action, and he cannot be said to be improperly joined as a defendant, even though the complaint does not sufficiently state an affirmative cause of action against him. If the relief sought by a plaintiff by reason of the cause of action as framed in his complaint would render all of the persons named as defendants proper parties to entitle him to such relief, a defendant against whom a sufficient cause of action is stated cannot demur for misjoinder of defendants because the complaint does not sufficiently state a cause of action against another defendant. "It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendants are improperly joined with him in the suit." Cherry v. Monro, 2 Barb. Ch. 627. In an action to foreclose a mortgage the mortgagor cannot demur for the misjoinder of a defendant whose alleged claim does not appear to constitute a lien upon the mortgaged lands, nor can the maker of a promissory note demur to a complaint against him and the indorser for the misjoinder of the indorser because the complaint fails to state facts sufficient to bind the latter. The judgment is reversed, and the court below is directed to overrule the demur-

rer of the defendant Samuels, with leave to him to answer within such time as it may designate.

We concur: VAN FLEET, J.; GAROUTTE, J.

(116 Cal. 111)

## DILLON v. BICKNELL, County Auditor.

(L. A. 236.)

(Supreme Court of California. Feb. 23, 1897.)

STATUTE—REPEAL BY IMPLICATION—COUNTY OFFICERS—COMPENSATION.

1. Pol. Code, § 4109, as amended March 7, 1881 (St. 1881, p. 72), providing that certain county officers shall take office on the first Monday after the 1st day of January succeeding the election, and hold for two years, was repealed by the county government act of 1891 (St. 1891, p. 314, § 60), providing that such officers shall hold till their successors are qualified.

2. Under the county government act of 1891 (St. 1891, p. 314, § 60), providing that certain county officers—whose compensation is fixed at an annual sum—shall hold office from the first Monday after the 1st day of January next succeeding their election till their successors are qualified, such officers are entitled to be paid for the actual time they serve.

3. Such right is not affected by section 221 of said act, which requires the county auditor to draw his warrant on the first Monday of each month for the salary due these officers for the preceding month.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Petition by Henry C. Dillon for a writ of mandamus to compel Charles C. Bicknell, auditor of Los Angeles county, to issue a warrant in favor of petitioner. From a judgment for petitioner, defendant appeals. Affirmed.

J. A. Donnell and Geo. M. Holton, for appellant. M. W. Conkling and H. C. Dillon, for respondent.

HAYNES, C. Plaintiff was elected district attorney of Los Angeles county, at the general election in November, 1892, and entered upon his said office on the 2d day of January, 1893, that being the first Monday after the 1st day of January; and his term of office expired on the 7th day of January, 1895, that being also the first Monday after the 1st day of January of that year. The salary was $4,000 per annum, and he received from the salary fund of the county $8,000, which was paid him in monthly installments of $333⅓ per month, by warrants drawn by defendant upon the county treasurer, as provided by section 221 of the county government act of 1891 (St. 1891, p. 419). Plaintiff, claiming that he served as district attorney five days more than two official years, demanded of the defendant, as such auditor, that he draw a warrant upon the county treasurer for his salary for said five days, amounting to $54.50. The auditor refused to issue said warrant, and the court below, upon the petition of the plaintiff, rendered judgment directing a peremptory writ of mandate to issue as prayed for by plaintiff, and from said judgment the defendant appeals.

Article 20, § 20, of the constitution provides as follows: "Elections of the officers provided for by the constitution, except at the election in the year 1879, shall be held on the even numbered years next before the expiration of their respective terms. Terms of such officers shall commence on the first Monday after the first day of January next following their election." Section 4,109 of the Political Code, as amended March 7, 1881 (St. 1881, p. 72), is as follows: "All elective county, city and township officers, except superior court judges, superintendents of schools and assessors, shall be elected at the general election to be held in the year 1882, and at the general election to be held every second year thereafter, and shall take office on the first Monday after the first day of January next succeeding their election, and shall hold office for two years. The years that said officers are to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and including the first Monday after the first day of January of the next succeeding year; provided," etc. It is conceded that, if that section of the Political Code is still in force, it is conclusive as to what constitutes the official year, and that under its provision the demand made by the plaintiff was unauthorized. It is contended, however, that said section has been repealed, and whether it has been repealed or not is, therefore, the controlling question.

The county government act of 1883 (Deering's Pol. Code, Append. p. 850, § 60) is as follows: "The elective county and township officers (except superintendent of public schools and assessors) shall be elected at the general election to be held in November, 1884, and every two years thereafter, and shall take office at 12 o'clock meridian on the first Monday after the first day of January next succeeding their election. * * * All officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified." The county government act of 1891 (St. 1891, p. 314, § 60) contained the same provision as to the time when officers should enter upon their office, and contained also the provision that all officers elected under it should hold office until their successors are elected or appointed and qualified. We think it clear that these subsequent acts repealed section 4109 of the Political Code as amended March 7, 1881, though none of them contained any provision expressly repealing that section. Said section 60 is a revision of said section 4109. It covers the same ground, with the exception of the clause defining how the official year shall be computed, but changes a number of its provisions, the more important of which are the following: The old section provided that the election shall be held "at the general election to be held in the year," etc. The new act inserted the word "November" in that sentence, thus changing the time of the election from September to November. In the clause in the old act providing that the officer shall take office on the first Monday after the 1st day of January next succeeding his election, and shall hold office for two years, the words "twelve o'clock meridian" were inserted, and instead of the provision that he should hold office for two years it was provided "that all officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified," thus repeating the rule fixed by section 879, Pol. Code, for the termination of his incumbency of the office. This change in the section, we think, conclusively indicates that the new section was intended to be a revision of the former section, and preserved all of its provisions that were intended to be retained.

We think the rule was correctly stated by the learned judge of the court below that: "Wherever it clearly appears that the intention of the legislature by the later act is to revise the entire subject-matter of the former, the subsequent act operates as a repeal of the former, although it contains no precise words to that effect." Treadwell v. Yolo Co., 62 Cal. 564; Charnock v. Rose, 70 Cal. 192, 11 Pac. 625; Hanley v. Sixteen Horses, 97 Cal. 183, 32 Pac. 10; Ex parte Benjamin, 65 Cal. 310, 4 Pac. 23. In Sedgwick on Statutory Law (page 124) it is said: "Even if a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the later statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act." Appellant contends, however, that other provisions of the county government act of 1891 are inconsistent with, and do not justify, the conclusion of the court below, and cites the following section of that act: "Sec. 221. The salaries of such officers named in this act, as are entitled to salaries, shall be paid monthly out of the county treasury; and it shall be the duty of the auditor, on the first Monday of each and every month, to draw his warrant on the county treasurer in favor of each of said officers for the amount of salary due him under the provisions of this act for the preceding month." The above section was also incorporated in the county government act of 1893. Section 117 of the county government act of 1891 (St. 1891, p. 323) provided as follows: "All warrants issued by the auditor during each year, commencing with the first Monday after the first day of January, must be numbered consecutively, and the number, date and amount of each, and the name of the person to whom payable, and the purpose for which drawn must be stated thereon. * * *" We do not think these sections sustain appellant's construction. Said section 221 requires the auditor to draw his warrant on the first Monday of the month in which the term of office expires; yet it may happen, and does occasionally happen, that the first Monday in January is the 1st day of January, and the term of the incumbent does not in that case expire until the second Monday; and in that case, upon the theory of appellant that the month for which the warrant is drawn is necessarily from the first Monday of the preceding month to the first Monday of the succeeding month, it would clearly appear that the incumbent does not, under his theory, always receive pay for the full time for which he serves, whether his successor is elected and qualified on the day fixed by the statute or not. Indeed, under the statute fixing the commencement and termination of the terms of county officers it can never happen that the term consists of precisely two years, it being sometimes more and sometimes less; and therefore the provision fixing the compensation at an annual sum should be construed as fixing the rate of compensation to be paid for the time the officer actually serves. This construction will do exact justice between the preceding and succeeding officers, and not increase the burden to be borne by the people. The judgment appealed from should be affirmed.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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5 Cal. Unrep. 612

## CITY AND COUNTY OF SAN FRANCISCO v. GROTE. (S. F. 379.)[1]

(Supreme Court of California. Feb. 23, 1897.)

EJECTMENT—TITLE TO MAINTAIN.

A city cannot maintain ejectment for recovery of possession of a street dedicated to the public by user, without showing ownership in the fee.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the city and county of San Francisco against Ellen Grote. Judgment for plaintiff. Defendant appeals. Reversed.

T. Z. Blakeman, for appellant. Harry T. Creswell, for respondent.

HAYNES, C. This is an action in ejectment, brought by the city and county of San Francisco against Ellen Grote to recover the possession, for street purposes, of a small strip of land alleged to be a portion of a public street, dedicated to the public as such. Said alleged street is known as "Garden Avenue," and extends through a single block from Devisadero street to Broderick street, between Geary and Post streets, and its alleged width is 25 feet. Defendant's lot lies next to Broderick street, with its front on Geary, and has a depth of 137½ feet, and the demanded premises consists of a strip 12½ feet wide across the rear end of her lot, and which, plaintiff contends, forms part of said street or avenue. The action was tried by the court without a jury, and findings and judgment were for the plaintiff. The defendant appeals from the judgment, and the facts are brought up by a bill of exceptions.

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[1] Reversed in banc. See 52 Pac. 127, 120 Cal. 59.

The record presents three questions: (1) Does the evidence show a dedication of the strip of land in dispute to the use of the public for street purposes? (2) If there was such dedication, was there an abandonment of that portion of the street? (3) Can the city and county of San Francisco maintain ejectment for the recovery of the possession of a public street without showing ownership in the land in fee? If the third question above stated should be answered in the negative, the consideration of the first and second questions becomes unnecessary, and we shall therefore consider that question first.

It is conceded by respondent that the defendant owns the fee in the demanded premises, nor is there any question that, if the said street is a public highway, it is such by dedication arising from the acts and acquiescence of the property owners along the same, and its acceptance, shown by the use thereof by the public. In other words, there has been no conveyance by the property owners of the land alleged to be covered by the street, nor has title to the easement been acquired by condemnation or other legal proceedings, but the right or title of the plaintiff and of the public rests solely in parol. Assuming that it is a street, and that the demanded premises is a part thereof, all the right or interest that the public has therein is an easement consisting in the right to use the same for the ordinary purposes of a highway; and such easement is an incorporeal hereditament. "By the common law and the general rule an ejectment will not lie for anything where an entry cannot be made, or of which the sheriff cannot deliver possession. It would follow, therefore, by this rule, that ejectment is only maintainable for corporeal hereditaments. * * * Things that lie merely in grant are not the subjects of ejectment, because these being incorporeal are in their nature invisible, and therefore not capable of being delivered in execution." Tyler, Ej. 37. "An action of ejectment will not lie against one claiming an easement in a parcel of land, or to his right to enjoy the same; nor will a writ of entry. But the owner in fee of land may maintain a right of entry to establish his title to the freehold against one having a prescriptive right of way over the same." Washb. Easem. (4th Ed.) 740. Newell, Ej. p. 17, lays down the following test as to the cases where ejectment is the only proper remedy: "(1) The thing claimed must be a corporeal hereditament; (2) a right of entry must exist at the time of the commencement of the action; and (3) the interests must be visible and tangible, so that the sheriff may deliver the possession to the plaintiff under the writ of possession issuing out of the court." The same author, at page 53, enumerates a large number of easements, among which is a "right of way," "a right to a road," which are "in legal consideration not tangible property, and for the recovery of which the action of ejectment will not lie." In Payne v. Treadwell, 5 Cal. 312, it was said: "The action of ejectment is merely a possessory action and is confined to cases where the claimant has a possessory title; that is to say, a right of entry in the lands." If it be true that an easement is an incorporeal hereditament, and that such hereditaments lie in grant, because not capable of livery of seisin, it is difficult to understand how there can be an ouster or a withholding of the possession, or how manual possession could be delivered by the sheriff.

This question, however, is not a new one in this state. In Wood v. Turnpike Co., 24 Cal. 474, it was held that ejectment does not lie to try the right to a road or right of way. In that case the plaintiff claimed title to the Truckee turnpike road (a toll road) under a conveyance made by the sheriff pursuant to an execution sale thereof, and the action was brought by said purchaser to recover possession of the road. The court said: "The plaintiff acquired nothing by the purchase of the road to which the action of ejectment has any remedial relations. 'Road' is a legal term, strictly synonymous with the word 'way,' and in the complaint and throughout all the title papers of the plaintiff their identity is strictly recognized; and the 'way' is an easement, and consists in the right of passing over another man's ground. It is an incorporeal hereditament; a servitude imposed upon corporeal property, and not a part of it. It gives no right of possession of the land upon which it is imposed, but a right merely to a party in whom the way is vested to enjoy the way. * * * A deed of a way or a right of way would pass to the grantee no title to or interest in the land. * * * But it is well settled that an action of ejectment will not lie in favor of a party to try his right to enjoy an easement, nor will it lie against one claiming an easement in land to try his right to enjoy it. And the reason is obvious,—the very subject matter of controversy is incorporeal. It is for that reason that an easement 'lyeth in grant and not in livery.' It is for that reason that the owner of a way cannot be disseised or otherwise ousted from it. He can only be disturbed or obstructed in his enjoyment, and for such injury the remedy is by action on the case at common law, or by bill in equity." Pages 487, 488. Wood v. Turnpike Co., supra, was cited and followed in City of San Francisco v. Calderwood, 31 Cal. 585, 590, where it was held that a deed of a way or right of way would pass to the grantee no title to or interest in the land; that it is an incorporeal hereditament and servitude imposed upon corporeal property, and not a part of it, and gives no right to possess the land upon which it is imposed.

In Fitzell v. Leaky, 72 Cal. 482, 14 Pac. 200, it was again said: "The owner of an easement upon the land has no right of entry, nor has he any right to possess the land as such."

There are several cases in this state which are claimed to be inconsistent with those above cited, and which should be briefly noticed. The case of City of San Francisco v. Sullivan, 50 Cal. 603, was an action of ejectment to recover a portion of a street upon which it was alleged the defendant had entered. The complaint, however, alleged that the city and county of San Francisco was "the owner thereof, subject to the right of its citizens to pass and repass over the same." The court said: "We are of the opinion that the force of the allegations that the plaintiff here is the owner and entitled to the possession of the premises sued for is not impaired or affected by the further allegation that the public has an easement therein as a public street. * * * The existence and enjoyment of the easement is entirely compatible with the seisin of the plaintiff as being the owner of the fee." This case, so far as we have quoted the opinion of the court, clearly sustains the general doctrine that the owner of the fee subject to an easement may maintain ejectment against an intruder who asserts a right inconsistent with the easement, and is not inconsistent with the cases we have above cited. It is true, the court quoted a paragraph from Dillon's Municipal Corporations, the first part of which is directly to the point in the case there before the court. The latter part of the quotation has no application to that case. This extract, however, we shall have occasion to notice in another connection. The case of City of Visalia v. Jacob, 65 Cal. 434, 4 Pac. 433, was also an action of ejectment for a portion of a public street. The demurrer to the complaint was sustained, and judgment rendered for the defendant. The complaint, however, in that case alleged that the plaintiff was "seised of and entitled to possession of the land, the same being a portion of a public street duly laid out and dedicated to the public use." This allegation is equivalent to an allegation that the fee of the land was in the city. The court in that case also cited Dillon on Municipal Corporations and City of San Francisco v. Sullivan, supra. It would appear from the language of the complaint that the defendant demurred on the ground that the complaint showed the cause of action was barred by the statute of limitations, and the opinion principally discusses the question whether title to the land dedicated to the public as a street could be acquired by adverse possession.

Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032, is also cited by respondent. That case, however, is clearly distinguishable from the case at bar. In that case the plaintiff was granted by congress a right of way over the public lands, 400 feet in width, for the purposes of a railroad. The action was ejectment to recover from defendant a portion of said right of way occupied by him. The court in its opinion referred to the case of Wood v. Turnpike Co., supra, and distinguished it from the case then under consideration. The grant of the right of way to the railroad company was necessarily exclusive as to the right of occupancy. Quoting from Railroad Co. v. Benity, 5 Sawy. 118, Fed. Cas. No. 2,551, it was said: "It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy; but, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under a grant of right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons." Page 285, 86 Cal., and page 1033, 24 Pac. This case, therefore, does not conflict with the views we have above expressed. In the case of City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, and 23 Pac. 1085, and the case of City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235, the action was ejectment for land alleged to be a portion of a public street. In neither of these cases, however, was any question made or considered in relation to the form of the action. But for the quotation of the passage from Dillon on Municipal Corporations in the case of City of San Francisco v. Sullivan, supra, and City of Visalia v. Jacob, supra, there is no real conflict in the decisions in this state upon the subject under discussion, and in neither of those cases was it necessary to decide the question here involved, inasmuch as in both cases it appeared that the fee in controversy was in the plaintiff.

The great consideration which should be given to all propositions of law stated by the learned author above mentioned requires that some notice should be given it. Section 662 of said work is as follows: "A municipal corporation entitled to the possession and control of streets and public places may, in its corporate name, recover the same in ejectment. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such action against the adjoining proprietor, or whoever may wrongfully intrude upon, occupy, or detain the property. And, where the adjoining proprietor retains the fee, the courts have overcome the technical difficulties by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable, right." I have examined all the American cases cited by the learned author in the note to said section. The New Jersey cases, it may be conceded, sustain the text, though it will be observed that two of the five cases cited were in equity. Of the cases at law, in Den v. Dummer, 20 N. J. Law, 86, the land in question was dedicated by the owner of the town site upon a recorded plat for a public market ground. Trustees of M. E. Church v. Mayor, etc., of Hoboken, 33 N. J. Law, 13, was to recover possession of land dedicated upon the original town plat as a public square. The third case—Hoboken Land & Improvement Co. v. Mayor, etc., of Hoboken, 36 N. J. Law, 540—involved the right to a street, which, by the original plat, extended back from high-water mark on the Hudson river. The improvement company—the plaintiff in error, and the defendant below—succeeded to the ownership of the land platted so far as it remained unsold, and was granted a charter by the legislature to fill in land covered by water in front of their property, and construct wharves, etc., but it was provided "that it should not be lawful for the company to fill up any such land covered with water * * * in front of the lands of any other person owning down to the water without the consent of such person in writing." It was held that the city could recover, in ejectment, the street to the new high-water line. City of Winona v. Huff, 11 Minn. 119 (Gil. 75). In a town plat, made under the statute, certain squares mentioned in the certificate to the plat were declared to be for "public use and benefit forever." It was held as to such dedication the plat itself operates as a conveyance to the public, and a claim by the public is unnecessary; that under a statutory dedication the fee simple to the land does not pass, but only such an estate or interest in the land as the trust requires. In the opinion (page 136, 11 Minn. [Gil. 85]) the court said: "The action of ejectment is a mixed action, and the form of remedy by which a person is entitled to recover possession of real property in fee, for life, or for years. It does not lie where the thing to be recovered is incorporeal. Saund. Pl. & Ev. tit. 'Ejectment,' p. 446. The purpose for which the action is brought is not to try the mere abstract right to the soil, but to obtain actual possession. Jackson v. Huntingdon, 6 Pet. 442. For a mere easement, perhaps, the action will not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie. Chit. Pl. 188, 189; Jackson v. Buel, 9 Johns. 298. If, therefore, the plaintiff has an interest in the land and the right of possession, this action may be maintained." It was further held by the court in that case that dedication of lands for different purposes may require different interests or estates to support them. As, for instance, a dedication of land for public buildings, or a burying ground, or a public square, which may be inclosed, improved, and ornamented for purposes of pleasure, or amusement, or recreation, or health. In Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797, the action was to recover the possession of a square marked "College Square." It was held that there was a dedication of College Square to the public, with a right to the use thereof for the purposes of an institution of learning so long as the user continued; the title remaining in the public as represented by the municipal corporation for that use, and ejectment will lie to remove any person in unlawful possession. In City of Hannibal v. Draper, 15 Mo. 634, it was held that the memoranda, "Lots numbered two, three, four, in block twenty-six, is intended for church grounds," and as concerning the lots were written the words "church ground," appearing upon a duly-acknowledged plat of the town of Hannibal, it was sufficient, under the act concerning plats, towns, and villages, to vest the fee in the county for public use. In City of California v. Howard, 78 Mo. 88, the action was ejectment for a public street. It was held: "A city invested by law with the title in fee, and the right and control over all public streets, may maintain ejectment for land dedicated for a street." In City of Chicago v. Wright, 69 Ill. 318, 322, the court quoted the above extract from Dillon on Municipal Corporations. That case, however, was a bill in equity, brought by Wright against the city of Chicago and the chief of police, to prevent them from removing certain fences from lands claimed by the city to be a public street. The only ground suggested by the author upon which ejectment is sustained in such cases is "by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable, right."

If it be conceded that where the dedication appears of record, as by recording a plat with streets delineated thereon, and the sale of lots described as bounded thereby, and especially where the municipality has expressly accepted the dedication, the action of ejectment may be maintained,—a proposition we neither concede nor decide,—the case here is very different. There was no dedication by filing a plat showing the existence of any street through the center of the block. Some of the conveyances described the lot as abutting on "an alley," but without designating the width of the alley. Defendant's lot extended to the center of the block, and the conveyance from plaintiff was silent as to an alley. If there was any dedication of the avenue or alley, it was by the individual owners of the lots. There was not, except as to irregular portions, any reservation in the deeds executed by the city of the land covered by the alleged street, and as to the land not conveyed no purpose was expressed in the conveyances; and whether there was any dedication rested wholly upon parol testimony of the acts and declarations of the respective owners, and the use of the way by the public. We think that, whatever may be the rule in cases where the evidence of dedication may be shown from the public records, such evidence of dedication as was given in this case will not support an action of ejectment. It is undoubtedly the general rule that in an action of ejectment legal title to land cannot be proved by parol, and, where not permitted by statute, equitable defenses thereto cannot be heard. The judgment appealed from should be reversed, and the action dismissed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to dismiss the action.

116 Cal. 120

## TOMPKINS et al. v. MONTGOMERY. (S. F. 799.)

(Supreme Court of California. Feb. 23, 1897.)

APPEALS—TRANSCRIPT—BONDS—JUSTIFICATION OF SURETIES—SUPERSEDEAS—DISMISSAL.

1. Notice of motion to dismiss an appeal from a judgment for failure to file a transcript having been given, the transcript was afterwards filed, and on the same day notice was given of an amendment of the notice of motion by including a motion to dismiss also an appeal from an order denying a new trial. *Held*, the transcript being sufficient for the latter appeal, that the amendment did not take effect as of the date of the original notice.

2. When the transcript is filed on the day on which notice is given to dismiss the appeal for failure to file a transcript, the burden is on movant, under Sup. Ct. Rule 5, to show that the notice was given before the transcript was filed.

3. A few days after appealing, appellant again appealed from the same judgment, and afterwards filed a transcript sufficient in substance. *Held* that, though the only notice of appeal in the transcript was the notice of the second appeal, the transcript was a "sufficient answer" (Sup. Ct. Rule 5) to a subsequent motion to dismiss the first appeal for failure to file a transcript.

4. The failure of the sureties in an undertaking on appeal to justify does not deprive the supreme court of jurisdiction so as to permit another appeal from the same judgment.

5. The fact that the sureties in an undertaking to stay execution on the judgment appealed from failed to justify before the county clerk does not preclude appellant from applying to the supreme court for leave to file another such undertaking. Hill v. Finnigan, 54 Cal. 493, followed.

6. Where a party appealed from a judgment and an order denying a new trial, his right to have execution stayed is not impaired by dismissal of the appeal from the judgment.

In bank. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by one Tompkins and others against one Montgomery. From a judgment for plaintiffs, and an order denying a new trial, defendant appealed, and, after the failure of his sureties to justify, he again appealed. On motions to dismiss and on application for leave to file an undertaking to stay execution. Appeals from the judgment and second appeal from the order denying a new trial dismissed. Application granted.

E. M. Gibson and Welles Whittemore, for appellant. A. A. Moore, for respondents.

HARRISON, J. The defendant served and filed a notice of appeal from the judgment and from the order denying a new trial December 3, 1896, and on December 5th filed an undertaking on appeal in the sum of $300, and also an undertaking to stay execution upon the judgment. The plaintiffs excepted to the sufficiency of the sureties, and on December 18th, upon notice that they would justify on that day before the county clerk, the sureties appeared, and, after examination, failed to justify, and were rejected by the clerk. December 21st the defendant served upon the plaintiffs and filed with the county clerk another notice of appeal from the judgment and from the order denying a new trial, and on the 23d of December filed a sufficient undertaking on appeal in due form of law. January 18th the respondents gave notice of a motion to dismiss the appeal from the judgment on the ground that no transcript of the record on appeal had been filed in this court. January 20th the appellant filed with the clerk of this court a transcript containing the judgment roll, statement on motion for a new trial, order denying a new trial, and a copy of the notice of appeal which was filed December 21st. On the same day the respondents gave notice to the appellant that they amended their notice of motion to dismiss the appeal by including therein a motion to dismiss the appeal from the order denying a new trial. February 4th the respondents gave notice of a motion to dismiss the appeals taken December 21st, upon the ground that at the time said notice of appeal was served and filed an appeal from the judgment and order was pending in this court and undetermined. February 6th the appellant made application for leave by this court to file an undertaking sufficient to stay execution upon the judgment appealed from. The several motions and applications have been heard and submitted together.

1. At the time the notice of the motion to dismiss the appeal from the judgment was served upon the appellant there had been no transcript filed in this court, and under the provisions of rule 5 the respondents are entitled to have this motion granted.

2. The motion to dismiss the appeal from

the order denying a new trial cannot be regarded as having been given until the notice by the respondents of their amendment to their motion, and, as the transcript was filed on that day, and the respondent has not shown that his notice was given prior to its filing (Hoyt v. Railroad Co., 87 Cal. 610, 25 Pac. 160, 1066), it must, under the same rule, be considered "a sufficient answer to the motion." It is contended by the respondent that, as the only notice of appeal which is contained in the transcript is that which was given December 21st, the transcript so filed cannot be regarded as an answer to the motion to dismiss the appeal which was taken December 3d. The transcript, however, purports to contain a record of all the proceedings of the superior court which are sought to be reviewed on the appeal, and is therefore sufficient to avoid a dismissal under rule 5. Hill v. Finnigan, 54 Cal. 311; Paige v. Roeding, 89 Cal. 69, 26 Pac. 787; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103. The most that can be claimed by the respondents is that there was a defect in the transcript, which could be cured under rule 14 upon a suggestion of a diminution of the record; and by rule 15 any technical objection to the record in civil cases, which might be so corrected, must be notified to the appellant, who is allowed until the hearing of the cause in which to present the additional record. Woodside v. Hewel, supra.

3. The notice of appeal which was served and filed on the 21st of December was unauthorized. At that time the appeal which was taken December 3d was pending in this court, and there was no judgment or order pending in the superior court from which an appeal could be taken. The failure of the sureties to justify upon the $300 undertaking did not render the appeal ineffectual, or take from this court the jurisdiction of the cause which was given by the appeal of December 3d. Schacht v. Odell, 52 Cal. 449; Hill v. Finnigan, supra; Brown v. Plummer, 70 Cal. 337, 11 Pac. 631.

4. The appellant is not precluded from applying to this court for leave to file an undertaking to stay execution of the judgment by reason of the failure of the sureties upon the former appeal to justify before the county clerk. A similar question was presented in Hill v. Finnigan, 54 Cal. 493, and it was held that an undertaking to stay execution may be filed after an appeal has been taken, but that, as the Code contemplates but one proceeding in the court below for that purpose, if the appellant has been unable to secure such stay by reason of the failure of his sureties to justify, this court has authority to permit such undertaking to be filed after an appeal has been taken. The right of the appellant to have the execution stayed pending the appeal from the order denying a new trial is not impaired by the fact that the appeal from the judgment is dismissed. Fulton v. Hanna, 40 Cal. 278. The appeals taken December 21, 1896, and also the appeal from the judgment taken December 3d, are dismissed. The motion to dismiss the appeal from the order denying a new trial is denied. The application of the appellant for leave to file an undertaking to stay execution upon the judgment is granted, and upon the sureties in such undertaking justifying before the chief justice of this court, upon notice to the respondents, the said undertaking may be filed, and thereupon the execution of the judgment shall be stayed until the determination of the appeal.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

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116 Cal. 116

## CARVER v. STEELE et al. (S. F. 258.)

(Supreme Court of California. Feb. 23, 1897.)

RIGHTS OF JUNIOR MORTGAGEE—FORECLOSURE OF SENIOR MORTGAGE—RELEASE OF INDORSERS ON NOTE.

1. A junior mortgagee does not discharge indorsers on his mortgage note by failing to set up and foreclose the mortgage in a suit to foreclose the senior mortgage, to which he was made a party.

2. Code Civ. Proc. § 726, providing that there can be but one action on a mortgage debt, which must proceed first against the security itself, does not cause a junior mortgagee, who made default in a suit to foreclose the senior mortgage, to lose his remedy against the indorsers of his mortgage note, though he may have thereby lost his remedy against the maker.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Minnie A. Carver against S. B. Steele and another. Judgment for defendants, and plaintiff appeals. Reversed.

William F. Gibson, for appellant. Warren Olney, for respondents.

BRITT, C. On March 18, 1889, one Staples borrowed of one Montgomery a sum of money. To secure its repayment, Staples and S. B. Steele executed their promissory note, payable in 90 days, to E. W. Steele, who indorsed the same to Montgomery. As between Staples and the Steeles, they were sureties for him in this transaction. As further security for the loan, Staples and his wife executed to Montgomery a mortgage, in form a bargain and sale deed, of a tract of land which was subject to a prior mortgage in favor of John and Louisa Bauerle. Finding that he would be unable to pay said note when due, Staples agreed with Montgomery for an extension of time of payment, and on May 27, 1889, pursuant to such agreement, he executed to Montgomery a new note for the same sum, payable August 27th after date, which was indorsed by the Steeles. Thereupon the first note was surrendered and canceled. Staples entered into no new express engagement relative to the mortgage, though the court found an "understanding" that it should secure the new note. February 16, 1892, John and Louisa Bauerle commenced an action for the foreclosure of their prior mortgage against said land, making Montgomery a party defendant. He made default, and on October 31, 1892, the land was sold under judgment of foreclosure in that action to satisfy the debt due the Bauerles, and in due time a sheriff's deed was issued to the purchaser. Subsequently to this judgment, Montgomery assigned the said note of May 27, 1889, to the plaintiff here, Minnie A. Carver, who brought the present action to recover the amount thereof from E. W. and S. B. Steele as indorsers. The defense—sustained by the court below—is that Montgomery discharged Staples, the maker of the note, and consequently the indorsers, by failure to set up and foreclose his junior mortgage in the suit brought by the Bauerles to enforce their prior lien.

Conceding the point contended for by respondents, though without intimating any opinion on the subject, that the mortgage continued to be a security for the payment of the renewed note in the hands of Montgomery at the time of the Bauerle foreclosure, we yet fail to discern that he was under legal compulsion to assert the same in order to hold the indorsers. In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser; even though his passivity in this regard may result in barring his remedy against the original debtor. Whiting v. Clark, 17 Cal. 407; Bull v. Coe, 77 Cal. 54, 60, 18 Pac. 808. Accordingly the rule is that the creditor loses no rights against the indorser, whose liability has become fixed, by simple failure to enforce his lien against property mortgaged for security of the debt. Bank v. Wood, 71 N. Y. 405; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505; Fuller v. Tomlinson, 58 Iowa, 111, 12 N. W. 127; Coleb. Coll. Sec. § 241, and cases cited. It is a familiar provision of our statutes that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be first directed to the exhaustion of the security (Code Civ. Proc. § 726); and it is the theory of respondents that in virtue of this section the effect of Montgomery's default in the Bauerle suit was to preclude him from maintaining any personal action against Staples for the recovery of his debt, citing Brown v. Willis, 67 Cal. 235, 7 Pac. 682, where it was so held; and hence that the maker being released the indorsers are released. Admitting that Brown v. Willis was correctly decided, it does not reach respondents' case. Their contract to pay Montgomery was not the same as that of Staples. "The promise of the maker of a note is one thing and the promise of an indorser is another," and their promise was not secured by the mortgage held by Montgomery. Vandewater v. McRae, 27 Cal. 596, 603. And, as the authorities referred to above show, the loss of personal remedy against the maker, or of the lien upon the mortgaged property, following as a consequence of mere inaction on the part of the holder, is of no moment in the case. The court therefore erred in holding that the indorsers had been released, and the judgment and order appealed from should be reversed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

116 Cal. 124

## KENNEDY & SHAW LUMBER CO. v. DUSENBERY et al. (S. F. 343.)

(Supreme Court of California. Feb. 25, 1897.)

Enforcing Lien for Material—Consolidation of Actions—Nonsuit of One Claimant—Findings and Judgment after Nonsuit—Default Judgment.

1. Where several suits to enforce liens were consolidated, and one plaintiff was nonsuited as to the defendant owners only, it was not error to render judgment that, as against the owners, such plaintiff should take nothing, and pay costs; since, after the nonsuit, he remained a party as against the other claimants, and they were entitled to have his claim to a portion of the contract price eliminated.

2. Nonsuiting one claimant in a consolidated suit to enforce liens for materials, in favor of the defendant owners only, does not affect his right to judgment against the contractor who had made default, as to such claimant's petition, before the nonsuit.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Kennedy & Shaw Lumber Company against Dusenbery and others to enforce a mechanic's lien. From a judgment entered after a nonsuit, plaintiff appeals. Affirmed.

William H. Jordan (H. M. Barstow, of counsel), for appellant. Napthaly, Freidenrich & Ackerman, W. H. Mahony, Stafford & Stafford, Fisher Ames, A. D. D'Ancona, W. C. Graves, T. J. Shackleford, E. H. Wakeman, and C. H. Herrington, for respondents.

HARRISON, J. Nine actions for the foreclosure of certain mechanics' liens, of which one was by the appellant, were commenced in the superior court, and, by the order of the court, consolidated, and thereafter tried. The plaintiffs in the several actions were material men, and claimed liens upon certain buildings of the defendants Dusenbery & Stencel for materials which had been furnished by them to one Green, by whom the building had been constructed under a contract therefor with

Dusenbury & Stencel. The defendant Green was a defendant in the several actions, but his default for want of appearance was entered in the action brought by the appellant. A nonsuit was granted against the appellant, in behalf of the defendants Dusenbery & Stencel. Findings of fact were thereafter made, and judgment rendered in favor of the other claimants, from which this appeal has been taken upon the judgment roll without any bill of exceptions.

It is recited in the findings that "the defendants Dusenbery & Stencel, at the close of the evidence introduced in support of the claim of lien of plaintiff the Kennedy & Shaw Lumber Company, moved for a nonsuit against said plaintiff, which motion was granted." No exception was taken to this ruling of the court, and we must assume that, upon the evidence before it, the nonsuit was properly granted. It does not appear that any evidence was afterwards presented to the court, and, as the appellant was nonsuited, there was no occasion for any findings upon the issues made upon the averments in its complaint. In its findings of fact, the court finds that, during the construction of the building the appellant furnished to the contractor certain lumber, which was used in the construction of said building, "but the evidence fails to show the quantity of lumber or the reasonable value of the lumber which was furnished," and, in its conclusion of law, finds that the appellant is not entitled to any judgment. It is contended by the appellant that it was error for the court, after having nonsuited it, to make these findings of fact, and render the judgment against it.

Upon the consolidation of the several actions, the plaintiffs therein became actors in the suit against each other, as well as against the owners, and each was entitled to reduce or avoid the lien of either of the others by any evidence that would have that effect. The nonsuit of the appellant was granted only in favor of the defendants Dusenbery & Stencel, and the judgment from which the appeal is taken merely determines that the appellant shall take nothing as against them, and that they shall have judgment against the appellant for their costs. After the nonsuit had been granted in favor of the owners, the appellant still remained a party to the consolidated action as against the other plaintiffs in the several actions, and the judgment which was finally entered is in the form which is proper to be entered upon a nonsuit. The foregoing statement in the findings may be treated as a reason for the order granting the nonsuit, but it does not strengthen or invalidate the judgment which was entered in the action. Neither the findings nor the judgment entered thereon purport to determine any right of the appellant, as against the contractor, but simply to determine that, as against the owners, the appellant is not entitled to a lien, and consequently is not entitled, as against the owners or the other lien claimants, to any portion of the unpaid amount of the contract price.

As the nonsuit was granted in favor of only the defendants Dusenbery & Stencel, it did not affect the default of the contractor that had been previously entered, or the right of the appellant to the judgment authorized by that default. Unless, however, the plaintiff established a lien upon the property, it was not entitled to a judgment against the owners for the unpaid amount of the contract price. Whatever remained of this amount after satisfying the other liens was a simple debt of the owners to the contractor, and they could not be directed in this action to pay it to the appellant.

The provision in the decree giving to the owners judgment against the appellant for their costs is not on its face erroneous. It does not appear that any costs were taxed, and no amount is named in the judgment. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J

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116 Cal. 146

## PEOPLE v. BUCKLEY. (Cr. 76.)

(Supreme Court of California. March 1, 1897.)

CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—APPEAL—BILL OF EXCEPTIONS—ELECTIONS—ALTERING RETURNS—EVIDENCE.

1. When an exception is that the evidence failed to show that defendant committed the offense charged, the state must place in the bill of exceptions at least some of the evidence, if any there was, showing participation by defendant.

2. When, however, the only evidence of defendant's guilt consisted in the comparison of handwriting by the jury, it was sufficient for the state, in response to an exception to the sufficiency of the evidence, merely to specify, in the bill of exceptions, of what the evidence consisted; since it could not incorporate such evidence into the bill, or provide fac similes of the writings. Garoutte, J., dissenting.

3. In the absence of evidence of motive for altering election returns, and of opportunity for doing so, a conviction was not sustained merely by a comparison by the jury of the few words and figures alleged to have been altered, with the same words and figures written by defendant under abnormal conditions.

4. Information was filed December 27th, and defendant was arraigned January 4th, and demurred on the 11th. Demurrer was argued the 18th, and overruled the 25th, and defendant then pleaded not guilty. Case was called for trial February 12th, and defendant obtained a continuance of one day, but the trial did not occur until March 18th. *Held*, that defendant was entitled to a dismissal under Pen. Code, § 1382, enacted pursuant to the constitution, providing that the prosecution shall be dismissed, unless good cause to the contrary be shown, if a defendant whose trial has not been postponed at his own instance is not brought to trial within 60 days from filing of information. McFarland and Harrison, JJ., dissenting.

5. The mere statement of the judge, on denying the motion to dismiss, that during the time of delay the court had been wholly occupied with other cases, does not show good cause for the delay.

6. Nor was it good cause that a material

witness for the state was absent during the period of delay, where no diligence was shown to procure his attendance.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Jerome A. Buckley was convicted for altering election returns, and appeals. Reversed.

John O'Byrne and J. J. Guilfoyle, Jr., for appellant. Atty. Gen. Fitzgerald, Chas. H. Jackson, and Wm. S. Barnes, Dist. Atty., for the People.

TEMPLE, J. In this case, the department having failed to agree upon a judgment, a reargument was had in bank. The defendant was a member of the board of election, in the Tenth precinct of the Thirty-Fifth assembly district, in the city and county of San Francisco, at the general election of 1894. The information charges that at such election the defendant and one L. M. Martinet altered the official returns, and returned and caused to be received as true and official returns certain false and fraudulent tally lists, etc. As presented here the transcript contains no evidence tending to show guilt in the defendant. It would appear that the only inculpating evidence before the jury consisted of the comparison by the jury itself of certain handwriting, proven to be that of the defendant, with the altered portions of the tally lists. The tally lists are not in the record in any form, and neither the original nor any fac simile of either paper is presented here. The point is made that the evidence does not sustain the verdict. Of course, since the only evidence consisted in the comparison of handwriting by the jury, the record here does not show whether there was any probative force in the evidence. A motion for a new trial was made, on the ground of the insufficiency of the evidence; and, among the specifications of the respects in which it was insufficient, it was stated, in the bill of exceptions proposed by defendant, that the evidence failed to establish that defendant was the person who made the alterations.

The defendant contends that, in response to that specification, it was incumbent upon the prosecution to have put into the bill some evidence (if any there was) which would make it appear to this court that there was proof of the participation of defendant in the crime specified. This position is sustained by the cases of People v. English, 52 Cal. 211, and People v. Fisher, 51 Cal. 319. In the first-mentioned case, the court, speaking of an exception of this character, said: "It must be presumed, and always will be presumed, by this court, that such exception in a bill is preceded by all the material evidence actually given bearing on the point of the objection." In People v. Fisher it is said: "The presumption in this court is that there was no evidence introduced in support of a fact in issue, unless the bill of exceptions contains the substance of the evidence introduced to prove the fact, or states that the fact was proven, or that evidence was introduced tending to prove it." This is in accord with the rule constantly enforced in civil cases, and seems just and reasonable. These cases have never been expressly overruled or criticised, but the cases of People v. Marks, 72 Cal. 46, 13 Pac. 149, and People v. Tonielli, 81 Cal. 275, 22 Pac. 678, are cited as holding a contrary doctrine. A contrary view is stated in People v. Marks, but it does not appear that any such question was raised in the case. In People v. Tonielli it is expressly stated that the evidence found in the record is sufficient, and it is then added that it does not appear that the statement contains all the evidence. I see no reason why the rule should be different in civil and criminal cases, and the cases last cited are not sufficient to establish a new departure in criminal cases.

But, although it was incumbent upon the people to see that the bill of exceptions contained some evidence tending to establish every element of the crime, still they could not, under the statute and rules of the court, incorporate into it the original papers. Nor was it the duty of the prosecution—or, indeed, permissible under the Code—to provide photographs of the writing. It was only possible under the Penal Code for it to do just what it did do, to wit, state what evidence was submitted to the jury. It then becomes one of the numerous cases in which we are at a disadvantage in weighing the evidence. It cannot be represented or pictured here as the jury and the court saw it. Perhaps, upon a proper application, this court would have ordered the original papers sent up under rule 25; but, as this has not been done, still, if we can see that in the nature of things the evidence might have been sufficient, we must so hold.

What, then, does the record show in regard to the evidence? Defendant was a clerk of election at the precinct named, appointed as a Republican. He assisted in keeping tally as the votes were counted. There is no suspicion that he did not perform this duty properly. It was shown by the prosecution that, after all the ballots had been counted for the state ticket, defendant gave the result to a person who was employed by one of the candidates, and gave the correct result, and not according to the altered list. It is assumed that the lists had not been tampered with until after they had been certified and sealed up to be carried to the registrar. There was no evidence—other than the handwriting alluded to—which tends to show that after that time the paper, or the package including it, was ever in the hands or under the control of defendant. On the contrary, all the precinct officers who were sworn testified that they never saw him have it. Nor, aside from the handwriting, was there shown a single suspicious circumstance against the defendant. No motive was proven or alleged. It did not appear that he knew the person in whose interests the changes were made, or had any reason to desire his success. Witness after witness went upon the stand, and testified to his good character. They were not even cross-examined, and there was no counter evidence. The circumstances show no opportunity for defendant to have made the alterations except that, against his protest, he was ordered to accompany Martinet, who was an inspector at that precinct, when Martinet took the returns to the registrar. Martinet was a Democrat, and defendant was ordered to go along as a Republican. The package was sealed up when it was taken, and was sealed up when it was returned again to the precinct; and no one noticed that the seal had been tampered with, nor was there any evidence which tended to show that the alteration was made while the package was thus in the custody of Martinet. Both defendant and Martinet testified that the package was never in the hands of the defendant, and that the package was not opened, and that no alterations were made. The package was returned to the precinct because the tally list and the ballots were sealed up in the same envelope, whereas they should have been in separate envelopes. The canvas for the local ticket had not yet been concluded. The package was then locked up in a box, and kept until the next day, when the seal was broken by another officer of the election in the presence of the board. A new package containing this tally list was then taken by a Mr. Maher, who was an additional judge, to be delivered to the registrar. He took them away alone to his residence, where they remained while he had dinner. He was there met by some other members of the board, who accompanied him to the registrar's office. The alterations were not discovered until the returns came to be canvassed by the board of election commissioners. How long that was after the returns were delivered to the registrar is not shown. As to their custody in the meantime, the registrar merely stated that they remained in his office sealed. The opportunity which defendant is supposed to have had to make the alterations was while the package containing the list was being taken by Martinet to the registrar, and back again to the voting booth. As already said, there is no evidence tending even to raise a suspicion of any such thing, or that defendant ever had the package in his hands, and positive evidence that he did not. There was no testimony tending to cast suspicion upon Martinet, and there is, as in the case of Buckley, a total absence of proof of motive or of interest in the candidate in whose interests the alterations were made.

The writing by defendant, which was compared with the alterations in the tally list, was not made under normal conditions, but in a state of excitement upon the first charge of wrongdoing, and consisted in the figures "60" and "135," the same numbers in longhand, his name, a few other figures, and 40 tally marks. The record does not show what portions of the tally list were offered in evidence, save that the alterations were put in evidence, and it does not show that these were submitted to the jury for inspection. The bill of exceptions does not state that the jury did make the comparison, or that they took the documents to their room, when they retired to deliberate upon their verdict. But suppose they did so, what does the bill show they compared? Why, only the figures alleged in the information to have been made in altering the tally list, —the numerals "60" and "135," nothing more. Now, there was positively no other evidence save the supposed similarity of the few figures and words, written by defendant under abnormal conditions, with these figures, or, at most (and that is a supposition unsustained by the record), the same numbers written out in longhand, which tends to prove guilt or raise a suspicion against the defendant. Certainly, we all know how unsatisfactory is the evidence derived from the comparison of handwritings even when done by experts of the greatest skill. Rarely will such evidence alone satisfy a reasonable person beyond reasonable doubt, especially when, as in this case, the conclusion is against positive evidence, in addition to the presumption of innocence. To allow such a verdict to stand would, in my opinion, be an outrage upon justice.

The accused was not tried within 60 days after the filing of the information. He asked that the prosecution against him be dismissed for this reason. His motion was denied, and the ruling is relied upon here as error. The constitution and the laws alike guaranty a speedy trial, and section 1382 of the Penal Code prescribes that the prosecution shall be dismissed, unless good cause to the contrary be shown, if a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the filing of the information. The motion was denied on three ground: (1) The defendant himself applied for and obtained a postponement; (2) there was no opportunity to try defendant, as the court had been constantly occupied; and (3) a material witness for the prosecution was absent.

1. The case was postponed, on the application of defendant, from the 12th of February, 1895, to the 13th,—one day. Does the postponement of one day, on the application of the defendant, deprive him entirely of the constitutional guaranty of speedy trial? Certainly not, and any such construction of the statute would be unreasonable.

2. In denying the motion, it was stated by the court that at no time since the plea had there been an opportunity to bring the case to trial except the 12th day of February, on which day the defendant asked for and obtained a continuance of one day,

other cases having in the meantime occupied the attention of the court. Nothing is said about the nature of the other cases. They are not shown to have been cases of equal urgency, and then nothing is said of the other 11 departments of the same court. In my opinion, the constitutional guaranty imposes upon the state the duty of providing courts which, under ordinary conditions, can furnish a speedy trial. A speedy trial does not mean at once, but with all convenient dispatch, and implies courts in which a trial may be had. No doubt it also implies reasonable time for the state to provide courts and juries, and to procure witnesses. It imposes, however, a special duty upon the state with reference to such cases, and, if the duty is not performed, the prosecution should be dismissed. The legislature has seen fit to lay down a rule by which the constitutional provision may be interpreted, which seems reasonable. In my opinion, the mere statement of the judge that the court has been otherwise engaged does not show good cause.

3. No diligence was shown to procure the attendance of the witness. Certainly, the statement of the witness that it would be a hardship to require him to come from Sacramento was a poor excuse for continuing the case 33 days, while the defendant was in jail, and liable to lose his witnesses by the delay. It was not shown that the services of the witness were at all important to the legislature. The benefit of this constitutional guaranty cannot be denied on such flimsy showing.

Upon the showing made, I think the motion to dismiss the prosecution should have been granted, and the prosecution dismissed. Under the rule laid down in People v. Houston (Cal.) 40 Pac. 756, the information must be held good. The judgment and order are reversed.

We concur: VAN FLEET, J.; HENSHAW, J.

McFARLAND, J. I concur in the judgment of reversal, and in that part of the opinion of Mr. Justice TEMPLE which holds that there is no evidence in the record sufficient to warrant the verdict. I do not concur in that part of said opinion which holds that in this case the prosecution should be dismissed because the defendant was not tried within 60 days after the filing of the information.

HARRISON, J. I concur in the judgment of reversal upon the ground, as set forth by Mr. Justice TEMPLE in his opinion, that the evidence, as shown by the record, was insufficient to justify the verdict. I am of the opinion, however, that the court did not err in refusing to dismiss the cause. The information was filed December 27, 1894, and the defendant was arraigned January 4th, and, having taken time to plead, on the 11th of January demurred to the information. Argument was had upon this demurrer January 18th, and on the 25th of January the court overruled the demurrer, and the defendant entered a plea of not guilty. This was the first point of time after the filing of the information at which the defendant could be brought to trial, and his trial was had on the 18th of March. Whatever time was consumed by him in dilatory motions or pleas which had the effect to postpone the time at which he could be brought to trial was "good cause to the contrary," upon his application, for the dismissal of the cause, under section 1382 of the Penal Code.

GAROUTTE, J. (concurring). The record presented to us in this case contains no evidence whatever indicating defendant's guilt; and wherever a defendant appeals to this court, upon the ground that the evidence is insufficient to support the verdict, we must assume that all material evidence introduced before the jury is in the record. Section 1944 of the Code of Civil Procedure provides: "Evidence respecting the handwriting may also be given by a comparison made by the witness, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge." In line with the principle declared in this section, the people introduced the genuine handwriting of the defendant before the jury, for the purpose of comparison with the handwriting in which the altered returns were made. We have not before us either a fac simile of the genuine handwriting of the defendant, or of the altered returns. Neither have we the original writings, which might well have been brought here for inspection, under the rules of court. This evidence not being before us in any form, it must be assumed that it failed to establish defendant's guilt, and for that reason was deemed immaterial by the people in the preparation of the record on appeal.

Section 32 of the purity of elections act provides: "A person offending against any provision of sections * * * of this act is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial hearing proceeding, or lawful investigation or judicial proceeding, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment, information or prosecution." St. 1893, p. 26. It is now claimed that the defendant, relying upon the aforesaid provisions of law, is exempt from prosecution, inasmuch as he gave testimony before the board of election commissioners at a hearing held by that body for the investigation of these alleged election frauds. The hearing, proceeding, or investigation mentioned in this section must be a lawful one; that is, one authorized by law. And the attorney general insists that the board of election commissioners has no authority, under the law, to carry on such an investigation as was being conducted when this defendant made the aforesaid statements. I agree with his position. The board of election commissioners is purely a creature of the statute, and it may only do those things which the statute says it may do. The examination carried on by it was in excess of and beyond its power, and defendant cannot therefore invoke the exemption provided by section 32 of the act. I concur in the reversal of the judgment and order.

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116 Cal. 140

## AYRES v. THOMAS. (L. A. 191.)

(Supreme Court of California. Feb. 27, 1897.)

BROKERS—COMPENSATION.

An agent for the solicitation on commission of orders for the output of another's business was not entitled to compensation merely because he performed services which "tended" to obtain orders, or because he introduced to his principal parties, who subsequently gave orders. Zeimer v. Antisell, 17 Pac. 642, 75 Cal. 512, followed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by E. S. Ayres against Albert Thomas. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

T. E. Gibbon, for appellant. Murphy & Gottschalk, for respondent.

SEARLS, C. This action was brought to recover $1,584.69, with interest on $831.48 thereof from July 28, 1893, and interest on the balance thereof from October 9, 1894. The cause was tried before a jury, and a verdict returned in favor of plaintiff for $1,694. Upon a motion for a new trial, the court made an order granting a new trial unless plaintiff should consent to reduce the verdict by $117.45, leaving the verdict to stand at $1,576.55, to which deduction plaintiff consented; whereupon the motion for a new trial was denied and judgment entered for $1,576.55. Defendant appeals from the judgment, and from the order denying his motion for a new trial. Plaintiff acted as an agent of defendant, a foundryman, in soliciting orders for the output of defendant's business on commission, and also to some extent as a collector for said defendant. There are five counts in plaintiff's complaint. The evidence shows that all of the five causes of action are based upon three several grounds: (1) A claim for services in obtaining orders for the products of defendant's business as an iron founder; (2) a claim for money paid by plaintiff to defendant's use; (3) a claim for labor performed by plaintiff as collector for defendant. The services were rendered and the money paid out between May 15, 1892, and October 9, 1894.

Appellant attacks the ninth instruction given by the court to the jury at the request of plaintiff, and urges that it was erroneous and injurious to defendant. It is as follows: "(9) The jury are further instructed that to entitle the plaintiff to commissions from the defendant for work done by the defendant for third parties, that it is not necessary for the plaintiff to show that he did everything in connection with procurement of the work. If, at the request of the defendant, he performed any services which tended to obtain the work, or introduced the parties to the defendant or to the defendant's managers or superintendent, or if you should find from the evidence that the plaintiff, by means of his solicitations, brought the attention of any parties to the defendant or his manager or superintendent, and by reason thereof work was afterwards ordered by such third parties, then, in such case, the plaintiff should be entitled to his commissions, even though he did not do all of the work of soliciting whereby the work was given to the defendant; but it is enough for him to show that he did something in connection with any job or work given by any third person to the defendant which aided or assisted the defendant in any way in obtaining the said work, and which was the cause of inducing the purchasers or customers negotiating with defendant or contracting with defendant." There was evidence tending to show that plaintiff was, under an arrangement with defendant, entitled to receive 5 per cent. on all orders for goods which he secured in amounts exceeding $50, and 10 per cent. on all orders for a less amount than $50. Plaintiff furnished a bill of particulars, and, as to some of the items charged therein, there was a sharp conflict as to whether or not plaintiff had secured the customers upon whose purchases he had charged a percentage. Under this state of the case, the law in relation to the circumstances under which plaintiff became entitled to a commission became an important factor in the problem to be solved.

Brokers are of many kinds, the most important being enumerated and defined as follows: Exchange brokers, insurance brokers, note brokers, pawn brokers, real-estate brokers, ship brokers, stock brokers, and merchandise brokers. "Merchandise brokers are those who buy and sell goods and negotiate between buyer and seller, but without having the custody of the property." Black, Law Dict. tit. "Broker." All brokers are agents, and there are certain well-defined principles of law applicable to them as such, and as to the different classes certain other principles are applicable dependent upon the peculiarities of the class. One of the distinguishing features of that class of agencies termed "brokerage" is that the transaction must be completed before commissions are earned. To this rule there is the exception that where the agent has completed his part in the transaction, and the failure of the negotiation be due to the interference of the principal or to causes outside of the agent, then the commissions are earned. Whart. Ag. § 325. The agent must be an efficient agent in or the procuring cause of the contract. Tombs v. Alexander, 101 Mass. 255; Walker v. Tirrell, Id. 257; Barrett v. Johnson, 64 Pa. St. 223; Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636. As was said by this court in Zeimer v. Antisell, 75 Cal., at page 512, 17 Pac. 643, quoting from Sibbald v. Iron Co., 83 N. Y. 382: "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and, until this is done, his right to commissions does not accrue." The broker must be the "efficient agent or procuring cause of the sale." McGavock v. Woodlief, 20 How. 221; Wylie v. Bank, 61 N. Y. 415.

Tested by these rules, the foregoing instruction was too broad. As is claimed by appellant, the instruction indicated to the jury that plaintiff was entitled to recover his commissions upon sales (1) if, at the request of the defendant, he performed any services which tended to obtain the work; (2) if plaintiff introduced to defendant, or to his manager or superintendent, parties who subsequently ordered work; (3) if the plaintiff, by means of his solicitation, brought the attention of any parties to the defendant or his manager or superintendent, and, by reason thereof, work was afterwards ordered by said parties. The first and second of the foregoing propositions cannot be maintained. It was not for any services which tended to obtain work that the plaintiff was entitled to commissions, but for such services as constituted the proximate and efficient or procuring cause of the work being ordered. In the case of Zeimer v. Antisell, supra, the plaintiff, a broker, had performed some services which tended to bring about the sale. He had taken Levy, the subsequent purchaser, to see the property, etc., but, as nothing more was done until plaintiff's authority ceased, this was held insufficient. The second proposition is still more open to objection. It clearly stated to the jury, as law applicable to the case, that if plaintiff introduced to defendant, his manager or superintendent, parties who subsequently ordered work, he would be entitled to a commission thereon. The instruction isolates the fact of an introduction from all idea of any other duty on the part of plaintiff, and, without reference to its object or the surrounding circumstances, makes it the prime factor in the problem, provided always the party or parties so introduced should at any future time, and under any circumstances, order work from the defendant. The remainder of the instruction, although proper, being connected with the portions indicated, disjunctively, in no wise qualifies the objectionable part.

We find nothing in the other instructions given calculated to dispel the effect of the error complained of. The sixth instruction, asked by the defendant and refused, was objectionable on account of the last clause therein, consisting of the words "without the intervention or aid of any other essential matter, thing, or influence." Aside from such last clause, the instruction contained a correct and clear exposition of the law applicable to the case. For the error indicated, we recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

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5 Cal. Unrep. 620

## PEOPLE v. FOURNIER. (Cr. 203.)

(Supreme Court of California. Feb. 26, 1897.)

ARSON—EVIDENCE.

1. On a trial for arson, where the evidence is circumstantial, and a witness for the state testifies that she was awakened during the night by the smell as of burning rags, she may be asked on cross-examination whether there was not a great deal of rubbish in the back yard, near where the fire originated.

2. Where the fire was seen in rubbish in a yard near the building burned, evidence that the rubbish was on fire in the same yard the day previous was admissible.

3. Where a suspicious circumstance in the evidence against defendant was the removal of certain goods from the burned building the day before the fire, it was error to exclude evidence of defendant explaining the removal.

4. Where a suspicious circumstance against defendant was that his building was insured, evidence that the building of a third person in which the fire started was also insured was admissible.

Department 2. Appeal from superior court, Madera county; W. M. Conley, Judge.

Joseph Marie Achille Fournier was convicted of destroying by fire a certain building with intent to defraud an insurance company, and appeals. Reversed.

Raleigh E. Rhodes and John R. Kittrell, for appellant. W. F. Fitzgerald, Atty. Gen., and C. N. Post, for the People.

TEMPLE, J. The defendant was charged, under section 548, Pen. Code, with the offense of willfully destroying by fire a certain building, with the intent to defraud the Palatine Insurance Company, Limited, of Manchester, England, a corporation, in which company the property was then insured. A fire occurred in the town of Madera on the 27th of July, 1895, in which several buildings were consumed, one of which belonged to the defendant, and was insured for the sum of $600. The witnesses all agreed that the fire commenced either in the building occupied by the Tribune newspaper, between which and the defendant's building there was a space of 8 feet, or somewhere along the line of a fence running northerly from the rear of the Tribune Building some 20 feet to a shed adjacent to the dwelling occupied by the defendant and his wife. The defendant did not own the land upon which the building was, but occupied the same under a lease, and had built a small wooden house on the southeast corner of the lot, which he occupied as a saloon. On the rear of the lot, and some 40 feet from the saloon, northerly, was the dwelling spoken of. Some of the witnesses—and apparently those who were first at the fire—testified that when first discovered by them it was immediately in the rear of the Tribune Building, back of which was a little porch; others, that when they saw it it was upon the fence mentioned, and was spreading rapidly along the fence from the dwelling occupied by the defendant towards the Tribune Building. The fence partly divided the lot occupied by the defendant from the lot upon which the Tribune Building was situated. The evidence that the fire was of incendiary character, and tending to cast suspicion upon the defendant, was entirely circumstantial. That which tended to show that the fire was of an incendiary character, aside from that which cast suspicion upon the defendant, was the testimony of some of the witnesses that the fire was proceeding along the fence from the dwelling of the defendant to the Tribune Building rapidly, indicating that the fence might have been saturated with coal oil, and that they perceived the odor of coal oil.

The evidence which tended especially to raise a suspicion against the defendant was simply and only: (1) That he was a Frenchman, and had announced his intention of soon returning to France, and that he had an insurance upon the building, as stated. (2) On the very day of the fire he removed from the saloon to his dwelling a barrel of brandy and two cases of champagne. And (3) he and his wife were, shortly before the fire, sitting on the sidewalk by the saloon. The fire occurred shortly before midnight, and defendant and his wife claimed that they were both in bed at the time the alarm was given. The fire occurred in the middle of summer, and it appeared that in the rear of the printing office, which was first on fire, there was a great deal of rubbish, consisting of old rags, paper, straw, etc. A witness for the prosecution, who occupied one of the houses destroyed, testified that she was awakened during the night by mosquitoes, and immediately smelled fire, as of burning rags. She looked from her window, and saw the fire. She thought it was back of the Tribune office, nearer the office than the fence; and finally she stated that she was sure that it was under the porch, back of the Tribune Building. On cross-examination the witness was asked as to the condition of the premises,—whether there was anything on the ground in the shape of rubbish, paper, or anything of the kind. The question was objected to as incompetent, immaterial, and irrelevant, and not cross-examination, and the objection was sustained. On like objection the court refused to permit an answer to the question whether at other times she had not perceived the odor of coal oil upon the premises, and the court also refused to permit the question whether, on the day before the fire, there had not been a pile of rubbish on fire, back of the Tribune office. These rulings were assigned as error here, and the attorney general hardly attempts a defense of them.

One question of interest at the trial was whether the fire ran along the fence from defendant's dwelling towards the Tribune Building, or was first discovered in the Tribune Building, or immediately at the rear of it. The attention of the witness was first aroused by the smell of burning rubbish,—rags. This first gave the alarm. The evidence was, therefore, quite material. The court sustained the objection to the existence of the burning rubbish on the 26th of July, on the ground that it was too remote in time. That was a question for the jury, and not for the court. No one would say that the time was so remote that it was absolutely impossible that a spark could be kept alive until the destruction of the building complained of. The ruling was clearly erroneous and injurious.

The court also erred in refusing to permit the defendant to show that the building owned by the witness Parsons was also insured. If the fact that the defendant's building was insured raised a presumption against him, it was competent to show that the person owning the building in which the fire first started had a like inducement to commit the crime.

A witness for the defendant (his wife) testified that the brandy and champagne were removed from the saloon because defendant expected certain persons who wished to buy the building and stock to inspect the same on the next day. Defendant offered to prove, in addition, the fact that two persons were expected to come upon that day, and did actually arrive upon the following day at Madera, pursuant to their appointment to inspect the building, with a view of making such purchase. The reason given why the removal was made under such circumstances was that whoever wished to buy the building and stock would want everything in sight thrown in, and would give no more for the property. The defendant should have been allowed to explain this act, which probably, more than any other, tended to cast suspicion upon him. It was for the jury to determine the truth and value of the explanation.

It is contended by the defense that the evidence was insufficient to justify the verdict, and it was certainly very weak. I doubt if an unprejudiced jury would have found a verdict of guilty upon it; but it is not necessary to reverse the case for that reason, as there are other sufficient grounds. Judgment and order reversed.

We concur: McFARLAND, J.; HENSHAW, J.

116 Cal. 627

## HELLER et al. v. DYERVILLE MANUF'G CO. (S. F. 421.)

(Supreme Court of California. Feb. 26, 1897.)

JUDGMENT—ACTION TO MODIFY—FRAUD—PLEADING—ADEQUATE REMEDY AT LAW.

1. A complaint to modify a decree in a prior suit for injunction and damages alleged that the parties filed a stipulation for judgment enjoining defendants therein, but without damages; that afterwards plaintiff's attorney in that suit, "for the purpose of cheating and defrauding these plaintiffs," prepared a decree which he represented to the judge "was in accordance with the stipulation"; that the judge relied on the representation and signed the decree, which was then filed, but not entered till nine months afterwards; that the decree was prepared without the knowledge of defendants therein, and that no copy was submitted to them; that no steps were taken under it for more than six months; that it was prepared and filed "for the purpose of defrauding these plaintiffs"; and that "thereby the defendant herein did obtain relief it was not entitled to." *Held* insufficient to show that the decree was procured by fraud.

2. A complaint to modify a decree on the ground that, as made, it was procured by fraud, is bad, where it shows that plaintiffs knew of the decree within the six months allowed by Code Civ. Proc. § 473, for moving to modify or vacate judgments.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by M. Heller & Sons against the Dyerville Manufacturing Company. From a judgment for plaintiffs, and from orders refusing to vacate an injunction, and denying a motion for a new trial, defendant appeals. Reversed.

Edmund Tauszky, for appellant. Rothchild & Ach, for respondents.

VAN FLEET, J. This is a suit in equity brought in the superior court of the city and county of San Francisco to secure the modification of a judgment theretofore entered in that court, upon the ground that it had been procured by fraud. The complaint alleges that in March, 1891, the present defendant, the Dyerville Manufacturing Company, brought an action in said superior court against M. Heller & Sons, the plaintiffs here, to enjoin the latter from pirating or infringing a certain trade-mark or label of said Dyerville Manufacturing Company, and for damages for an infringement already perpetrated; that thereafter, on August 3, 1891, the parties in that action entered into a stipulation in writing that judgment should be entered therein enjoining the defendants "as prayed for in the complaint," and for costs, but without damages; that afterwards, on August 7, 1891, the attorney for the plaintiff in that action, "for the purpose of cheating and defrauding these plaintiffs," presented to the judge before whom said action was pending a decree prepared by said attorney, which the latter represented to the judge "was in accordance with the stipulation"; that the judge relied upon such representation and signed said decree; and that the decree was thereupon, on said 7th day of August, filed, but was not entered until April 26, 1892. It is alleged that Heller & Sons, the defendants in that action, had no knowledge of the filing of said decree "until subsequent to the 26th of April, 1892"; that the same was prepared without their knowledge or that of their attorneys, and no copy thereof was submitted to them; that no steps were taken under said decree by the plaintiffs in that action, the defendants here, until more than six months after the same had been signed and filed; and that it was prepared and filed by the plaintiff in said cause and its attorney "for the purpose of defrauding these plaintiffs, and that therein and thereby the defendant herein did obtain relief it was not entitled to, either by the terms of its complaint or by the terms of said stipulation." The said decree is set out in hæc verba, and the complaint in that action is attached as an exhibit, and made a part of the complaint in this. The complaint further alleges,—what we regard as largely if not wholly immaterial here,—in substance, that since August 3, 1891, said Heller & Sons have not infringed said trade-mark or label, but that, notwithstanding, they were on July 29, 1892, cited to show cause why they should not be punished for violating the said decree, and that thereafter, on December 5, 1892, they were adjudged guilty of a violation thereof; that on December 10, 1892, they applied to the superior court in said action to modify the said decree "so that the same should comply with the stipulation" upon which it was entered, and that on January 6, 1893, the court made an order so modifying the decree; that from this order the plaintiff in that action took an appeal to this court, where the order was reversed on the sole ground that the application was not made within six months from the entry of the decree. It is finally alleged that plaintiffs have no plain, speedy, or adequate remedy at law, and that, unless defendant is restrained from enforcing said decree, plaintiffs will suffer irreparable damage, etc. Upon the filing of the complaint a preliminary injunction was issued, restraining defendants from enforcing said decree in the particular wherein it is sought to be modified. Defendant demurred to the complaint as not stating facts entitling plaintiffs to any relief, and subsequently moved to vacate the injunction upon the same ground. The demurrer was overruled, and the motion to vacate the injunction denied. Thereafter defendant answered, and upon the trial the court found the facts substantially as alleged in the complaint, upon which findings judgment was entered modifying said decree as prayed. Defendant appeals from the order refusing to vacate the injunction, and from the judgment and an order denying it a new trial.

The appeal from the judgment is the only one which we are called upon to consider, since we are satisfied that the complaint states no cause of action, or, in other words, no case for equitable intervention. In the first place, assuming for present purposes that the relief awarded by the decree sought to be modified transgressed that to which the plaintiff in that action was entitled under the stipulation of the parties, the averments of the complaint, taking as true all the issuable facts, fail to make out a case of fraud in its procurement. It is true, it is alleged, in general terms, that in procuring the decree certain things were done "for the purpose of cheating and defrauding these plaintiffs," and "that said decree was prepared and filed by the plaintiff in said cause and its said attorney for the purpose of defrauding these plaintiffs"; but the specific facts alleged to point and support these general assertions of fraud will not bear the construction thus sought to be put upon them. It is alleged that the representation was made to the judge that the decree was drawn "in accordance with the stipulation," but it is not alleged that such representation was made with intent to deceive, or that when made the attorney did not honestly believe it to be true. Since the pleading is to be construed most strongly against the pleader, it will be presumed, in the absence of an averment to the contrary, that the representation was without deceit, and with a belief in its truth. It is not even alleged in express terms, or otherwise than by implication or mere recital, that the representation was in fact false, and there is no pretense of any direct averment that the attorney knew or believed it to be so. It is averred that the judge, in signing the decree, relied on the representations of the attorney. But fraud cannot be predicated of a statement or representation made without knowledge of its falsity, or an intent to deceive thereby, however implicitly it may have been acted upon. In this case it appears from the decree that the precise words of the substantive part of the stipulation relied upon were recited therein, and also the fact that the stipulation itself was on file. There was thus presented to the judge the same means of knowing the truth of the representation made as that possessed by the party making it, and it must be presumed, the contrary not being averred, that the decree was read over and examined by the judge before attaching his signature thereto. The averment that the decree was signed on August 7, 1891, but not filed until April 26, 1892, is not pointed by any averment that this delay was intentional, or for the purpose or with the intent of concealing from plaintiffs any fact upon which their rights depended, or to thereby deprive them of any such right, or for any similar purpose, and that fact is therefore without significance as tending to show fraud. It is alleged that the decree was prepared and filed without the knowledge of plaintiffs, and was never submitted to them; that they had no knowledge of the same until after April 26, 1892; and that no step was taken by defendant to enforce it until more than six months after it had been filed. But it is not alleged that knowledge of the filing of the decree was intentionally withheld from them, nor that there was any reason in fact, as there was none in law, why defendant was required to serve them with a copy of the decree, or to notify them of the filing. There was nothing in the stipulation, which is also set out in the complaint, requiring it. It is not alleged that defendant by any act prevented the knowledge of said filing from being acquired by plaintiffs. The decree was placed upon the public records, to which they had access, and it was as much the duty of plaintiffs as of defendant to keep track of the case, and to see that a proper decree was entered. They could not be permitted to indulge the presumption that the taking of their stipulation for a decree was a mere idle ceremony, and that nothing further would be done by defendant in the action. The significance of the fact that defendant delayed action under the decree, as tending to show fraud, is not disclosed, nor is it apparent. In the absence of averment to the contrary, it will be presumed that no earlier occasion arose for invoking its protection. There is therefore nothing in the facts alleged to sustain the general averments of a fraudulent purpose in the manner of procuring the decree; and such general averments, standing alone, and unaccompanied by facts which in themselves disclose fraud, are insufficient to give the transaction even a colorable aspect of that nature. Such general averments are to be regarded as merely the conclusions of the pleader, embracing no issuable character, and not the averment of substantive facts, which are admitted by the demurrer. Harris v. Taylor, 15 Cal. 349; Oroville & V. R. Co. v. Supervisors of Plumas Co., 37 Cal. 363; Bank v. Hynes, 50 Cal. 202; Pehrson v. Hewitt, 79 Cal. 598, 21 Pac. 950. As said by the supreme court of the United States in passing upon the sufficiency of a bill of similar construction: "It is full of the words 'fraudulent' and 'corrupt,' and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisprudence, unless the transactions to which they refer are such as, in their essential nature, constitute a fraud or a breach of trust for which a court of chancery can give relief." Van Weel v. Winston, 115 U. S. 237, 238, 6 Sup. Ct. 22. See, also, Fogg v. Blair, 139 U. S. 127, 11 Sup. Ct. 476.

In the next place, we think the complaint discloses a case in which plaintiffs had a plain, speedy, and adequate remedy at law, and in such case there is no occasion to resort to equity, and it will not be permitted. Ketchum v. Crippen, 37 Cal. 223; Eldred v. White, 102 Cal. 600, 36 Pac. 944. The judgment was entered April 26, 1892. Plaintiffs aver that they had no notice of this fact until "subsequent to April 26, 1892," but this, under a proper construction of the pleading, is equivalent to the averment that they had such knowledge immediately after that date,—as early as April 27th, if need be. Collins v. Townsend, 58 Cal. 614. Furthermore, it appears that they, at all events, had actual knowledge on July 29, 1892, on which date they were served with an order to show cause why they should not be held guilty of a violation of the decree. Even the latter date was well within the six months from the entry of the decree, within which, under section 473, Code Civ. Proc., they could have moved for its modification or vacation. The fact that, under a misapprehension of their rights, they failed to take advantage of this remedy until too late, affords no ground for equitable relief.

For these reasons, the complaint was bad, and it is unnecessary to consider the further objection that the complaint does not show that any excessive relief was in fact awarded by the decree. As the complaint stated no cause of action, it constituted no proper basis for the injunction, and the motion to vacate should have been granted, and the demurrer should have been sustained. The judgment and orders appealed from are reversed, with instructions to vacate the injunction and sustain the demurrer to the complaint.

We concur: HARRISON, J.; GAROUTTE, J.

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116 Cal. 136

## CALIFORNIA IMP. CO. v. BAROTEAU et al. (S. F. 35.)

(Supreme Court of California. Feb. 27, 1897.)

NEW TRIAL—TIME FOR MOTION.

1. Time for motion for new trial, which Code Civ. Proc. § 659, provides shall be within 10 days after filing of findings, is not extended by motion to modify and set aside findings; they not having been modified, changed, or added to.

2. An order staying judgment till determination of motion to set aside findings does not extend time to move for new trial.

3. Under Code Civ. Proc. § 659, declaring that a motion for new trial must be within 10 days "after notice of the decision," formal notice of the decision is not necessary, but it is enough that the moving party had actual notice thereof.

In bank. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by the California Improvement Company against Mary Baroteau and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Chickering, Thomas & Gregory (Chas. Harding Tubbs, of counsel), for appellant. J. W. Goodwin, for respondents.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendants, and from an order denying its motion for a new trial. The notice of the motion for a new trial is based alone upon "insufficiency of the evidence to justify the decision," and all the questions raised by the appellant rest upon the insufficiency of the evidence. Respondents contend that there can be here no review of the evidence, because (1) the appeal from the judgment was not taken until more than 60 days after it was rendered; and (2) that appellant's notice of intention to move for a new trial was not given in time. Both of these contentions must be sustained. As to the appeal from the judgment, it clearly appears, and is not denied, that it was not taken until more than 60 days after the rendition of the judgment. The facts as to the notice of intention to move for a new trial are as follows: The findings, which constitute the decision, were filed May 12, 1894. Three days afterwards, to wit, on May 15th, the appellant served and filed a notice of a motion, as follows: "That, the court having filed its findings in this case, plaintiff moves the court to modify and set aside the findings of fact and conclusions of law based thereon, to wit." The notice stated that this motion would be made on the 21st of May, 1894, or as soon thereafter as counsel could be heard. On the 4th of June, 1894, the said motion was heard by the court and denied. Thereafter, on the 11th day of June, 1894, the appellant served and filed his notice of intention to move for a new trial. This was, of course, much more than the 10 days prescribed by section 659, Code Civ. Proc., after the filing of the findings, and was clearly too late. The right to move for a new trial is statutory, and must be pursued in the manner pointed out by the statute. Burton v. Todd, 68 Cal. 489, 9 Pac. 663. The position of appellant, that the motion to modify and set aside the findings extended the statutory period within which a motion for a new trial must be made, is not tenable. If that were so, a party could always extend the time, at his own volition, by giving notice of motion to modify. In this case the findings filed on the 12th of May were never modified or changed in any respect, nor were any new findings ever made; and it is clear that the time for moving for a new trial commenced to run from the date of the filing of said findings. This same principle was applied in Shinn v. Cummins, 65 Cal. 97, 3 Pac. 133, where it was held that "the pendency of defendant's motion to dismiss, vacate, and set aside the pretended service of summons and copy of complaint" did not extend the time specified in the summons for answering the complaint. In the case at bar the judgment was not entered until after the determination of the said motion to set aside the findings, and it is stated in plaintiff's brief that the entering of the judgment was stayed by an order of the court until after the determination of said motion to set aside the findings; and, although we do not observe any statement of that fact in the record, still, if it were so, an order suspending the judgment does not extend the statutory time within which a motion for a new trial must be made.

The appellant contends that there was no notice served on him of the filing of the findings, and that, therefore, the time for making a motion for a new trial had not expired when such motion was made; but section 659 provides now only that the motion must be made within 10 days "after notice of the decision," and it has been definitely settled that, where it appears affirmatively that the party moving for a new trial had actual notice of the decision, no formal service of a written notice is necessary. Gray v. Winder, 77 Cal. 525, 20 Pac. 47; Mullally v. Society, 69 Cal. 559, 11 Pac. 215; Wall v. Heald, 95 Cal. 365, 30 Pac. 551; Dow v. Ross, 90 Cal. 562, 27 Pac. 409. Of course, where a party in whose favor a decision is made has not given formal notice of such decision, and there is a conflict of evidence as to whether the other party had actual knowledge of the same, this court would not look very closely into such evidence; but where, as in the case at bar, a party makes formal written motion to set aside findings, reciting in his motion that the court had filed the same, he will not be heard to say that he had no notice of such findings. Appellant relies somewhat upon Biagi v. Howes, 66 Cal. 469, 6 Pac. 100. That case, however, seems to have been based upon the authority of cases where there was a statutory provision that there must be a written notice of the decision, and upon that ground it was distinguished from the other cases upon the subject in the opinion of the court in Mullally v. Society, 69 Cal. 559, 11 Pac. 215; and, if it cannot be so distinguished, it must be held as overruled by the later decisions above cited. The judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; TEMPLE, J.

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(5 Cal. Unrep. 624)

## Ex parte VINTON. (Cr. 263.)

(Supreme Court of California. March 2, 1897.)

HABEAS CORPUS—DISCHARGE OF PRISONER.

A prisoner not brought to trial within 60 days after commitment will be discharged on habeas corpus. Garoutte and Temple, JJ., dissenting.

In bank. Application of John M. Vinton for discharge on habeas corpus. Granted.

Henley, Bigelow & Costello, for petitioner.

PER CURIAM. Petitioner discharged.

GAROUTTE, J. I dissent. The prisoner is discharged by the court upon the ground that he has not been brought to trial within 60 days after his commitment. I am well satisfied that the writ of habeas corpus cannot be invoked in a case of this character.

I concur: TEMPLE, J.

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(116 Cal. 156)

## HARRISON v. SUTTER ST. RY. CO. et al. (S. F. 499.)

(Supreme Court of California. March 2, 1897.)

DEATH BY WRONGFUL ACT—NEGLIGENCE—EVIDENCE—PRIVILEGED COMMUNICATIONS—INSTRUCTIONS—DAMAGES—MEASURE—EXCESSIVENESS—NEW TRIAL—APPEAL—REVIEW.

1. Whether a jury rendered their verdict through passion or prejudice is determinable from the evidence without any showing of extrinsic facts.

2. The fact that there was no conflict in the evidence as to the circumstances which the jury had a right to regard in fixing the damages for death by negligence does not preclude the verdict being set aside as excessive.

3. The measure of damages for the death of a man 69 years old, more or less debilitated, and without permanent employment, being the amount that he would in reasonable probability have earned during the rest of his life, minus his probable personal expenses, it was not an abuse of discretion to set aside as excessive a verdict rendered on the theory that deceased's life expectancy would be fully realized, that he would continue to the end with the same earning capacity he had at his death, that he would have constant employment, and that it would never be interrupted by sickness.

4. The rule that the court cannot set aside a verdict as excessive, except when it is so grossly disproportionate to the measure of damages as to raise a presumption of passion or prejudice, does not apply on appeal from the setting aside of a verdict as excessive.

5. Where a car stopped suddenly in the middle of a street intersection, and a wagon crossing at the intersection collided therewith, it was relevant to the question of negligence that in stopping where it did the car company violated an ordinance.

6. The result of an autopsy on the body of one for whose death an action is brought is not privileged (Code Civ. Proc. § 1881, subd. 4) as "information acquired in attending the patient which was necessary to enable [the physician] to prescribe or act for the patient."

7. The personal representative of a deceased patient cannot waive the privilege created by Code Civ. Proc. § 1881, subd. 4, providing that a physician "cannot, without the consent of his patient, be examined, in a civil action," as to information acquired in attending the patient.

8. A charge that the measure of damages was the amount which deceased would probably have earned in the nine years "which it appears he had yet to live," according to mortality tables in evidence, which the jury might take "into consideration, as they are part of the proof that he might have lived that long," did not virtually tell the jury that the tables established that deceased would have lived nine years.

9. A charge as to measure of damages that the jury should consider "(a) pecuniary loss, if any, suffered by the heirs of the deceased through his death; (b) also the relations proved as existing between the deceased and such heirs at the time of his death, and the injury, if

any, sustained by them by his death,"—might have misled the jury into the error of supposing that they could, on account of the widow and children being deprived of the comfort, society, and protection of deceased, include something more than pecuniary loss.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Joseph N. Harrison, administrator, against the Sutter Street-Railway Company and the National Brewing Company. There was a judgment for plaintiff, and from an order granting a new trial plaintiff appeals. Affirmed.

William H. Jordan, for appellant. Naphtaly, Freidenrich & Ackerman, Marcus Rosenthal, and Dunne & McPike, for respondents.

VAN FLEET, J. Plaintiff had verdict and judgment against defendants for $8,000, as damages suffered by the heirs of his intestate through the death of the latter, resulting from injuries received in a collision between a car of the railroad company, on which he was a passenger, and a wagon of the brewing company, occasioned by the negligence of the defendants. The court below granted defendants a new trial, on the ground that the verdict was excessive; and the plaintiff appeals from such order, urging that it was wholly unwarranted under the evidence, and was an abuse of discretion on the part of the trial court.

Certain preliminary objections are interposed by defendants, and reasons suggested why the order appealed from cannot be reviewed; but these objections, while possibly possessed of some merit, being purely technical, and the court being of opinion that the order must be affirmed on the merits, it will prove more satisfactory to both parties, and more in accord with the disposition of the court, to so dispose of the appeal.

That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable, or even fairly debatable, justification under the law for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former where there appears any reasonable room for difference.

Appellant does not seriously question the correctness of these principles, but he contends that the record does not disclose a proper case for their application. He contends that there was no room for the exercise of discretion; that the evidence as to the amount of damages suffered was wholly without conflict; that there was nothing to indicate passion or prejudice, except the amount of the verdict itself; and that there was no showing, by affidavit or otherwise, of any improper conduct on the part of the jury. As to the last suggestion, it is impertinent to the inquiry. Granting a new trial for the misconduct of the jury, such as may be shown by affidavit, is something wholly different and apart from the right which the statute gives to grant such relief on the ground of excessive damages. The former contemplates some overt act of impropriety, such as receiving evidence out of court, reaching a verdict by chance, and the like; while an excessive verdict implies no misconduct of the jury necessarily, but simply that the result has been induced through excited feelings or prejudice, of which the jury may not, perhaps, have been even aware, but which has, nevertheless, precluded an impartial consideration of the evidence. Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury,—a question which cannot be aided by the showing of extrinsic facts, by affidavit or otherwise.

As to the suggestion that the evidence touching "the amount of damages" was without conflict, we are not wholly certain that we appreciate exactly what counsel means. There was no evidence given as to the amount of the damages suffered. The damages sued for were in their nature unliquidated, and no witness pretended to fix the precise amount plaintiff should recover. We presume counsel means that the evidence as to the circumstances which the jury had a right to regard in determining the award of damages, such as age, condition in life, etc., of deceased, was without conflict. But, if this were true, which we do not think can be fairly said, the question as to the proper deduction and conclusion to be drawn from such evidence would still remain for the jury, and whether their consideration of the evidence for this purpose was influenced by passion or prejudice would not necessarily be affected by the fact that the evidence was without conflict. A jury, if excited by prejudice, might as readily award unjust damages where the evidence was uncontradicted as where it was in sharp conflict. The evidence tended to show that deceased was about 69 years of age, but his physical appearance would seem to have indicated more advanced years. Dr. Dorr, one of his physicians, testified that he looked older, that he appeared between 75 and 80 years of age; while Dr. O'Brien, a physician who examined him on behalf of one of the defendants, after the accident and before his death, testified that he considered him a debilitated man; that in his judgment the result of the injury would not have been serious but for his age and debility. According to the testimony of his widow, his health was very good, but he had suffered all his life from sick headache, for which she had been required to nurse him. His income was about $110 per month,—that is, it did not appear that he was in steady or permanent employment, but the evidence tended to show that he was an expert accountant, who straightened out books and tangled accounts when called upon, and that his earnings averaged that sum monthly. According to the Carlisle Mortality Tables, he had an expectancy or probable lease of life of a fraction over nine years and a half. He had dependent on him a wife and an adult unmarried daughter. Upon these facts the jury were instructed, as to the question of damages, in effect, that they should estimate and determine the amount that the deceased would in all reasonable probability have earned in the years yet remaining to him; and, deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate the heirs. It is conceded that this instruction gave the correct rule for the guidance of the jury.

In view of this evidence, and the rule of compensation by which the jury were to be governed, we think it quite manifest that we would not be justified in holding that there was an abuse of discretion in setting aside the verdict. The jury would seem to have proceeded upon the theory that the deceased's expectancy of life would be fully realized, and that he would continue to the end with the same earning capacity as that possessed by him at the time of his death, for their verdict implies that he would have earned, over and above the amount required for his personal needs, the large net sum of $8,000. And this would necessarily contemplate constant employment, without interruption from sickness or other cause, and with a rate of earnings in no way diminished; since it will readily be perceived that, according to his income, his utmost gross earnings in the given time would not have exceeded $12,000. Such a result does not accord with ordinary human experience. The deceased's expectancy of life was not a certainty, but a mere probability. It is true he might have lived longer, but the chances were much against it. He might also have retained his vigor and ability to labor to the last, but ordinary experience teaches that the weight of advancing years after the age attained by deceased bears strongly against such result. Under these circumstances we do not think it should be said that the conclusion of the trial judge was without support in the evidence. But appellant urges that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury; and that such an instance is not shown. The rule invoked is correct, as addressed to the function of the trial court, or when asking this court to set aside the verdict where it has been refused by the court below. But when we are asked to review the act of that court, where, in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and, as elsewhere suggested, it will not be disturbed if the question of its propriety be open to debate.

Among the grounds urged by defendants in support of their motion was that of errors of law occurring at the trial. Some of the exceptions under this head we deem material, and, as they were not noticed by the court below, and the cause is to be retried, the parties are entitled to have them considered. The collision of the two vehicles occurred at a street crossing in the city of San Francisco. The street car was stopped suddenly in its progress, near the middle of the intersection, and the brewery wagon, coming rapidly down a grade on the side street, collided with the car. There was evidence having a tendency to show that, had the car not stopped where and when it did, the collision might have been avoided. This being the case, the defendant brewing company offered in evidence, as against its co-defendant, a municipal ordinance of said city forbidding the stopping of street cars upon any street crossing or cross walk so as in any manner to obstruct travel thereon, except where the grade of the street is such as not to admit of stopping at the further crossing. This evidence was objected to by the railway company, and excluded. The ruling was erroneous. Evidence that the party was acting in violation or neglect of a statute or ordinance regulating the mode of conducting vehicles is always admissible in such a case, as tending to show neglect in the one guilty of the omission. In this instance the evidence bore directly upon the one material question arising as between the defendants,—as to which one caused the collision; and its exclusion was, therefore, prejudicial error.

Plaintiff contends that the ruling did no injury, because it appeared that the stopping of the car was the best thing to do. But whether this was so was for the jury, since the fact was not admitted.

Dr. O'Brien was called by defendants, in rebuttal, upon the question whether the injuries to the deceased were the inducing cause of death. The witness had made a medical examination of deceased after the accident at the instance of the brewing company, and an autopsical examination of the body after death. The court permitted him to give the results of the medical examination, but excluded his testimony as to what was disclosed by the autopsy, upon the theory that the latter was not admissible, under subdivision 4 of section 1881 of the Code of Civil Procedure, which provides: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." The evidence does not fall within the inhibition of that provision. A dead man is not a "patient," capable of sustaining the relation of confidence towards his physician which is the foundation of the rule given in the statute, but is a mere piece of senseless clay, which has passed beyond the reach of human prescription, medical or otherwise. Moreover, the deceased had not, in life, been the patient of Dr. O'Brien. Freel v. Railway Co., 97 Cal. 40, 31 Pac. 730. The evidence was competent, and, being relevant to the issue, should have been admitted. The testimony which the witness was permitted to give did not cover all that the defendants were entitled to show by the witness.

Defendants excepted to the admission of the testimony of the attending physicians of deceased, to the effect that in their opinion the injuries caused his death; that opinion being based upon facts ascertained by them during such medical attendance. It is contended by respondents that this evidence was within the rule of exclusion announced by the provisions of section 1881, above quoted, and was inadmissible. Under the principles announced in Re Flint's Estate, 100 Cal. 391, 34 Pac. 863, the evidence should have been excluded. While the precise question here presented—whether, after the death of the patient, his legal representative may waive the objection which the statute gives, in terms, to the patient alone—was not there directly decided, it was, nevertheless, fully considered and discussed, and the meaning of the statute in that regard very clearly indicated in the following language: "The question of waiver of the privilege by the personal representative or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York (section 836) provides that the privilege is present unless 'expressly waived by the patient.' The California provision contains the words, 'without the consent of his patient.' It will thus be seen that the provisions are, in effect, the same. The courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege, and when such patient is dead the matter is forever closed. Westover v. Insurance Co., 99 N. Y. 56, 1 N. E. 104; Renihan v. Dennin, 103 N. Y. 573, 9 N. E. 320; Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 374. The decisions of the appellate courts of Michigan, Missouri, and Indiana support respondent's position in this regard. Morris v. Morris, 119 Ind. 341, 21 N. E. 918; Groll v. Tower, 85 Mo. 249; Thompson v. Ish, 99 Mo. 160, 12 S. W. 510; Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882. But the statutes of those states regarding privileged communications vary quite materially from those of New York and California, and, as it said in Thompson v. Ish, 99 Mo. 160, 12 S. W. 510: 'The difference in the statutes may well cause the difference in the rule laid down in New York and Missouri.'" This construction is not unreasonable in view of the peculiar terms of our statute, and is undoubtedly fully supported by the New York authorities referred to in the case just cited; and, since our statute seems to be framed largely after that of New York, the construction given the latter by the courts of that state should have great weight with us in interpreting the meaning of our own.

The court charged the jury that the plaintiff was entitled to "recover the reasonable amount which Mr. Harrison would probably have earned in the nine or ten years which it appears he had yet to live, according to these tables in evidence, and which are also a guide. You may take them into consideration, as they are part of the proof that he might have lived that long." It is objected by defendants that this was virtually telling the jury that the Carlisle Tables established the fact that deceased would have lived nine or ten years. We hardly think the instruction would be so understood, but yet the language is not as clear as it should have been. The jury should have been instructed that in determining the probable length of life the deceased would have enjoyed they were entitled to consider these mortality or expectancy tables as evidence bearing on that question and as tending to show the ordinary experience in like cases.

The jury were also instructed that in determining the amount of damages plaintiff should recover they should consider: "(a) The pecuniary loss, if any, suffered by the heirs of the deceased through his death; (b) also the relations proved as existing between the deceased and such heirs at the time of his death, and the injury, if any, sustained by them by his death." This instruction was too general and indefinite, and was calculated to confuse the jury. Such an instruction should be more carefully limited. Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 601; Pepper v.

Southern Pac. Co., 105 Cal. 401, 402, 38 Pac. 974. While the jury have the right in such a case to consider the loss suffered by the widow in being deprived of the comfort, society, and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The form of the instruction here was calculated to lead the jury into the error of supposing that they could, on this account, add something more than pecuniary loss. The instruction, while somewhat similar, is less guarded than in Beeson v. Mining Co., 57 Cal. 37. Order granting new trial affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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(116 Cal. 169)

## FERGUSON v. SHERMAN et al. (L. A. 222.)

(Supreme Court of California. March 3, 1897.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCING LIABILITY UNDER STATUTES OF ANOTHER STATE—DEFINITION OF "RAILROAD CORPORATIONS."

1. Const. Kan. art. 12, § 2, secures debts of certain corporations by the individual liability of the stockholders to an amount equal to their stock; and Gen. St. Kan. § 1192, enacted to carry into effect such provision, provides that, after the return of an execution on a judgment against a corporation unsatisfied, execution may, on motion and notice, issue against any of the stockholders to the amount of their stock, together with any amount unpaid thereon, or "the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." *Held*, that the liability of a stockholder under such provisions is one of contract, and is not penal, and an action to enforce it may be maintained under the latter clause in the courts of another state having jurisdiction of such stockholder, without first obtaining a judgment against the corporation in such state, but based upon the judgment and return of execution in Kansas.

2. The provision of Const. Kan. art. 12, § 2, excepting the stockholders of "railroad corporations" from the individual liability for corporate debts thereby imposed on stockholders of other corporations for profit, does not include stockholders in street-railroad corporations.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by William Ferguson against M. H. Sherman and others to enforce a liability as stockholders in a corporation. Judgment for plaintiff, from which, and from an order denying a new trial, defendants appeal. Affirmed.

Bicknell & Trask, J. S. Chapman, and John D. Pope, for appellants. Wells, Monroe & Lee, for respondent.

HENSHAW, J. Appeals from the judgment, and from the order denying a new trial. Plaintiff pleaded that the defendant the Electric Rapid Transit Company was a corporation organized and existing under the laws of the state of Kansas, and that it was not a railway, religious, or charitable corporation. He further alleged a judgment obtained against the corporation in the circuit court of the United States for the district of Kansas for the sum of $7,717.50, together with costs; that he caused execution to be issued out of the court, to be levied upon the property of the Electric Rapid Transit Company, which execution was thereafter in due time returned wholly unsatisfied. Then follows, in appropriate language, an averment to the effect that, under the constitution and laws of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation. The defendants other than the Electric Rapid Transit Company are sued as stockholders of that corporation. The action, then, is an effort upon the part of the judgment creditor of the Kansas corporation to enforce against California stockholders their statutory liability for the judgment debt.

1. On the trial the provisions of the Kansas constitution and statutes bearing upon the questions were introduced in evidence. Section 2 of article 12 of that constitution provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law, but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Section 1192, art. 4, c. 23, of the Statutes of Kansas, under the title of "Corporations" and the subtitle of "Miscellaneous Provisions," is as follows: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or a charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; *or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judg-*

*ment.*" Plaintiff's action is admittedly an attempt to charge the stockholders under the italicized portion of the statute above quoted. Appellants' contention is that all of the provisions of this act contemplate special statutory remedies given by the laws of another state, and not consonant with the laws and procedure of this state, and that such liability cannot be enforced in this action. It is undoubtedly true that penalties and special remedies provided by the laws of a state will receive no extraterritorial recognition, and may not be imported into the courts of another state. That question has recently received careful consideration at the hands of this court, and it is necessary to do no more than refer to the case of Russell v. Railway Co., 113 Cal. 258, 45 Pac. 323. Upon the other hand, it is equally true that when a statutory liability is not in its nature penal, and does not depend upon remedies whose enforcement is peculiar to the courts of the state which has created the law,—where, in short, the statutory liability is a simple personal liability growing out of the contract of the shareholder,—that liability may be enforced wherever jurisdiction over the particular shareholder may be obtained. It is to be considered, then, whether the statute of Kansas above quoted, in creating the specific liability, designates a mode for its enforcement which may not be exercised without the jurisdiction of its courts, or whether it merely provides for a personal liability, enforceable in an action at law in any of the courts of sister states possessing common-law jurisdiction. It will be noted that the statute in question offers a two-fold remedy to the judgment creditor of a corporation whose execution has been returned nulla bona. It first provides a remedy peculiar to the laws of Kansas and unenforceable in other forums. The second is embraced in the portion of the statute which has been italicized. That this language empowers the judgment creditor to maintain his action at law against a shareholder wherever he may be found, and to do this without first obtaining a judgment against the Kansas corporation in the courts of the state where the statutory liability of the shareholder is sought to be enforced, we entertain no doubt; and, if doubt were to be entertained, the numerous and uniform decisions of the supreme court of Kansas, of the federal courts, and of the courts of sister states, so interpreting this clause, would be sufficient to remove it.

In Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. 759, the court had under review this statute, and, interpreting it, said: "It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the court where the judgment was rendered against the corporation; in the other, by an ordinary action, to be instituted wherever personal jurisdiction of the stockholders can be acquired. * * * This ruling does not debar a creditor of the insolvent corporation of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Dennick v. Railroad Co., 103 U. S. 11; McDonough v. Phelps, 15 How. Prac. 372; Seymour v. Sturgess, 26 N. Y. 134." To like effect are the cases of Hentig v. James, 22 Kan. 326, and McClelland v. Cragun, 54 Kan. 601, 38 Pac. 776. In the federal courts, also, the same statute, and the rights of litigants under it, have been frequently the subject of consideration. Thus, in Bank v. Rindge, 57 Fed. 279, the suit was an action at law by a judgment creditor of a Kansas banking corporation against the defendant, as a stockholder in that corporation, to enforce the stockholder's liability under the statute in question. It was held that the action would lie; that, under the interpretation given to the law by the Kansas courts, the stockholder's statutory liability was in the nature of a contract of guaranty; and that a judgment creditor might proceed against the stockholder accordingly. Such, also, was the decision of the federal courts in Rhodes v. Bank, 66 Fed. 512, and McVickar v. Jones, 70 Fed. 754. The same law has passed under the review of the supreme court of Missouri in the case of Guerney v. Moore, 131 Mo. 650, 32 S. W. 1132. It was there held that the judgment creditor might proceed by an ordinary action at law against the stockholder wherever personal jurisdiction of the stockholder could be obtained, and that the statute of Kansas was the measure of the stockholder's liability. Bank v. Rindge, 154 Mass. 203, 27 N. E. 1015, is relied on by appellants as being in opposition to these authorities. In that case the supreme court of Massachusetts regretted that under the pleadings it was not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which might have been put upon it by the courts of that state; but, being unable so to do, it held that in the commonwealth of Massachusetts it was well settled that the courts had declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other states under statutes of those states. But in the later case of Bank v. Ellis (Mass.) 44 N. E. 349 (decided in 1896), the court, stating that the facts alleged in that case were different from those presented in Bank v. Rindge, supra, receded from its former position, and retained an action such as the one here at bar, brought against a stockholder under the Kansas statute, and there declared "that the liability of the stockholders must be determined according to the laws of Kansas." It may therefore be concluded, with much certainty, that under the Kansas statute the liability is in contract, and is not penal; that the rights of the judgment creditor and the reciprocal rights and duties of the stockholder are measured by this statute, and that under the law the creditor who has obtained judgment in Kansas against a corporation, upon which judgment and execution has been issued and returned nulla bona, may pursue the stockholder in an action at law wherever jurisdiction of his person may be obtained, and secure judgment against him; that he may sue one or many of the stockholders; that he may take judgment against them without first having obtained judgment against the corporation in the state in which his action against the stockholders is commenced; and that the measure of the individual stockholder's liability is the face value of his shares, together with the amount of his unpaid subscription thereon. Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Hoyt v. Bunker, 50 Kan. 574, 32 Pac. 126; Bagley v. Tyler, 43 Mo. App. 195; Aldrich v. Development Co. (Or.) 32 Pac. 756; Dennick v. Railroad Co., 103 U. S. 18; Paine v. Stewart, 33 Conn. 516.

2. It is next contended by appellants that the Electric Rapid Transit Company, organized under the laws of Kansas, is a railroad corporation, and that its stockholders are therefore relieved from all liability under the constitution of the state. The provision of the constitution bearing upon the question has been quoted. We approach its consideration with reluctance, for the provision has not received judicial interpretation in this regard from the supreme court of Kansas, and it must needs be embarrassing for the courts of another state to be called upon in the first instance to put their own interpretations upon the constitutional provisions of a sister state. There are certain considerations, however, which will go far towards the elucidation of the question, so far as affects this corporation. It may be safely said that the privilege held out to stockholders of railroad corporations organized under the laws of Kansas was not designed as an invitation to foreigners or citizens of other states to take advantage of the Kansas laws, and thus secure immunity to themselves, while equipping and operating railroads entirely without the boundaries of the state. Agriculture was and is one of the most important industries of Kansas. Cheap transportation and a ready market are essential to agricultural success. This the framers of the Kansas constitution well knew, and it is not unreasonable to infer that the exemption held out to stockholders of railroad corporations organized under the laws of Kansas was designed to prompt and stimulate the building of railroads within the state, in aid of one of its greatest industries. It is not so easy to believe that the purpose of that constitution was to exempt from liability the stockholders of street railways, which are designed merely to facilitate travel and communication upon the public highways of a municipality, while at the same time the stockholders of mercantile, manufacturing, and banking corporations, which corporations certainly tend as much to the public convenience and welfare as do street-railroad corporations, should be held to strict accountability. We recognize that the word "railroad" or "railway," as used in a law, is broad enough to include street railroads, and that many cases have arisen where the courts have held that the word does, in its signification, include such corporations; but, when all has been said, each case has been determined upon its own facts, having in view the circumstances of the case, the context, the presumed intention of the lawmakers, and the general policy of the particular state in regard to the matter; and therefore, while a large number of cases may be cited in which the courts have held that the statutes under consideration dealing with "railroads" embraced in their provisions street railroads, an equal number could be instanced in which the courts have, under the facts of the case, narrowed and limited the application of the statute, and held that street railroads were not included. It would be difficult, if not impossible, to formulate any rule to govern the determination. In this state the difficulty is much relieved by the distinction which our Codes make between railroad corporations proper and street-railroad corporations. This consideration, however, is entitled to weight. The exemption from liability of stockholders of railroad corporations under the constitution of Kansas is an immunity in the nature of a grant or privilege. There is no rule of construction which make it mandatory upon a court to hold that "railroad" must include street railroads, and, upon the principle that all grants from the state are construed most strongly in favor of the grantor, it would certainly be proper in this case, no reason to the contrary being shown, to narrow rather than to broaden the meaning of the word, and to limit its applicability to the one class which is necessarily embraced within the term; and we therefore conclude that the provision of the constitution of Kansas here under consideration was not designed to apply to stockholders of street-railroad corporations. In consonance with this view, it is said by the learned authors of the Law of Incorporated Companies (1 Foote & E. Incorp. Cos. p. 668, note): "Whether any of the statutes relating to railways apply to street railways is an undetermined question. It is a question which arises again and again, as can readily be imagined, since the statutes have very little to say about street railways. Still, for

various reasons, it is believed that the grea body of railroad legislation of this state does not apply to street railways." The judgment and order are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

115 Cal. 316

### FASSETT v. WISE et al. (Sac. 9.)

(Supreme Court of California. March 8, 1897.)

For majority opinion, see 47 Pac. 47.

GAROUTTE, J. (dissenting). The facts may be stated briefly as follows: (1) On March 14, 1894, plaintiff's mortgage was executed, and at that date the mortgagor resided in Kings county, and the mortgaged property was also there situated. (2) The mortgaged property was thereafter, on April 3, 1894, and before the mortgage was recorded anywhere, removed to the county of Tulare, where it was attached by the defendants, on April 28, 1894, after plaintiff's mortgage had been recorded in the county of Kings, but before its recordation in the county of Tulare. (3) After such attachment, and on April 30, 1894, plaintiff's mortgage was duly recorded in the county of Tulare, where the mortgaged property then was.

Upon the foregoing statement of facts, the only question presented is, was the mortgage of plaintiff recorded in the manner required by law, before the levy of the attachment under which the defendants justify? for, if it was so recorded, then plaintiff is entitled to a judgment upon the findings. And the solution of this question is dependent upon the true construction of two sections of the Civil Code. These sections read:

"Sec. 2959. A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resides, and also in the county in which the property mortgaged is situated, or to which it may be removed."

"Sec. 2965. When personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either,

"(1) The mortgagee, within thirty days after such removal causes the mortgage to be recorded in the county to which the property has been removed; or,

"(2) The mortgagee, within thirty days after such removal, takes possession of the property as prescribed in the next section."

A fair construction of section 2959 is that the mortgage must be recorded in the county where the mortgagor resides at the time of its execution; and, if the property is situated in a different county at that time, then the mortgage must also be recorded in the county where the property is then situated. Jones on Chattel Mortgages (section 251) says: "It is the place of residence of the mortgagor at the time the mortgage is executed, and not his place of residence at the time it is recorded or filed, that determines the place where it should be recorded or filed." Cobbey on Chattel Mortgages (section 573) says: "The place of residence at the time it is executed, and not at the time it is filed, is what governs." While the text of these writers is not fully borne out by cases they have cited, owing to the peculiar language of the various statutes under which these decisions were made, I think the general principle they have stated entirely sound; and the case of Bank v. Weed, 89 Mich. 357, 50 N. W. 864, supports such a construction of our statute. We have statutes authorizing chattel mortgages in nearly every state in the Union. About one-half of these statutes provide, in terms, that the mortgage must be recorded where the mortgagor resides at the time the mortgage is executed, while the remainder are couched in language similar to our own. There does not appear to be a single statute of them all that in terms requires the mortgage to be recorded in the county where the mortgagor resides at the time the mortgage is recorded. And in the decision of many cases under similar statutes, from other states, the courts appear to assume without question that the residence of the mortgagor and location of the mortgaged property at the date of the execution of the mortgage are the all-controlling elements.

It necessarily follows from the foregoing that the fact of the mortgage not having been recorded in Kings county until after the sheep were removed to Tulare county is immaterial. That portion of section 2965 here involved means that the mortgagee had 30 days from such removal within which to record his mortgage in the county to which the property is removed, and that he loses no rights if he records his mortgage within that time. In the present case the mortgage was recorded in Kings county—the county in which the mortgagor resided, and in which the property was situated at the time of its execution—prior to the levy of defendants' attachment; and, although the attachment was levied upon the property in Tulare county prior to the recordation of the mortgage in Tulare county, still it was levied at a time before the 30 days had expired in which the mortgagee had the right to there record the mortgage. If this attachment is binding against the mortgagee, it would have been binding against him if levied the very day the property passed into Tulare county, and thus the purpose of the statute in giving the mortgagee time in which to record his mortgage would be defeated, and the statute rendered unavailing for any purpose. By reason of the foregoing views, the case, then, presents itself exactly as though the property had never been removed from Tulare county, but had remained in Kings county, and this attachment had been levied there as of the time it was actually levied. Under such conditions, the writ of attachment being levied subsequent to the recordation of the mortgage, it should not prevail.

It is urged by respondents that the mortgage must be recorded immediately upon its execution, and, if not so recorded, it is void; but I find no law for such a conclusion. The statute has no provision requiring immediate recordation, and it would be judicial legislation for this court to so declare the law. Section 2957 of the Civil Code declares: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: (1) It is accompanied by an affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors; (2) it is acknowledged or approved, certified and recorded, in like manner as grants of real property." Under the statutes of other states which, like ours, contain no provision fixing a definite time in which a chattel mortgage must be recorded in order that it may not be void, it has been held that mere delay in such recordation in no way invalidates the mortgage, and that the holder of the mortgage, in not recording it, simply assumes the perils and risks of losing his security by the intervention of other liens or subsequent purchasers. Jones, Chat. Mortg. § 237; Wilson v. Leslie, 20 Ohio, 166; Hicks v. Williams, 17 Barb. 527; McVay v. English, 30 Kan. 368, 1 Pac. 795; Mitchell v. Black, 6 Gray, 100; Crooks v. Stuart, 2 McCrary, 13, 7 Fed. 800. I believe such to be the law in this state.

Respondents rely, both directly and by analogy, upon section 3440 of the Civil Code, which declares that all transfers of personal property are void, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession. But this section cannot be invoked to any degree in this case. It is not applicable, for in terms mortgages upon personal property, when allowed by law, are exempted from its provisions. Neither is there any analogous principle of law which will aid respondents' contention. Berson v. Nunan and like cases declare that the recordation of the mortgage is an equivalent of an immediate delivery and continued change of possession, but there the court only meant to say, and the language can have no other reasonable interpretation, that the recordation of the mortgage, when had, from that time was the equivalent of the immediate delivery and continued change of possession referred to in section 3440 of the Civil Code. The recordation of the mortgage is no part of the execution, no more than recordation would be an element in the execution of a deed. It is substantially so stated in Berson v. Nunan, 63 Cal. 551. I think the judgment should be reversed.

# MEMORANDUM DECISIONS.

115 Cal. 553

In re BLYTHE'S ESTATE. (S. F. 657.) (Supreme Court of California. Jan. 8, 1897.) Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. H. T. Blythe and others appeal from the decree of final distribution in the matter of the estate of Thomas H. Blythe. Dismissed on motion. Holliday & Holliday, for appellants. W. H. H. Hart (Garber, Boalt & Bishop and W. W. Foote, of counsel), for respondent.

PER CURIAM. This is a motion to dismiss the appeal of H. T. Blythe and others from the decree of final distribution in the matter of said estate, upon the ground that said appellants are not parties in interest in the proceeding. The appellants are concluded by the decision of this court upon their other appeals. They are no longer parties in interest. The motion is granted, and the appeal dismissed.

115 Cal. 554

In re BLYTHE'S ESTATE. (S. F. 658.) (Supreme Court of California. Jan. 8, 1897.) Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. The Blythe Company appeals from the decree of final distribution in the matter of the estate of Thomas H. Blythe. Dismissed on motion. George W. Towle, Jr., for appellant. W. H. H. Hart (Garber, Boalt & Bishop and W. W. Foote, of counsel), for respondent.

PER CURIAM. This is a motion to dismiss the appeal of the Blythe Company from the decree of final distribution in the matter of the said estate, upon the ground that said company is not a party in interest in the proceeding. Such was the determination of the court as to this appellant in Re Blythe's Estate, 112 Cal. 689, 45 Pac. 6. The appeal is therefore dismissed.

FIRST NAT. BANK OF SAN DIEGO, Appellant, v. NASON, Respondent. (L. A. 140.) (Supreme Court of California. Jan. 22, 1897.) Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge. Action by the First National Bank of San Diego against Arthur G. Nason. From a judgment of dismissal for want of prosecution, plaintiff appeals. Affirmed. Trippett & Neale, for appellant. Cassius Carter, for respondent.

PER CURIAM. This appeal is from a judgment of dismissal of the action for want of prosecution. The action is upon a promissory note, and is in all essentials identical with the case between the same parties, entitled "First National Bank of San Diego vs. Arthur G. Nason, No. 141," submitted on a like bill of exceptions and the same briefs, and this day decided. 47 Pac. 595. For the reasons given in that case, the judgment here is affirmed.

GRAY et al., Appellants, v. MAHON, Respondent (three cases). (S. F. 459–461.) (Supreme Court of California. Dec. 28, 1896.) Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge. Actions by Gray and others against Mahon. Judgments for defendant, and plaintiffs appeal. Affirmed. Fisher Ames and Jas. W. Cochrane, for appellants. E. B. Mahon, for respondent.

PER CURIAM. Upon the authority of Gray v. Lucas (S. F. 458; this day decided) 47 Pac. 354, the order in each of the above-entitled cases is affirmed.

HALEY, Appellant, v. PARKER, Auditor, Respondent. (S. F. 344.) (Supreme Court of California. Jan. 6, 1897.) In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge. Action by Edward Haley against W. F. Parker, auditor. From a judgment in favor of defendant, plaintiff appeals. Reversed. D. W. Burchard, for appellant. B. A. Herrington, for respondent.

PER CURIAM. This cause was submitted to follow the decision in Dwyer v. Parker (S. F. 345) 47 Pac. 372. For the reasons given in the opinion in that case, the judgment is reversed, with directions to enter judgment for the appellant as prayed for. BEATTY, C. J., not participating.

JOHNSTON et al., Respondents, v. SHORE et al., Appellants. SAME, Respondents, v. BROWN et al., Appellants. SAME, Respondents, v. SAWYER et al., Appellants. (S. F. 354–356.) (Supreme Court of California. Jan. 28, 1897.) Department 1. Appeal from superior court, San Benito county; James F. Breen, Judge. Actions by one Johnston, administratrix, and others, against Shore and others, Brown and others, and Sawyer and others. From orders granting changes of venue, defendants appeal. Affirmed. Scott & Dooling and N. C. Briggs, for appellants. D. W. Burchard (F. E. Spencer, G. B. Montgomery, and L. W. Jefferson, of counsel), for respondents.

PER CURIAM. Upon the authority of Johnston v. Brown (S. F. 353; this day decided) 47 Pac. 686, the order in each of the above cases is affirmed.

WARREN, Respondent, v. CHANDOS et al., Appellants. (S. F. 451.) (Supreme Court of California. Dec. 18, 1896.) Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge. Action by one Warren against one Chandos and others on an assessment for grading a street. From a judgment for plaintiff, defendants appeal. Reversed. Naphtaly, Friedenrich & Ackerman, for appellants. J. C. Bates, for respondent.

PER CURIAM. Upon the authority of Warren v. Chandos (S. F. 450; this day decided) 47 Pac. 132, the judgment herein is reversed, and the superior court is directed to enter judgment upon the findings in favor of the defendants.

# CALIFORNIA REPORTER

## 48 PACIFIC REPORTER

116 Cal. 267

## SCHMIDT et al. v. MESMER. (L. A. 166.)

(Supreme Court of California. March 12, 1897.)

FRAUD—ACTION FOR DAMAGES—WAIVER.

In an action by tenants of an hotel against the landlord to recover damages for false representations as to the income of the hotel, it appeared that, over a year after plaintiffs had knowledge of the alleged fraud, they asked to have the rent reduced, without any intimation of the alleged fraud; that afterwards they obtained an extension of time for payment of rent, without any such intimation; and that they had failed to pay the rent. *Held*, that plaintiffs waived the alleged fraud and their right to damages.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by G. L. Schmidt and Ivar A. Weid against Louis Mesmer. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Bicknell & Trask and D. K. Trask, for appellants. Murphy & Gottschalk, for respondent.

McFARLAND, J. This action was brought to recover damages for an alleged false and fraudulent representation made by the defendant to the plaintiffs with respect to a certain lease executed between the parties. The jury found a verdict for the defendant, and judgment was entered accordingly. Plaintiffs appeal from the judgment, and from an order denying a motion for a new trial. On December 30, 1893, the defendant was the owner of certain real property in Los Angeles, described generally as the "United States Hotel." On that day the parties executed a written instrument by which the defendant leased said property to plaintiffs for a term of three years, commencing January 1, 1894, at the monthly rent of $800, payable on the first day of each month; and the plaintiffs agreed to pay said sum of money as rent on the first day of each month, and entered into certain other covenants not necessary to be here mentioned. The upper floors of the building on the premises had been used, and were intended to be used, as an hotel; and there were two storerooms on the first story, and also rooms used as a barroom, barbershop, laundry, etc., which were included in the lease. The gist of the complaint is that the defendant falsely and fraudulently represented to plaintiffs that the income of the hotel for the year preceding had been at least $750 a month, whereas in truth said income had not exceeded the sum of $350 a month. There was a conflict of evidence upon the point as to whether or not defendant had ever made said representation. There was also evidence that on the day upon which the lease was executed the son of the defendant, who was managing the hotel, informed the plaintiffs that they could not afford to pay $800 a month for the property, and showed them the register and other books of the hotel, which were to some extent examined by one of the plaintiffs. There was a conflict of evidence as to whether this information was given to plaintiffs an hour or two before the execution of the lease, or an hour or two afterwards; but it was given on that day, and before the plaintiffs took possession of the premises. Quite a number of instructions were given by the court to the jury as to the effect of this notice given to them by the said son of the defendant, and as to the duty of plaintiffs, under the circumstances, to have informed themselves fully upon the subject, and also as to the correct measure of damages; and it is upon these instructions, and certain rulings made by the court with respect to evidence upon these subjects, that appellants base their contention for reversal. We do not think, however, that it is necessary for us to pass definitely upon the alleged errors in these respects, because, under our view of the case, the acts of the appellants, as hereinafter stated, constitute a waiver of the alleged fraud, if any such there was, and prevent appellants from recovering in this action, without regard to said alleged errors.

The appellants took possession of the premises on the 1st of January, 1894; and, if the respondent made the representation alleged, the falsity of that representation must have been discovered, and it was admitted that it was discovered, immediately after the plaintiffs took possession. The averments of the complaint show that. Nevertheless, they occupied the premises until the commencement of this suit, which was about 17 months afterwards, without making any complaint whatever as to said false representations, or giving respondent any notice whatever that such false representation was claimed. Some time in January, 1895, or later, the appellants asked the respondent to reduce the rent, but without any intimation whatever that any alleged false representation, as charged in the complaint, had been made by respondent. Respondent refused to reduce the rent. Appellants failed to pay all the rent for the month of February, 1895, and failed to pay any of the rent for the months of March and April, but asked further time to pay said rent, and were allowed by respondent's agent to give their note for said rent, payable six months thereafter, which note they gave. Said note was not paid when due, nor was the rent for said months of March and April paid. This suit was commenced in the month of May, 1895. It is, no doubt, the law that while, where a party seeks to rescind a contract into which he was induced to go by the fraudulent representations of another party, he must rescind at once upon the discovery of the fraud, and restore the other party, as near as may be, to his former condition, yet he may elect to go on with the contract, and sue to recover damages for the deceit, without giving any warning to the other party that he intends at some future time to charge him with fraud. This rule, when applied to a continuous contract which runs through a series of years, sometimes, no doubt, works an injustice to the party charged with fraud. It is true that one actually guilty of fraud is not entitled to much consideration; but the real difficulty usually is to determine whether or not the alleged fraud actually existed, and the issue has generally to be determined upon conflicting testimony, and in accordance with the preponderance of evidence. In such a case it is evident that the party who keeps his intended charge of fraud secret for years has a great advantage, in preparing for a future, intended action, which he alone anticipates, over his adversary, who has had no intimation of such action or such charge of fraud, and has had no reason to preserve or discover evidence concerning it. But this rule, which relieves a party, when he chooses to sue for damages, from many of the acts required of him when he elects to rescind, is subject to some just limitations. If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand towards the other party at arm's length; he must, on his part, comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud. Cooley says: "The fraud may be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having the right to complain of the fraud had fully, and with a full knowledge of his rights, in some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception." Cooley, Torts, 505. In Doherty v. Bell, 55 Ind. 205, the court say: "If the appellee, with full knowledge of all the facts, as we think it fair to presume, from the allegations in the reply, it was intended to charge he had, and after the appellants became the owners of it, agreed to pay the note, provided a certain extension of time was allowed him, and, in consideration thereof, such an extension was given him, we must regard him as having ratified the execution of the note, and as having waived whatever objection or defense he may have had to the manner of its execution." In St. John v. Hendrickson, 81 Ind. 350, the court say: "We fully recognize and approve the rule that a party may retain what he receives, stand to his bargain, and recover for the loss caused him by the fraud. We do not mean to run counter to this rule. We neither hold nor mean to hold that affirmance by retention of the thing bargained for cuts off an action for damages. We do hold that where a party, with full knowledge of all the material facts, does an act which indicates his intention to stand to the contract and waive all right of action for fraud, he cannot maintain an action for the original wrong practiced upon him. Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. * * * Nor are we unmindful of the settled rule that the defrauded party has an election of remedies. * * * We do decide that where a party with full knowledge declines to repudiate a transaction known to him to be fraudulent, and fully and expressly ratifies it, he can neither rescind, nor maintain an action for damages." In Edwards v. Roberts, 7 Smedes & M. 544, the court say: "If a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making a new agreement and engagement respecting it, he thereby waives the fraud and abandons his claim to equitable relief." In Negley v. Lindsay, 67 Pa. St. 217, the court say: "Judge Baldwin, who may be regarded as belonging to our judiciary, in Blydenburgh v. Welsh, Baldw. 338, Fed. Cas. No. 1,583, held that if, after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it, on a condition which he has no right to exact, he thereby waives the fraud, and cannot set it up in an action on the contract. This, said he, is a waiver of the objection to the contract on the ground of fraud, if he was informed of all matters which bore upon that question." See, also, Blydenburgh v. Welsh, Baldw. 338, Fed. Cas. No. 1,583; Kerr, Fraud & M. 298; People v. Stephenson, 71 N. Y. 527; Nounnan v. Land Co., 81 Cal. 1, 22 Pac. 515.

Under the foregoing authorities, and upon principle, we think that the acts of the appellants in the case at bar constitute a waiver of the alleged fraud, and an abandonment of the suit for damages. After the expiration of more than a year subsequent to their knowledge of the alleged fraud, they ask to have the rent reduced, without any intimation of the alleged fraudulent conduct of the respondent. Subsequent to that time they solicited and obtained an extension of the time for the payment of the rent, still without any intimation of the alleged fraud; and they themselves have failed to comply with their part of the contract, by failing to pay the rent as provided therein. This conduct of the appellants clearly brings them within the principle declared in the authorities above cited, and, this being so, the alleged errors of the court, with respect to other matters, become immaterial. Under no view of the case could a verdict in favor of plaintiffs be maintained. Judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(119 Cal. 192)

## LEHNHARDT v. JENNINGS, Sheriff, et al.
(L. A. 170.)[1]

(Supreme Court of California. March 10, 1897.)

SUPERIOR COURT — JURISDICTION — CONTROVERSY.

A complaint alleged that defendant sheriff demanded certain fees, which were paid him under protest; that he also demanded a further sum, all of which sums he agreed to return to plaintiff if the demands were not legal; and that the charges were illegal; and prayed judgment for the aggregate amount. It was not stated on what pretext defendant made the additional demand, nor wherein its illegality consisted, nor that it was paid. The complaint was not verified, and the answer was a general denial. The court made findings reciting that the parties agreed on the same as true, and showing that the amount first mentioned was paid defendant, and judgment therefor was rendered for plaintiff, but no reference was made to any additional demand or any other payment. *Held*, that there was no controversy as to the additional demand, and, the other demand being less than the jurisdictional amount of the superior court, the judgment was reversed, with directions to dismiss the action.

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[1] Rehearing granted.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Emil Lehnhardt against Frank S. Jennings, sheriff, and others. From a judgment for plaintiff, defendants appeal. Reversed and dismissed.

A. H. Sweet, for appellants. Trippet & Neale, for respondent.

BRITT, C. Plaintiff sues, as the assignee of one Hinton, to recover from defendant Jennings (who is sheriff of the defendant county) money paid by Hinton to Jennings, as fees demanded by the latter for official services in the levy of a writ of execution. Allegations appear in the complaint showing with considerable detail that the question arose between Hinton and the sheriff whether, in levying an execution issued on an ordinary money judgment, which judgment has become a lien on real property of the debtor, lands subject to the lien must be attached in the manner in which a writ of attachment is levied, under section 542, Code Civ. Proc., the sheriff claiming that course to be proper. It is averred that the sheriff demanded "the fees hereinafter specified, which fees were paid the said Jennings under protest." The fees so specified were for proceedings taken by the officer in accordance with said section 542, and amounted to $117.40. Then occur the following allegations: "That said defendant demanded of said Hinton the sum of $200, in addition to said sums heretofore stated, all of which sums the said Jennings agreed to return to said Hinton if said demand was not legal. * * * And plaintiff alleges that all of said charges and sums paid as aforesaid are illegal," etc. The prayer is for judgment in the sum of $317.40. The complaint was not verified, and the answer was a general denial. The court made findings containing a recital that the parties agreed upon the same as true. These show that the sheriff, in executing the writ, attached numerous parcels of land in the manner alleged by plaintiff, and charged and was paid therefor the sum of $117.65; and for this amount the court rendered judgment in favor of plaintiff. No reference is made in the findings to a demand by the sheriff, or payment to him, of anything beyond said sum of $117.65.

In our opinion, the record discloses no cause of action of which the superior court has original jurisdiction. In order that jurisdiction may be exercised by that court in an action at law for the recovery of money only, the constitution requires that the demand in suit shall amount to $300. Article 6, § 5. It is well settled that in such actions the amount sued for determines the jurisdiction of the court. But in the cases pertaining to the subject an actual dispute concerning an amount within the jurisdiction of the court to consider appeared prima facie from the record (Dashiell v. Slingerland, 60 Cal. 653; Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126; and others); and it has never been held that the prayer of the complaint should conclude the question of jurisdiction, regardless of the allegations on which it is founded. See Jackson v. Whartenby, 5 Cal. 94. In this case there is no semblance of real controversy over any sum greater than that for which the court gave judgment. It is alleged in the complaint that the sheriff demanded $200 in addition to the specified fees for attaching the land; but it is not stated upon what pretext he made such additional demand, nor wherein its illegality consisted, if it was illegal, nor that it was paid. Both the contents and the omissions of the findings tend to confirm the inference that the only substantial purpose of the statement relating to an additional demand of $200 by the sheriff is to give color to the prayer for a sum sufficient to authorize the court to take cognizance of the action. If it was deemed desirable to have an authoritative decision of the question of the sheriff's duty under the writ, the law has provided methods competent for that purpose, and not obnoxious to any provision of the constitution. We recommend that the judgment be reversed, and the cause remanded, with directions to the court below to dismiss the action.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to dismiss the action.

116 Cal. 264

## O'NEILL v. REYNOLDS, Judge. (S. F. 712.)

(Supreme Court of California. March 11, 1897.)

INSOLVENCY—ASSIGNEE—MANDAMUS—WHEN LIES.

1. In the election of an assignee in insolvency under Insolvent Act, § 15, the majority in amount of claims entitled to vote prevails.

2. A mandate will not issue out of the supreme court to require a lower court to set aside its order, whether the order be merely erroneous, or in excess of jurisdiction.

3. Conceding that a mandate would issue out of the supreme court to require a lower court to admit to the office of assignee of an insolvent's estate one other than such court's appointee, it will not issue where appellant has not qualified for the office.

In bank. Petition by Hugh O'Neill against John Reynolds, judge of the superior court of Santa Clara county, for a writ of mandate. Peremptory writ denied.

N. H. Castle and Daniel W. Burchard, for petitioner. John H. Dickinson and Eugene Deuprey, for respondent.

GAROUTTE, J. One Corkery filed his petition in insolvency. At the time set for the election of an assignee by the creditors, claims in the amount of $3,940.32 were voted for O'Neill for assignee, and claims in the amount of $3,705.80 were voted for Fleming for assignee. The total of these two amounts constituted substantially all the claims that were entitled to vote at the election. A further claim in the amount of $16,000 was on file at that time, but, by virtue of proceedings taken under section 8 of the insolvency act, the court held that said claim was not entitled to be voted. Upon the foregoing facts, the court decided that no person received a majority in amount of claims for assignee, and, declaring no election, appointed the sheriff assignee. This proceeding was thereupon inaugurated, in the form of an application for an alternative writ of mandate from this court, asking that, if good cause to the contrary be not shown, the order appointing the sheriff assignee be vacated, and that said O'Neill be admitted to the use and enjoyment of the office of assignee of the estate of Corkery, insolvent, upon his qualifying as such assignee. No showing of any kind has been made to this court by respondent in answer to the writ, and there has been no appearance.

The true construction of section 15 of the insolvent act is that the majority in amount of claims entitled to vote shall prevail in the election of an assignee; and, if the court in this instance pursued a course based upon some contrary construction of the statute, its action was wrong. But conceding the election of the petitioner, O'Neill, as assignee, and further conceding that the court should have so declared, still we do not see how this petitioner is entitled to the relief here demanded. He desires a mandate requiring the lower court to set aside an order appointing a certain person assignee of an insolvent estate. Surely, mandates are not usually issued to set aside orders of courts. If the order is one made in excess of the court's jurisdiction, mandate is not the remedy. If the order is erroneous, then, certainly, mandate will not lie. Again, this court is also asked by the writ to command the trial court to admit O'Neill to the use and enjoyment of the office of assignee upon his duly qualifying as such assignee. Conceding that, under section 1085 of the Code of Civil Procedure, mandate would lie to the lower court, requiring it to admit O'Neill to the office of assignee if such court was unlawfully precluding him from that office, still such a case is not this case. It is not apparent that he is precluded by the court from the office. It is apparent that up to the present time he is not entitled to the office, for he has not qualified by giving bond and taking oath. In substance, he asks for a conditional mandate; that is, for an order which is to have force and effect, provided he (petitioner) in due time qualifies by giving bond and taking oath. Perchance he is financially unable to give the bond, and possibly might never take his oath of office. Under such circumstances the mandate of the court would be an idle act, and made so by petitioner himself. For these reasons, and others which possibly could be suggested, we conclude that mandate is not the road to be traveled in reaching the relief sought. The application for the peremptory writ is denied.

We concur: HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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(116 Cal. 689)

## KOSHLAND et al. v. SPRING et al. (S. F. 439.) [1]

(Supreme Court of California. March 2, 1897.)

Sale of Land—Contract—Title of Vendor.

1. A contract by S. to sell to K. all the land conveyed by deed to G., S. "now being the owner thereof," provided the title prove good, excepting any lots, streets, or parts of streets "heretofore sold and conveyed, or in writing contracted to be sold," by S., for "$400 per acre of all the lands in said tract now owned by" S. (the premises conveyed by deed to S. being therein described by monuments, courses, and distances), "containing 304 acres, more or less," excepting therefrom a strip owned by a railroad, and 22 blocks "situate in the town of D.," designated by numbers on a certain map of D., is not a contract to sell only so much as S. owned at the time, but all the land within the exterior bounds specified in the deed to G., less the exceptions in such deed and the contract; and K. need not complete the purchase, there being streets (other than those which by use and improvement had obviously and notoriously become highways) throughout the tract, which was chiefly used for agriculture, in which the public had rights through dedication, though K. knew a town site had been laid out on the tract, and had seen copies of the map.

2. One need not complete his purchase of a tract of land, the vendor having obligated himself to make good title as a condition of sale, where litigation with grantees of various lots deeded according to a map which embraces the tract agreed to be sold, and shows streets thereon, is necessary to determine their rights in such streets.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by Simon Koshland and others against F. S. Spring and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

Edward J. Pringle and P. G. Galpin, for appellants. Daniel Titus and I. B. L. Brandt, for respondents.

BRITT, C. Plaintiffs agreed with defendants for the purchase of certain land, and deposited with the latter $5,000 as earnest money pending investigation of the title. This action was brought to recover such deposit, plaintiffs claiming that the title was not good or satisfactory. Defendants denied the defects alleged, and filed a cross complaint to compel specific performance of the contract. The court below held with the plaintiffs. The facts of the case are numerous, and have not much interdependence. A somewhat extended statement of them is necessary to an understanding of the dispute.

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[1] Rehearing denied.

The contract of the parties bore date August 27, 1887. By its terms, F. S. and J. R. Spring, the defendants, agreed to sell to plaintiffs all that tract of land in Alameda county which was conveyed by the sheriff of said county to one Grogan by deed dated October 24, 1876, reference being made to such deed for description of the bargained premises, "said parties of the first part [the Springs] now being the owners thereof: provided, however, that the title to said lands and premises shall prove good or satisfactory to said parties of the second part [Koshland et al.], and not otherwise; excepting and reserving from said lands and premises any lots or parts of lots, streets or parts of streets, that may have been heretofore sold and conveyed, or in writing contracted to be sold, by said parties of the first part, or either of them, for the price or sum of $400.00 per acre of all the lands in said tract now owned and belonging to said parties of the first part, or either of them." Within the time allowed for examination of title and ascertainment of the acreage in the tract, the purchasers stated their objections to the title and demanded return of their deposit. The premises conveyed by the deed of the sheriff to Grogan were therein described by monuments, courses, and distances, "containing 304 acres, more or less," excepting therefrom (1) a strip of land 100 feet wide, in the middle of which ran the track of the Central Pacific Railroad, extending across the tract a distance of more than half a mile; (2) another piece, 50 feet wide and 1,000 feet long, in the eastern part of the tract, adjacent to the strip first reserved, and which had been conveyed to the railroad company for purposes of a station; (3) 22 blocks of land "situate in the town of Decoto," and known and designated by numbers and letters upon a map of Decoto entitled "Plan of Decoto Land of the Decoto Land Company, Alameda Valley." It is thus seen that the subject of the treaty between plaintiffs and defendants was a tract containing 304 acres, less the portions owned by the railroad company, and 22 specified blocks, excepted in the deed of the sheriff to Grogan, and diminished also by a further exception in the contract of "any lots or parts of lots, streets or parts of streets, that may have been heretofore" (i. e. before August 27, 1887) "sold and conveyed, or in writing contracted to be sold," by defendants or either of them. The map of Decoto mentioned in the Grogan deed showed the whole tract platted into lots, blocks, and streets, traversed by the line of railroad, bounded east, north, and northwest by county roads, and two of such blocks marked as "parks." The controversy here concerns mainly the streets delineated on the map exterior to those parts of the tract reserved from the contract of sale. Such streets included an area of about 90 acres, and plaintiffs contend that the same had become, in consequence of the acts of defendants and their predecessors in estate, impressed with an easement in favor of the public and of individuals tantamount to dedication thereof for public use, to the serious impairment of the title. Defendants deny that such easement exists to any extent incompatible with their contract, and claim ability to make good title to about 238 acres, and that plaintiffs should pay them therefor the stipulated price of $400 per acre. On November 6, 1869, the tract—by which term we designate the entire body of 304 acres—was owned by Ezra, John, and Adolphus Decoto, brothers; and on that day they entered into a written contract with one Brown, by which they authorized him to enter on the land and lay out the same in lots, blocks, and streets, and to negotiate sales of lots, reserving several of the blocks to the Decotos. They agreed to execute deeds to the purchasers of lots from Brown; they to receive the proceeds of sales up to the sum of $42,000, and convey to Brown the remaining land after sales of that amount had been made. Brown, on his part, agreed, among other covenants, that he would "cause said lands to be platted and divided into lots and blocks and streets, for sale." January 18, 1870, Brown assigned his interest in such contract to the Decoto Land Company, a corporation, the instrument of assignment providing that the latter should fulfill Brown's engagements with the Decotos. Such corporation entered upon the land, and surveyed and staked it into lots, blocks, streets, and parks, and made the aforesaid map thereof, and on July 9, 1870, filed such map in the office of the county recorder. It also planted many thousand trees on the tract, disposing them around the blocks along the curb line of the prospective sidewalks. There were 131 blocks in all, many of them fractional.

The only sale made in the year 1870 was evidenced by a deed to one Hastings, in which the Decoto Land Company and the three Decoto brothers joined, of four lots in block C "in the town of Decoto," as laid down on the said map. Block C was one of the 22 blocks excepted from the contract between plaintiffs and defendants. On January 10, 1871, the Decotos conveyed by deed to said company the entire tract, described by metes and bounds, excepting therefrom in favor of the railroad the strips of land already mentioned, and reserving also said 22 blocks. The excepted portions were described by reference to said map in the recorder's office. Contemporaneously with this deed, and to secure a portion of the purchase money unpaid, the company executed to the

Decotos a mortgage on the premises, described in the same manner and with like exceptions as in the deed. About the same time the Decotos and said company joined in a deed of 9 of such excepted blocks, described by reference to the map, to F. S. Spring, one of the appellants here. Such 9 blocks lay in an oblong body on both sides of the railroad, intersected by several cross streets, and extended from the eastern boundary of the tract westerly about half the width thereof, and included a majority of the lots afterwards sold in the nascent town. All the deeds and contracts above mentioned were recorded in the county recorder's office at or near the respective times of their execution. July 28, 1871, the Decoto Land Company conveyed 88 blocks, as shown on the map, to F. S. Spring. The deed was not recorded until April 26, 1875. Meanwhile the appellant J. R. Spring had become the assignee of said mortgage, and on April 24, 1875, he began a suit for its foreclosure. In due course the land described in the mortgage was sold under decree of foreclosure, and Grogan became the purchaser thereof, and received the sheriff's deed referred to for description in the contract which gave rise to this action. On February 2, 1877, Grogan conveyed the same premises to said J. R. Spring. Prior to the action for foreclosure, F. S. Spring made divers sales of lots in the 9 blocks conveyed to him in January, 1871. His deeds of such lots described them as being in the town of Decoto, or by reference to said map. Neither he nor any of the purchasers from him were parties to that suit. After the sheriff's deed, J. R. Spring made or agreed to make conveyances, seven in number, to as many different purchasers, of lands in the tract outside the excepted 22 blocks. Some of his deeds described the premises conveyed by reference directly to the map, others by metes and bounds, and some of the latter included portions of streets marked on the map. One may be noted specially. It was executed July 3, 1883, by J. R. Spring to the trustees of a school district, and granted block 102 "marked on a sketch map made for the late Decoto Land Company, * * * together with the right of way on H street to the railroad, and a right of way to the Bell Ranch road." The latter road bounded the Decoto tract on its easterly side. On this block a public school house was built, and school was kept. Said deeds of J. R. Spring appear to have covered all or nearly all the parcels excepted from the contract with plaintiffs as "lots or parts of lots, streets or parts of streets, heretofore conveyed and sold, or contracted to be sold." F. S. Spring in the years from 1875 to 1887 also made a number of sales out of his excepted blocks near the railroad station, his conveyances referring more or less directly to the map for description. In 1887 about 40 families resided on lots sold and reserved within the tract, and there were some business houses near the station. "Railroad Avenue" (so called on said map) was the main thoroughfare across the tract from east to west, and was graveled and maintained as a highway by the county. Portions of two other streets were in like manner maintained as highways. Parts of a few streets outside the limits of the excepted blocks were traveled to some extent, and more or less marked by narrow wagon roads or trails. In some instances purchasers of lots extended their fences across adjacent streets, and all the western portion of the tract (perhaps one-third or more of its area) was for many years before 1887 fenced, plowed, and cultivated. The two blocks marked as "parks" on the map were in a barley field. It seems from the foregoing that Decoto was a town site laid out in a rural district on a tract of land nearly half a square mile in extent, having a railroad station within and near its eastern boundary, around which grew a straggling village. The town failed to attract population as its projectors hoped, and a large —it may be, the greater—part of the site reverted to its original state of agricultural fields.

1. It is said by defendants that the contract recognizes some dedication of streets, but provides for the sale of all the land owned by them; that the case "does not involve the sale of a certain ranch, farm, or parcel of land, with boundaries defined or definable. * * * This was not a contract to sell all the land within the outside boundary of the sheriff's deed. It was a contract to sell within that boundary only so many acres as the appellants owned at the time of the sale." And upon this view of the contract it is claimed, as we understand the defendants, that they have the right to an ascertainment by the court of the acreage to which their title may be proved perfect, whether little or much, and to be paid therefor by plaintiffs at the contract rate. We dissent from such a construction of the contract. We are disposed to think it doubtful, on the facts appearing, whether specific performance could be had in any event, if the agreement is so indefinite as to its subject-matter. But we see no uncertainty as to the premises which defendants agreed to sell. These were all the land conveyed by the sheriff's deed of October, 1876, except "any lots or parts of lots, streets or parts of streets, that may have been heretofore sold by the parties of the first part," etc. All the exceptions within the exterior boundaries specified in the deed of the sheriff were susceptible of exact ascertainment, and so the residue on which the contract was to operate was capable of like definition, and was within the requirement of the contract for good title.

2. The owners of the land offered to dedicate all the streets marked on the plat. Appellants contest this conclusion with much vigor, but it seems to result from the evi-

dence. The Decoto brothers, by their contract with Brown in 1869, expressly assented to the platting of the land into lots, blocks, and streets, for sale; provided for their own participation in the benefits of the scheme, and the reservation to themselves of some of the platted blocks. When Brown's assignee had fulfilled Brown's agreement relative to the survey and plat, the owners signified their approval of such performance by joining in the conveyances to Hastings, to the railroad company, and F. S. Spring, all referring to the map for purposes of description. The intent of the owners to dedicate was fairly apparent, whether or not Brown was, in strictness, their agent. People v. Beaudry, 91 Cal. 213, 27 Pac. 610; Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025.

3. We think, also, that the evidence does not bear out the further contention that the offer made was "repudiated as a whole by the owners, and was afterwards renewed only as to the special streets expressly contemplated by the terms of the contract." Although, in the deed made by the Decoto brothers to the Decoto Land Company, the tract was described as a whole by its exterior confines, a mode of description regarded as indicative of a design to revoke an offer of dedication (Archer v. Salinas City, 93 Cal. 53, 28 Pac. 839), yet the circumstance loses its importance when we consider that it was by a similar description, adopted before any map was made, that the Decotos had bound themselves to convey the land to Brown, to whose interest the land company succeeded, and that in the same deed 22 blocks, as well as other parcels, were excepted by reference to the map. No greater effect can be allowed to the foreclosure of the mortgage executed simultaneously with such deed, and which contained the same description of premises. The foreclosure may have rendered nugatory the deed of 88 blocks made by the land company to F. S. Spring in July, 1871; but it did not affect the precedent steps towards dedication taken by the Decotos alone and jointly with the land company, nor the consequence of sales by F. S. Spring to purchasers who were not parties to that suit, and had succeeded ratably to his interest in all the streets. Regarding the conveyances made by J. R. Spring out of the land acquired by him as the result of the foreclosure, they cannot be said to evince a design for any general revocation of the previous offer to dedicate. Rather, for the most, they treat the streets as present utilities for access to the lots sold, with a potential character of public ways. For example, the deed of block 102 to the school district, "together with the right of way on H street."

4. It is said that, if any of the deeds of lots made by either J. R. Spring or F. S. Spring operate indirectly towards a dedication of streets in other parts of the tract, "such dedication must be accepted by respondents as a necessary part of the exceptions of the contract of sale." This is a corollary of the proposition that the parties agreed for the sale of whatever land within exterior limits defendants had good title to, and falls with that theory of the contract, for reasons already stated. But it remains to consider whether those conveyances, and the concomitant formation of a village community, did have such tendency; it being borne in mind that there had been an offer to dedicate all the streets marked on the map of the tract, and that such offer was, to some extent, accepted. Appellants claim that there was no dedication to public use except of Railroad avenue and parts of two other streets, and that "no rights of purchasers extended beyond these streets, unless it be to such rights of way as were attached 'of necessity' to the reserved blocks," all of which were within the exceptions of the contract; and, by way of illustration, they say it is "preposterous to presume that the man who bought a lot near the depot contracted for an immediate right of way through streets half a mile off, upon which he could not walk without destroying growing grain of his vendors." They cite Civ. Code, § 1104, and various cases claimed to be in consonance with their view. Plaintiffs urge, on the other hand, that by platting the land into streets, etc., and the sale of lots by reference to the map, there was an irrevocable dedication of all the spaces called "streets" on the map to the use of the public; also, that the grantors impliedly covenanted with each purchaser of a lot bounded upon a street represented on the map that the street should be permanent of the width and length depicted on the plan. Language is used in San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, which justifies the contention of respondents regarding the effect of a plat exhibiting streets, and sales of lots with reference thereto, but the doctrine has been modified by subsequent decisions. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961. The present attitude of this court upon the question is reflected in Archer v. Salinas City, 93 Cal. 52, 28 Pac. 841: "Whether the owner, by making sales according to such map or designation, has made the offer with reference to other streets than those by which the lots sold are bounded, is a fact which the court must determine from the circumstances of each case, such as the number of sales; their proximity to the street claimed to have been dedicated; the use to which the land has been put; the means by which, or the extent to which, the streets have been brought into connection with other streets or highways." Necessarily, similar considerations must govern when the inquiry concerns the extent to which the offer has been accepted, or the extent of the rights of purchasers of lots in the tract. This doctrine is decisive of the present case. Plaintiffs were not bound to complete the purchase

unless defendants' title was found to be free from litigation, palpable defects, and grave doubts. Turner v. McDonald, 76 Cal. 177, 18 Pac. 262; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046. As to many streets marked on the plan of Decoto, it may be that any offer to dedicate them has been withdrawn, and they are no qualification of defendants' title, but there are many others of which this cannot be affirmed. Take for example F, G, and H streets. They extend lengthwise of the tract and crosswise of the principal reserved area. It is conceded that portions of them are affected by rights of way in favor of purchasers of lots bounded on them, and that a part of H street has become an undoubted highway. It cannot be affirmed on the evidence here, even if it were the province of this court to determine, that the rights of the public and of the owners of abutting lots in these streets are confined to those portions thereof within the excepted blocks, etc., mentioned in the contract. There is ground for serious argument whether they ought not to be kept open throughout their length, or, if some portions of them may be lawfully closed, it is hard to see how those portions are to be ascertained except by agreement or litigation with more or less numerous persons interested in such ascertainment as owners of neighboring lots. The circumstances in pais mentioned in Archer v. Salinas City, 93 Cal. 53, 28 Pac. 839, need to be invoked.

5. Appellants further maintain that, even allowing the dedication of all the streets laid out on the map, yet respondents had notice of the fact, and contracted to buy subject to that easement. This is asserted on the evidence that, in the course of the negotiation, Koshland, one of the purchasers, was shown copies of the map; knew that a town site had been laid out on the tract by the Decoto Land Company, and that "there was a piece of land called 'Decoto.' It was the town of Decoto that was to be sold." Since defendants were, in express terms, obligated to make good title, as a condition of the sale, we do not concede that actual knowledge by the purchasers of dedication to public use of the extensive street surface exhibited on the map—the tract being mainly or largely agricultural, and to be sold as acreage—could be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. Sugd. Vend. *390; Speakman v. Forepaugh, 44 Pa. St. 363, 374. Compare Devl. Deeds, §§ 911, 913, and cases cited. But, without passing on that question, we think the contract itself forbids the construction that plaintiffs made a chancing bargain relative to streets other than those which had, like Railroad avenue, become, by use and improvement, obviously and notoriously public highways. It provided for the sale—let us say—of the Decoto town site, excepting "all lots or parts of lots, streets or parts of streets, that may have been heretofore sold and conveyed, or contracted to be sold," etc. These terms, by excepting streets and parts of streets previously sold, imply that the vendors assume the right now to sell the remaining streets. If one contract to sell a piece of woodland, excepting so much of the standing timber as he had previously conveyed by proper writing, we suppose the fair inference would be that he undertook to sell all the timber which he had not so conveyed; and if it turned out that he owned none of the timber, because it had been reserved in the deed under which he claimed the land, or for other reason, this fact would be good cause to the purchaser for refusing to take the title. So, here, the reasonable construction of the contract is that defendants, the map before them, agreed to make title to plaintiffs of unconveyed streets as well as lots; but it is found that there are at least grave doubts whether they have right to convey many of the streets, and the result is that they cannot enforce specific performance of the contract, and plaintiffs are entitled to return of their deposit. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(116 Cal. 239)

## SHOEMAKER v. ACKER. (L. A. 108.)[1]

(Supreme Court of California. March 10, 1897.)

BREACH OF CONTRACT — DAMAGES — PROSPECTIVE PROFITS—EVIDENCE.

1. One who agrees to "devote his whole time and attention to the management" and cultivation of an orchard commits no breach of contract by occasionally absenting himself from the premises, at times when his presence is not necessary.

2. Prospective profits are recoverable as damages for breach of a partly-executed contract, whereby plaintiff was to plant and cultivate an orchard for five years, and share in the profits.

3. In estimating such profits, evidence of the value of a similar orchard at the time of the trial, if matured as contemplated by the contract, was admissible.

Department 2. Appeal from superior court, Los Angeles county; Waldo H. York, Judge.

Action by R. H. Shoemaker, Jr., against David D. Acker, to recover for breach of contract. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

John D. Pope, for appellant. Wm. D. Stephens and Ben. Goodrich, for respondent.

McFARLAND, J. This action was brought to recover damages in the sum of $35,000 for an alleged breach of a written contract between the parties. The jury returned a verdict for plaintiff in the sum of $2,000, for which judgment was entered; and defendant appeals from the judgment, and from an order denying his motion for a new trial. The contract out of which the litigation arises was executed on the 4th day of October, 1892; and, as appellant relies mainly upon two points for a reversal, the parts of said contract necessary to be considered may be briefly stated as follows: The contract recites that the appellant was about to invest from $5,000 to $7,500 in the purchase of unimproved land, to be selected by the parties; that the land should be cultivated, improved, and planted in lemon or orange trees, or partly in each, as the said appellant might elect; that the respondent was to have charge of the improvements and cultivation of the land, and was to have an interest in the income and profits that might be derived from the sale of the land or its products, and in the increase and value of said land from said improvements or otherwise. It is then agreed that the respondent "will devote his whole time and attention to the management, care, cultivation, and improvement of said land, and the sale of said land, and the products thereof"; that the appellant would provide for respondent a suitable dwelling house upon the land, and give him a certain amount monthly for his maintenance; that the appellant should furnish the necessary funds for the purchase of trees, implements, labor, etc.; that the appellant would not sell any portion of the land within five years from the date of the contract, except with the consent of the respondent; that, whenever any portion of the land should be sold, the profit derived therefrom should be ascertained by a method particularly stated in the contract; that, whenever any income should be derived from the land in any one year, certain deductions of expenses should be made, and the balance should be considered as profits, and all profits should be equally divided between the parties; that the respondent should keep an account of all moneys received by him from the sale of the products of the land; and that, if any portion of the land should remain unsold upon the expiration of five years, the value thereof should be ascertained by certain appraisers to be selected by the parties; and, if from such valuation there should appear to be any profit, that the respondent should be entitled to receive a deed for such portion of the land as would, according to said appraisal, represent in value his share of the profits; and that "this agreement shall continue for five years, unless all the land should be sold in the meantime, whereupon it shall cease and determine." In accordance with this contract, about 110 acres of land was purchased, at the price of $5,750; and immediately thereafter the respondent entered upon the performance of his obligations under said contract, and under his management, down to the 17th day of January, 1894, about 70 acres of said land had been cultivated, improved, and planted in lemon trees, as determined upon by the appellant. On said January 17, 1894, the appellant notified the respondent that for certain reasons he elected to consider the contract annulled, after which the respondent, in accordance with the appellant's demand, left the ranch, and gave up its management. It is not contended by appellant that he did not prevent the further execution of the contract, or that the respondent had not the right to consider it rescinded by the act of appellant, provided the appellant was not justified by the conduct of the respondent in putting an end to the contract.

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[1] Rehearing denied.

Appellant's contention that he had a right to put an end to the contract is based upon an alleged violation by respondent of his covenant to "devote his whole time and attention to the management, care, cultivation, and improvement of said land." The facts as to that contention are these: The respondent did faithfully and well manage the cultivation of said land, and the planting of same in trees, the care of the trees, etc.; but on several occasions he left the land on Saturday afternoon, and did not return until about noon on Monday, and, upon the remonstrance of the appellant, the respondent claimed that he had the right to so absent himself from the ranch when he could do so without any damage or loss occurring through such absence; and it fully appears that there was no defect in the management of the land, and no loss of any kind occasioned by such absence. Appellant contends, however, that the said agreement in the contract that appellant would devote "his whole time" was violated by his occasional absences, as above stated. We do not think that this contention can be maintained. A contract must be construed with reference to the subject-matter, to the circumstances under which it was made, and to the evident intention of the parties, as made apparent by all the language used, keeping in view the said subject-matter and circumstances. In the case at bar the most literal construction of the contract would not include a requirement that the respondent should positively remain on the land all the time. Indeed, his continuous personal presence there would have prevented the performance of many of his duties under the contract. His duty was the "management, care, cultivation, and improvement of said land, and the sale of said land and the products thereof"; and as he performed this duty faithfully and well, until he was prevented by appellant from doing so any longer, and as his short absences from the land were when he was "not needed there," and when his "presence was not necessary," and did not result in any loss or injury, or constitute any defect in management, we think that the jury were entirely warranted in finding that he had not by such absences committed any breach of the contract.

2. The second point made by appellant on the question of proper damages, although not as elaborately argued as the first point, is, in our opinion, one of graver import. "Prospective profits," as damages, present one of the most difficult subjects with which courts have to deal. It is not the law, however, that they can never be recovered. Our own Code states the rule to be that the measure of damages for the breach of a contract is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. An examination of the authorities will show that the cases in which future profits were rejected as "speculative" or "too remote" were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract. Familiar instances of profits which are thus speculative and remote are those which might have been realized on a new contract with a third person, which could have been consummated with the proceeds of the contract sued on if the latter had not been broken; for in such a case the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on. But, where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages. Suth. Dam. (2d Ed.) §§ 64, 72, 107, 120; Masterton v. Mayor, etc., 7 Hill. 61; U. S. v. Behan, 110 U. S. 344, 4 Sup. Ct. 81; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501; Hale v. Trout, 35 Cal. 229; Stoddard v. Treadwell, 26 Cal. 308; Cederberg v. Robison, 100 Cal. 98, 99, 34 Pac. 625; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. 1020. In Suth. Dam. § 64, the author, after speaking of profits which are too remote, says (quoting from a decided case): "But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement." We think that the damages claimed in the case at bar are of the kind which are recoverable under the principles above stated. Contracts for the purchase and sale of future crops running through a series of years have been recognized as valid (Civ. Code, § 1768; Blackwood v. Packing Co., 76 Cal. 212, 18 Pac. 248; Brown v. Anderson, 77 Cal. 236, 19 Pac. 487); and actions have frequently been maintained for damages for the destruction of growing crops, although, of course, there was no absolute certainty that they would have matured (Suth. Dam. § 120, and cases there cited).

Appellant particularly objects to certain questions asked by respondent of his witnesses, of which the following is a fair specimen: "What, in your opinion, is the present value of a lemon orchard, situated as this is, and of the varieties of which this orchard is composed,—that is, of Eureka, Villa Franca, and Lisbon varieties,—supposing the orchard to be of the age of four and a half years, or to have been planted out four and a half years?" It is contended that this question involved matters too remote and speculative, but we do not think so. As appellant, by his own wrong, forced respondent into the strait of proving damages, he cannot complain that the latter used the best methods left him for accomplishing the result. Of course, all property is somewhat vacillating in value, but land is usually as little so as any other kind of property; and certainly, as against a wrongdoer, there is no presumption that land will be of less value in a year or two hence than at the present time. Upon the breach of the contract by appellant, in manner as hereinbefore stated, respondent was entitled to sue at once, and to recover the entire damages resulting from the breach (Hale v. Trout, 35 Cal. 241); and the questions objected to would have been admissible if they had been asked immediately after such breach; but the trial at which the questions were asked did not take place until 1895, which was much nearer the time when, "in the ordinary course of things," the trees would mature, and the land would be in the condition which the parties contemplated it would be at the expiration of five years. This rendered the offered evidence more valuable; for in an action upon a contract which contemplates a long period of time for performance, if the trial be delayed, the conditions existing at the time of the trial, as affecting the prospective profits, may be shown. In such a case "parties are entitled to the benefit of any facts transpiring subsequently to the bringing of the action which show more clearly the gains prevented by the breach complained of, or the damages sustained from such a cause of action, or any other, the injurious effects of which extend into the future." Suth. Dam. § 107. See, also, Tahoe Ice Co. v. Union Ice Co., 109 Cal. 248, 249, 41 Pac. 1020. As was said in Cederberg v. Robison, supra, a party to such a contract "is not to be deprived of all profits because they are not susceptible of exact measurement." In Sutherland on Damages, the author, speaking of an action for damages for the destruction of growing crops, and basing his text upon authorities cited, says: "The jury may estimate, with the aid of testimony, the value of the crop at the time of its destruction, in view of all the circumstances existing at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed growth or appreciation." And within that principle, under the circumstances of the case at bar, the jury had the right to know the present value of an orchard like the one here involved, if matured as contemplated by the contract. Of course, they were also to consider "all the hazards and expenses incident to the process of supposed growth or appreciation"; and this they evidently did, for while the testimony of respondent, based upon calculations which supposed the most favorable outcome, and took no accounts of "hazards," placed his damages at over $25,000, the jury gave him only $2,000. We have examined the case of Rhodes v. Baird, 16 Ohio St. 573, cited by appellant. That action was to recover damages for the breach of a covenant to make a lease of land for a term of years upon which a peach orchard was to be planted; and it was held that the measure of damages was the value of the lease. The contract was therefore essentially different from the one in the case at bar. There are expressions in the opinion which are somewhat favorable to appellant's contention; but, if it was there intended to hold that deprivation of future crops can in no instance be ground for damages, the case is in that respect not in accord with the current of authority.

In our opinion, the court below did not commit error in admitting the said evidence objected to, or in instructing the jury upon that subject. Moreover, it is evident that the jury were not carried away by those exaggerated estimates of future profits and value which in such a case can be so readily figured with pencil and paper. The verdict was apparently the result of a fair consideration of the issues involved by reasonable men, who were probably well informed about the subject-matter of the suit. A verdict for a very large amount would naturally have aroused distrust; but, if respondent was entitled to recover damages at all for the breach of this very important contract,—and we have held that he is,—it cannot be said that the amount awarded was in any sense excessive, or the result of any irrelevant or improper considerations.

We have considered the two main points made by appellant, and there are no others calling for special notice. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

116 Cal. 260

## VENTURA & O. V. RY. CO. v. HARTMAN.

(L. A. 231.)

(Supreme Court of California. March 11, 1897.)

CORPORATIONS—SUBSCRIPTION TO CAPITAL STOCK—LIABILITY OF SUBSCRIBER.

A mere agreement to "subscribe and take" the amount of capital stock set opposite the subscriber's name does not bind him to pay an assessment levied before one-fourth of the capital stock has been subscribed, in violation of Civ. Code, § 331.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the Ventura & Ojai Valley Railway Company against F. Hartman to recover on a subscription to the capital stock of plaintiff corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Blackstock & Ewing, for appellant. Barnes & Selby, for respondent.

HARRISON, J. The Ventura & Ojai Valley Railway Company was incorporated under the laws of this state April 21, 1892. Its capital stock, as provided in its articles of incorporation, was $250,000, divided into 2,500 shares, of $100 each. Of this amount only 260 shares were subscribed at the commencement of this action. Prior to its incorporation a preliminary agreement therefor had been entered into between several individuals, which was to become operative in the event that $20,000 should be subscribed to its capital stock. This amount having been subscribed, the necessary steps for its incorporation were taken, and subsequently thereto the defendant, with others, subscribed the following agreement, which appears to have been annexed to the original subscription paper:

"Whereas, under and pursuant to the foregoing agreement and subscription, there was incorporated the Ventura & Ojai Valley Railway Company, to the capital stock of which there was subscribed the amounts above named by the parties named respectively: Now, therefore, we, the undersigned, subscribe and agree to take the number of shares set opposite our names respectively, and thereon pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to A. Bernheim, treasurer of such corporation:

| Subscribers. | Stock Subscribed. | Amount of Cash. |
|---|---|---|
| F. Hartman. | $2,000. | $200. Pd.' |

Of the amount thus subscribed by the defendant, he paid to the plaintiff two installments of $200 each. It is alleged in the complaint that the plaintiff had incurred certain obligations in building its road above the amount received by it from its stockholders, and that, to provide funds to meet the same, it had demanded from each of its stockholders an additional payment of 40 per cent. of the amount of their several subscriptions respectively; and that on or about the 6th day of June, 1895, it demanded from the defendant the payment of the sum of $800, being said 40 per cent. of the amount of the capital stock for which he had subscribed; and that the defendant had refused to pay the same. The present action was brought to recover this amount. The defendant demurred to the complaint, and, his demurrer having been overruled, judgment was entered against him, for the amount demanded by the plaintiff, from which he has appealed.

The right of the plaintiff to a recovery from the defendant depends solely upon the terms of the agreement of subscription made by him. Aside from the absence of all averments in the complaint of a compliance by the plaintiff with the statutory requirements for an assessment, it affirmatively appears therefrom that the plaintiff had no authority to levy an assessment upon its capital stock. Section 331, Civ. Code, gives authority to a corporation to levy such assessment only when one-fourth of its capital stock has been subscribed, and it is alleged that only 260 out of 2,500 shares of its capital stock had been subscribed. See Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487. That a subscriber to the capital stock of a corporation may by the terms of his subscription vary his liability from that which exists merely by virtue of the statute, has been frequently decided in this state (West v. Crawford, 80 Cal. 19, 21 Pac. 1123; Electric Light & Power Co. v. Johnson, 93 Cal. 538, 29 Pac. 126); but, as in the case of all other obligations arising from contract, the liability of the subscriber in such cases is measured by the terms of his agreement. As a copy of the subscription agreement which the defendant signed is annexed to the complaint, the averment in the complaint that he thereby agreed to pay his subscription "when and as it might be demanded by said plaintiff," not being contained therein, must be disregarded, and the liability of the defendant is to be determined by a construction of the language used in the agreement. The agreement to "subscribe and take" the shares set opposite his name bound him as a stockholder in the corporation, but not to pay for the stock otherwise than as assessments therefor might be legally made. Cook, Stock, Stockh. & Corp. Law, § 105. The further agreement, "And thereon pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to A. Berheim, treasurer of said corporation," is shown by the complaint to have been complied with. As the defendant's liability to the plaintiff in the present action is based upon the terms of his agreement, the plaintiff's right to enforce the agreement was not affected by the indebtedness it had incurred in constructing the road, and the averments thereof in the complaint are immaterial. The court should have sustained the demurrer to the complaint, on the ground that no cause of action is alleged against the defendant. The judgment is reversed, and the superior court is directed to sustain the demurrer to the complaint.

We concur: TEMPLE J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HENSHAW, J.

(116 Cal. 226)

DUFF et al. v. RANDALL et al. (S. F. 443.)[1]

(Supreme Court of California. March 10, 1897.)

FORECLOSURE SALE — BONA FIDA PURCHASER — NOTICE.

A bona fide purchaser of mortgaged premises at foreclosure sale, who pays the price and takes a certificate of sale, is not affected by subsequent notice of adverse rights, though received before execution of the sheriff's deed.

Department 1. Appeal from superior court, Humboldt county; E. W. Wilson, Judge.

Ejectment by Julia Duff and another against one Randall and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed

W. L. Duff and J. W. Turner, for appellants. Buck & Cutler, for respondents.

HARRISON, J. Ejectment for certain lands in the county of Humboldt. The title to the property in question was vested in William R. Duff in 1863, and upon his death, in 1875, the plaintiffs herein succeeded to his interest in the property as his heirs at law. In 1869 he, by his attorney, conveyed the property to Robert P. Duff, who mortgaged it to Huntoon, July 19, 1877. In an action by these plaintiffs against Robert P. Duff (the facts of which are found in Duff v. Duff, reported in 71 Cal. 513, 12 Pac. 570), it was determined that by reason of the fraud of the attorney this conveyance did not have the effect to divest William R. Duff of his title thereto. William R. Duff had, however, given to his attorney authority to convey the property, and, although the conveyance was invalid as against William R. Duff and the plaintiffs herein, it was not absolutely void, and a bona fide purchaser for value from the grantee would hold the title as against William R. Duff, or as against the plaintiffs herein. The facts relating to the controversy between the parties hereto are substantially the same as those presented in the case of Randall v. Duff, 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610. The material difference between the present action and that is that in that action it was shown that the suits for the foreclosure of the mortgages executed by Robert P. Duff to Ritchie and Fiebig were not commenced until after the commencement of the action of Duff v. Duff, supra, and after a notice of the lis pendens had been filed in the office of the county recorder, whereas, in the present case, it was shown that the suit of Duff v. Duff was not commenced until after the property involved herein had been sold to the defendant Randall under the judgment in the foreclosure suit. The suit of Duff v. Duff was commenced by the plaintiffs herein December 30, 1880. The action to foreclose the Huntoon mortgage was begun August 14, 1880, and judgment was rendered therein October 28, 1880. November 30, 1880, the sheriff sold the property under this judgment to the defendant Randall, who paid the purchase price therefor, and received a certificate of sale the same day. The sheriff's deed was executed to Randall, August 18, 1881, and on August 8, 1882, Randall conveyed the property to the defendants Murphy and McAleenan. Neither Randall nor either of the other defendants herein had any notice of the plaintiffs' claim to the property until after the filing of the notice of lis pendens in the suit of Duff v. Duff. The present action was begun December 12, 1894.

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[1] Rehearing denied.

The decision in Randall v. Duff, 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610, was given in favor of the plaintiffs herein upon the ground that, by reason of the commencement of the action of Duff v. Duff before the commencement by Ritchie of his action to foreclose, the purchaser under the judgment in that action had notice of the plaintiffs' claim, and purchased subject to their rights; but it was said in the opinion given upon a rehearing in that case (page 121, 79 Cal., and page 611, 21 Pac.): "If Ritchie had foreclosed without notice of William Duff's interest in the mortgaged estate, the foreclosure would have cut off his right of redemption, for precisely the same reason that the mortgage subjected his estate to a lien,—for the reason, that is to say, that no man can be allowed to mislead another to his injury." It is contended by the appellants herein, however, that this expression in the opinion is not conclusive of the present appeal, for the reason that the foreclosure of a mortgage is not complete until the time for redemption has expired and the sheriff's deed has been executed to the purchaser, and that Randall did not receive the sheriff's deed until after the commencement of the action of Duff v. Duff. In support of this proposition counsel for appellants have cited expressions in some opinions to the effect that the term "foreclosure" implies the execution of the sheriff's deed, as well as the sale under the judgment, and argue therefrom that in the present case the Huntoon mortgage was not foreclosed at the time the suit of Duff v. Duff was commenced. An examination of these cases, however, will show that in none of them was such a proposition decided by the court, and that the language used in the opinions was merely in the nature of an illustration. In Goldtree v. McAllister, 86 Cal. 104, 24 Pac. 801, it was used for the purpose of showing that when proceedings are instituted for the foreclosure of a mortgage, where the mortgaged property is situated in more than one county, the sale, as well as the deed to be executed thereunder, is to be made by the sheriff of the county in which the judgment was given, rather than that there should be several sales by the sheriffs of the different counties. The case of National Bank of D. O. Mills & Co. v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509, merely holds that if a mortgagee buys in the property at the foreclosure sale, and a loss by fire occurs before the execution of the deed, there is not such a change of title as to deprive him of the right to the insurance money. It was said in Sichler v. Look, 93 Cal. 600, 29 Pac. 220: "The effect of the sale is of itself to extinguish the right and claim of all the defendants in the action, acquired subsequent to the date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage, discharged of all such right and claim;" and in Randall v. Duff it was said: "The apparent title being in Robert P. Duff, a defendant in the foreclosure suits, we think that a purchaser at the sheriff's sales for value, and without notice, would take as good a title as if he had purchased directly from Robert P. Duff and taken a deed from him."

Although the right of a mortgagor to redeem the mortgaged premises is not cut off until the expiration of the time allowed for redemption, yet the purchaser at a sale under the judgment rendered in the foreclosure suit acquires the same interest in the property sold as does a purchaser in property sold under an ordinary money judgment. "Upon the sale the purchaser acquires all the right, title, interest and claim of the debtor thereto" (Code Civ. Proc. § 700), and only the right to redeem from this sale is left in the mortgagor. If a redemption is made by the mortgagor it is not from the lien of the mortgage, but from the sale under the judgment, and the amount which he is required to pay under such redemption is not the amount of the mortgage, but the amount for which the property was sold. Prior to the entry of the judgment the mortgagor holds the title to the property subject to the lien of the mortgage, and after the judgment is entered, and before the sale, he holds it subject to the lien of the judgment; but after the sale he has only a right of redemption, while the purchaser has the entire beneficial interest in the property, subject to be defeated by a redemption from the sale. "The execution of the deed gives to the purchaser at the sale no new title to the land purchased by him, but is merely evidence that his title has become absolute." Robinson v. Thornton, 102 Cal. 680, 34 Pac. 121. "The purchaser obtains an inchoate right, which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid and paid by the purchaser. The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time, the right to a conveyance becomes absolute without any further sale, or other act to be performed by anybody." Page v. Rogers, 31 Cal. 301. The purchaser is entitled to all the rents and profits of the property sold, or the value of its use and occupation from the time of the sale until the redemption (Code Civ. Proc. § 707), and if no redemption is made he is entitled to retain these rents and profits without any obligation to account therefor to the mortgagor.

Strictly speaking, however, there could have been no "foreclosure" of the plaintiffs herein in the suit upon the Huntoon mortgage. A foreclosure is limited to the mortgagor and those claiming under him, while the plaintiffs herein claim by title superior to both the mortgagor and the mortgagee in the action on the Huntoon mortgage, and in the respect that their title is paramount thereto it would not be affected by that suit; but, to the extent that they are estopped as against the mortgagee or the purchaser at the sale under his judgment from questioning the validity of the mortgagor's title, they are bound by the judgment as fully as if they had been made parties to the suit, and the extent of this estoppel is measured by the notice of their claim, given by them or by their predecessor. This is the purport of the decision in Randall v. Duff. To the extent that William R. Duff held his attorney out to the world as authorized to convey the land, these plaintiffs are as much estopped as he would have been to assert their rights against a bona fide purchaser for value, under a conveyance made by the attorney. A purchaser of real property at an execution sale stands in the same position as any other purchaser from the judgment debtor, and the certificate of sale which he receives from the sheriff is a conveyance, within the meaning of the recording act, by which he is protected from the unrecorded claims of others, of which he did not have notice. In Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680, certain property standing of record in the name of a judgment debtor had been purchased by the defendant at a sale under execution against him, but more than two years prior to the sale the judgment debtor had conveyed the property to the plaintiff. At the time of the purchase by the defendant this conveyance had not been recorded, but was recorded prior to the execution of the sheriff's deed. To the contention of the plaintiff that the sale by the sheriff was inoperative as against his unrecorded deed, the court said: "The transfer is not perfect until the execution and delivery of the sheriff's deed, but by the doctrine of relation the deed when thus executed is to be deemed and taken as though executed at the date when the lien, of which it is the sequence, originated;" and held that the defendant's title obtained at the sheriff's sale was superior to that of the plaintiff under his unrecorded deed. See, also, Stewart v. Freeman, 22 Pa. St. 120; Atwood v. Bearss, 45 Mich. 469, 8 N. W. 55; McMurtrie v. Riddell, 9 Colo. 497, 13 Pac. 181; Byers v. Engles, 16 Ark. 543. By virtue of the principles thus declared, the title acquired by Randall under his purchase at the sheriff's sale must prevail over that held by the plaintiffs, of which he had no notice until after he had paid the purchase money and received the certificate of sale. He is fully protected in this purchase, and his right to this protection is the same whether he received the notice of the plaintiffs' claim before or after the execution of the sheriff's deed. He was a bona fide purchaser for value before the notice was given, and his rights cannot be affected by any notice given thereafter. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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5 Cal. Unrep. 621

## BARRY v. ST. JOSEPH'S HOSPITAL & SANITARIUM OF THE SISTERS OF MERCY et al. (L. A. 185.)

(Supreme Court of California. March 10, 1897.)

CANCELLATION OF DEED—INADEQUACY OF PRICE—RATIFICATION.

1. Mere inadequacy of price is insufficient to warrant setting aside a sale.

2. Where a person sick in the hospital makes a deed to it for a certain sum paid and an agreement for further care, and recovers, and for several weeks is able to transact business, and up to the day of his death is satisfied with the transaction, it amounts to a ratification thereof.

3. In a suit to set aside a sale made in consideration of a promissory note and board and care, plaintiff cannot recover unless she offers to return the note, and pay for the board and the care.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Margaret J. Barry, adminstratrix of John M. Little, against the St. Joseph's Hospital and Sanitarium of the Sisters of Mercy and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Trippet & Neale and C. F. Holland, for appellant. Parrish & Mossholder and Deney & Wright, for respondents.

BELCHER, C. The plaintiff, as administratrix of the estate of John M. Little, deceased, brought this action to have a deed of three pueblo lots in the city of San Diego, executed by the decedent to the defendant St. Joseph's Hospital and Sanitarium, on February 5, 1895, canceled and set aside, upon the ground that at the time of its execution the grantor was sick and infirm, and mentally incompetent to attend to any kind of business, and that there was no sufficient consideration for its execution. At the trial certain issues were submitted to a jury, and the court made other findings, and gave judgment in favor of the defendants. From that judgment the plaintiff appealed, and has brought the case here on the judgment roll.

It appears from the findings that on February 5, 1895, Little was sick and confined to his bed in defendant's hospital, and was then in a condition of imbecility or great weakness of mind; that the deed was procured by no undue influence; that the consideration for the deed was not grossly inadequate; and that at the time of its execution the value of the property conveyed was $2,000. It further appears that the consideration for the deed was a written agreement entered into by the parties, under and in pursuance of which the defendant corporation executed and delivered to Little its promissory note for $500, and agreed to furnish him a private room in its hospital, and to support and maintain him for and during the term of his natural life, to furnish, provide, and prepare for him proper and sufficient food, and to give him proper care, nursing, and medical attendance in sickness, and, upon his death, to provide a respectable burial of his remains. The agreement also provided that, in case of the rescission thereof for any good and reasonable cause by either party, $40 per month from its date to the date of the rescission should be a just compensation for the board, lodging, and medical attendance furnished during said period. It further appears "that on the 26th day of February, 1895, said Little had so far recovered from his said sickness as to be able to be out of doors and walk about; and that on said 26th day of February said Little knew he had signed said deed and said contract for a home; and that for several weeks thereafter said Little was able to be out of doors, and to walk about, and to go into the business portion of said city, and able to transact business"; and that on the 27th day of May, 1895, he died. It also appears that on June 22, 1895, the defendant corporation sold and conveyed the said lots to the defendant Mary J. Moulton; and, as a defense to the action, it is alleged that she purchased the lots for the consideration of $1,450, without any notice or knowledge of the facts set out in the complaint; and it is admitted by appellant that, under these circumstances, the cancellation of the deed of February 5th had become impossible; but it is claimed that the court below could and should have awarded to the plaintiff the alternative relief of damages, and that the amount of damages should have been the difference between the value of the lots, $2,000, and the amount actually paid therefor by the grantee, namely, $500, evidenced by its promissory note, and $40 per month for the board, lodging, and medical attendance furnished the grantor during the 3 months and 22 days that elapsed between the date of the deed and his death.

It is argued for appellant that the consideration paid for the deed amounted to only $649.33, while the value of the property conveyed was at that time $2,000; and that such consideration must be held to have been grossly inadequate, notwithstanding the finding to the contrary; and hence that the judgment is not supported or justified by the findings, and should be reversed. But the consideration cannot be limited to the sum named. The agreement was that Little should be furnished with a private room, and board, care, and medical attendance in sickness, during the term of his natural life. He was then only 70 years old, and it may have been, and probably was, anticipated by both parties to the agreement that he would live for several years; and, if he had lived a little more than three years longer, the cost of his board, care, and medical attendance, at $40 per month, with the said $500, would have equaled the full value of the land. Besides, mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale. Hammond v. Wallace, 85 Cal. 522, 24 Pac. 837. Moreover, it appears that, shortly after executing the deed, Little recovered from his sickness, and was on the streets, and for several weeks was able to go into the business part of the city, and transact business, and knew that he had signed the deed and contract for a home; and, so far as appears, he was during all that time, and up to the day of his death, fully satisfied with the transaction. Under these circumstances, he must be held to have ratified and confirmed it. Under our statute, a contract may be rescinded for various reasons; but the party desiring to rescind must act promptly, and must restore, or offer to restore, to the other party, everything of value received from him under the contract. Civ. Code, §§ 1689, 1691. Here, conceding that the plaintiff acted with sufficient promptness in commencing the action, still it does not appear that she restored, or offered to restore, the promissory note received by Little, or to pay for the board, care, etc., which he received up to the time of his death. She cannot therefore avail herself of the statute. We advise that the judgment be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 628)

## SANTA MONICA LUMBER & MILL CO. v. HEGE et al. (L. A. 158.)[1]

(Supreme Court of California. March 10, 1897.)

MECHANICS' LIENS—PROCEEDINGS TO PERFECT—TIME OF FILING CLAIM—RIGHT TO LIEN—KNOWLEDGE OF OWNER—AMOUNT OF RECOVERY.

1. Where there was evidence that buildings were, in effect, completed before the claim of

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[1] Affirmed in banc. See 51 Pac. 555, 119 Cal. 376.

lien was filed, a finding to that effect will not be disturbed, though there was evidence of trifling imperfections remedied after such time.

2. Where the owner of a lot gives permission to his tenant to erect a building thereon of a certain character, and the tenant does so, he had such knowledge of the intended construction of the building as to render a notice posted by him after the lien was filed, on visiting the premises, too late, under Code Civ. Proc. § 1192, providing that buildings constructed on lands with the owner's knowledge shall be held to be constructed at his instance, and liable for a lien, unless, within three days after knowledge of the construction, he post notices thereon.

3. In an action to enforce a material man's lien, plaintiff can recover only for the materials furnished between the dates stated in the claim of lien, though the proof shows that materials were furnished on other dates. Goss v. Strelitz, 54 Cal. 640, followed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by the Santa Monica Lumber & Mill Company, a corporation, against J. H. Hege and William Naumann, to enforce a material man's lien. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant Hege appeals. Reversed.

Clarence A. Miller, for appellant. Tanner & Taft, for respondent.

BELCHER, C. This is an action to foreclose a lien for materials furnished for and used in the construction, alteration, and repair of certain buildings on a lot of land in the town of Santa Monica, county of Los Angeles. Defendant Hege was the owner of the lot, and defendant Naumann was the lessee thereof. The materials were furnished by plaintiff upon the order of Naumann, and were of the alleged value of $244.59. Naumann suffered his default to be entered. Hege demurred to the complaint, and, his demurrer being overruled, answered. The case was tried, and the court found, among other things, that all the allegations of the complaint were true, except that $75 instead of $100, as stated therein, would be a reasonable attorney's fee, and, as conclusions of law, that there was "due to the plaintiff from the defendants the sum of $244.59, and the further sum of $1.45, expenses of recording said lien, and the further sum of $75, hereby allowed as attorney's fees; that defendant Dr. Wm. Naumann is personally liable therefor, and that the amounts aforesaid are, and each of them is, a valid lien against the real property described in the complaint, and of every part and parcel thereof, and plaintiff is entitled to a decree foreclosing its said lien against said real property." Judgment and decree were accordingly so entered, from which and from an order denying a new trial defendant Hege appeals. Several grounds for reversal are urged by appellant, but only the following need be noticed:

1. It is insisted that the claim of lien was prematurely filed, and hence that it conferred no rights. The statute provides that any person, save the original contractor, claiming the benefit of the chapter in regard to liens of mechanics and others upon real property, must "within thirty days after the completion of any building, improvement or structure, or after the completion of the alteration, addition to or repair thereof," file for record his claim of lien, etc., and that "any trivial imperfection in the said work, or in the construction of any building, improvement or structure, or of the alteration, addition to or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien," and also that "cessation from labor for thirty days" shall be deemed equivalent to a completion. Section 1187, Code Civ. Proc. It has been held that the filing of a claim of lien before the time authorized by the statute is premature, and no right to enforce the lien is thereby acquired. Roylance v. Hotel Co., 74 Cal. 273, 20 Pac. 573; Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235; Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629. It was alleged in the complaint and the court found that "the said buildings and repairs were completed on the 23d day of July, 1894," and that on the 11th day of August, 1894, the plaintiff duly filed its claim of lien, etc. We find in the record no evidence tending to show that the buildings and improvements were fully completed on the day named, or at what particular time they were completed. Plaintiff's witness Emerson testified that he worked as a carpenter on the buildings, and that he finished work in the latter part of June, "and the buildings were completed shortly after." And on cross-examination he testified that what he knew of matters that occurred after he quit work was what he saw on passing by the property, which was nearly every day; that he did not see any person working on the buildings after the date he stated they were completed; and that he did "not know whether on August 11, 1894, any sidewalks had been laid on the premises, or whether the ridge of the roof had been closed, or was watertight. The windows were puttied on the inside, but whether they were also puttied on the outside I do not know, or whether any cleats were on the windows, or whether the windows were rain tight, or whether all the battens were on the building, nor whether the bathtubs were entirely finished." Dr. Naumann testified for defendant that when the claim of lien was filed the buildings were unfinished in the particulars spoken of by Emerson, and in some other particulars, and that after August 11th he employed two or three workmen on the buildings for five or six days in all. Respondent contends that it is a case of conflicting evidence, and that under the settled rule in such cases the finding of the court cannot be disturbed, and also that the defects relied on were trivial imperfections, which could not prevent the filing of the lien. This contention, we think, should be sustained. The court below saw and heard the witnesses, and

could determine better than we can whether the defects were in fact trivial imperfections, and the buildings were in effect completed before the claim of lien was filed.

2. The statute provides that every building constructed upon any lands with the knowledge of the owner shall be held to have been constructed at the instance of such owner, and the interest owned shall be subject to any lien filed in accordance with the provisions of the Code, unless such owner shall, within three days after he shall have obtained knowledge of the construction, or the intended construction, give notice that he will not be responsible for the same, by posting a notice in writing, etc. Section 1192, Code Civ. Proc. The court found that "the said constructions and repairs were made and the said timber and materials were furnished by plaintiff with the full knowledge and consent of defendant Hege from their inception, and the said Hege gave no notice, by posting a notice in writing to the effect that he would not be responsible for the same, nor did he give any notice at all, either by posting or otherwise." Appellant contends that this finding was not justified by the evidence, but we think it must be sustained. It appears that Naumann was a practicing physician, and that he leased the premises and took possession of them, with his family, consisting of his wife and six children, early in May, 1894. Appellant lived in Los Angeles, about 16 miles away, and a week or 10 days later he visited the place, and Naumann then asked of him permission to build another house on the lot. Appellant gave him permission to build a small shanty, half of wood and half of glass, far enough away from the dwelling already on the place not to interfere with it in any shape or manner, to be perfectly detached, in the rear of the lot, and without fire in or about it. And in the latter part of July, or first of August, Naumann wrote to appellant and asked permission to put up another building; and the latter answered that he might do so, but it must have no fire, and must not be attached to the house. Naumann proceeded to erect the buildings in controversy, and placed them in the rear of, and in part adjoining, the dwelling house on the lot. A day or two after the claim of lien was filed, appellant again visited the place, and then posted notice that he would not be responsible. Under these circumstances, we think it must be held that appellant had knowledge of the construction or the intended construction of the buildings, and that his notice was not posted in time. And the fact that the buildings were not placed on the rear end of the lot, and perhaps were not constructed as appellant intended they should be, cannot be availed of, as against the respondent, that knew nothing of his intentions in these respects.

3. It is stated in respondent's claim of lien that "on or about the 1st day of July, 1894," Dr. Naumann, as lessee of said premises, entered into a contract, not in writing, with the Santa Monica Lumber & Mill Company, under and by which said company furnished said lumber and materials, and that said contract was fully performed on the part of said company, and was completed on July 14, 1894. It is alleged in the complaint that the contract was entered into on the 1st day of July, but in the findings the language used is the same as in the claim of lien. At the trial it was proved, on behalf of the plaintiff, that its first charge for materials furnished was made on May 24th, and its last on July 14th; that the aggregate of its charges was $419.59, of which sum $175 had been paid, leaving still due and unpaid $244.59; and that after June 25th there were only four charges, which were made in July, and amounted to $29.02, and the payments after that date amounted to $115. Appellant contends that, at most, he could be held responsible only for the materials furnished between the dates named in the claim of lien; and in support of this contention he cites the case of Goss v. Strelitz, 54 Cal. 640. That was an action to foreclose a lien for materials furnished for the construction of a building, and in the claim of lien it was stated that the materials were furnished between February 20 and April 14, 1877. It appeared that some of the materials were furnished before February 20th, but it was held that the plaintiff was entitled to recover only for the materials furnished between the dates stated in the claim. That case seems to be directly in point here, and under the law as there declared the respondent was not entitled to recover for materials furnished before, "on or about the 1st day of July." The words "on or about" leave the time when the contract was made somewhat indefinite and uncertain, but we think the language used cannot be held to extend back to the 24th of May, and that it should be limited to time alleged in the complaint. It follows that the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

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5 Cal. Unrep. 625

## Ex parte O'BRIEN. (Cr. 255.)

(Supreme Court of California. March 5, 1897.)

DIVORCE—ALIMONY.

Where, on rendering a decree of divorce, the question of alimony is reserved, a subsequent order awarding alimony is not void.

Application by one O'Brien for a discharge on habeas corpus. Denied.

Beatty & Beatty, for petitioner. Henley, Bigelow & Costello, for respondent.

BEATTY, C. J. In this proceeding the order of the superior court amending the original decree in the case of O'Brien v. O'Brien is conclusive upon me, and the decree as amended shows that the question of alimony was reserved. This being so, the subsequent order or supplemental decree awarding alimony is not void, and the court did not exceed its jurisdiction in imprisoning the petitioner for his refusal to pay the sums decreed to be paid. The prisoner is remanded.

116 Cal. 232

## MASON v. LUCE et al. (L. A. 116.)

(Supreme Court of California. March 10, 1897.)

LIMITATIONS—ACCRUAL OF CAUSE—MORTGAGES—RIGHT TO FORECLOSE—WAIVER—BILLS AND NOTES—ATTORNEY'S FEES.

1. Where a mortgage provides that on default in payment of interest the whole sum of principal and interest shall become due, and the mortgage may be foreclosed, limitations begin to run only when the note matures according to its terms, and not on default in payment of interest. Pelloc v. Davis, 38 Cal. 242, followed.

2. Where a mortgage provides that on default in payment of interest the whole sum of principal and interest shall become due, the mortgagee, by accepting payment of interest after default, waives the forfeiture. Belloc v. Davis, 38 Cal. 242, followed.

3. Though a mortgage does not secure attorney's fees stipulated for in the note secured, a personal judgment for such fees may be rendered in the suit in which the mortgage is foreclosed.

4. A stipulation in a note for attorney's fees in case of suit is valid.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by John Mason against M. A. Luce and another to foreclose a mortgage. From a decree of foreclosure, and from a personal judgment against defendants for attorney's fees, they appeal. Affirmed.

M. A. Luce, for appellants. William H. Fuller and Clarence L. Barker, for respondent.

BELCHER, C. The plaintiff commenced this action on January 29, 1895, to foreclose a mortgage executed by the defendants, M. A. Luce and Adelaide M. Luce, on February 18, 1890, to secure payment of their promissory note for $4,000, made on the same day, and due one year after date. The note bore interest at the rate of 13 per cent. per annum, payable quarterly, and, if not so paid, then to become part of the principal and bear a like rate of interest. It also contained the following clause: "And we further agree that, in the event of suit being brought against us, then there shall be added to any judgment against us rendered in said suit, as counsel fees, an additional sum of five per centum, in like gold coin, upon the amount of the principal and interest thereof accrued at the time of the entry of such judgment; or, if paid before judgment, and after action commenced, then on the amount at the date of payment." The mortgage stated that it was given to secure the payment of the principal and interest of the said promissory note, a copy of which was set out, and then contained the following clause: "And the mortgagor hereby covenants with the mortgagee that if default be made in the payment of the interest, or any part thereof, according to the tenor of said note, then the whole sum of principal and interest shall become immediately due, and the mortgagee may proceed with suit of foreclosure, and sell the mortgaged premises in the manner provided by law." The answer of defendants alleged—First, that the provision in the note in regard to counsel fees "was in the nature of a penalty imposed upon said defendants in case they should fail to pay the note when the same should become due," and that 5 per cent. was not a reasonable counsel fee, or any other sum over and above $50; and, second, it set up the provision above quoted from the mortgage, and alleged "that on November 18, 1890, there was due and payable upon said note a quarter of a year's interest, but that said defendants failed to pay the same at that time, and made default in the payment of the interest provided in said note and mortgage, and that the same thereupon became due." It then alleged that the cause of action stated in the complaint was barred by the provisions of section 337 of the Code of Civil Procedure. To the second defense set up in the answer the plaintiff interposed a general demurrer, and the same was sustained. Subsequently the case came on for trial, and was submitted. The court found that all the allegations of the complaint were true, and all the denials and allegations of the answer were untrue; that there was due and owing to the plaintiff from the defendants the sum of $5,632.47 for principal and interest of the said promissory note, and $14 costs of suit, aggregating $5,646.47, which was secured by the mortgage, and the further sum of $281.62 as and for an attorney's fee, as provided in said note, which was not secured by the mortgage. A decree in the usual form was accordingly entered, foreclosing the mortgage and directing a sale of the mortgaged premises and the application of the proceeds, after paying the expenses of the sale, to the payment of the said sum of $5,646.47 and interest thereon, and also directing that in case of a deficiency a judgment for the deficiency be docketed against the defendants. A personal judgment against the defendants was also entered for the said sum of $281.62. From this decree and judgment the defendants appealed, and have brought the case here without any statement or bill of exceptions.

1. Appellants contend that the action was

barred by the statute of limitations, and that the court erred in sustaining the demurrer to their answer. It was alleged in the complaint that payments of interest due and accrued were made from time to time, and indorsed on said promissory note, and that the date of the last payment was January 7, 1895. The answer did not deny this allegation, but simply alleged that a quarterly installment of interest was due and payable upon the note on November 18, 1890, and "that said defendants failed to pay the same at that time." From all this the natural and necessary inference is that the installment of interest referred to was subsequently paid by defendants. In Belloc v. Davis, 38 Cal. 242, the action was brought to foreclose a mortgage given to secure payment of a promissory note for $16,000, executed and delivered on the 11th day of October, 1861, payable six months after date, with interest payable monthly, and with the following clause in the note, to wit: "And, in case default be made in any payment of interest when the same shall become due as aforesaid, then the whole amount of principal and interest to become due and payable immediately upon such default." The monthly interest which became due from February, 1862, to November, 1862, was not paid as stipulated in the note. The plaintiff commenced his action on the 7th of April, 1866, to foreclose the mortgage, and the defense relied upon was the statute of limitations. The note became due and payable, on its face, on the 11th of April, 1862, and the action was commenced four days less than four years from the maturity of the note, but more than four years after the first default was made in the payment of interest. The court said: "Our statute of limitations requires that an action to foreclose a mortgage shall be commenced within four years from the time 'when the cause of action accrues.' The question for our decision, therefore, is, when did this cause of action accrue, in the sense of the statute? Did the statute commence to run from the time of the first default in the payment of interest, or only on the expiration of the term of credit specified in the note, to wit, six months from its date? The question is novel, and somewhat embarrassing; but our conclusion is that the cause of action, within the true meaning of the statute, accrued at the expiration of the credit fixed by the note, to wit, six months after its date. The provision in the note to the effect that in case of default in the payment of interest the whole amount of principal and interest shall 'become due and payable immediately upon such default' is evidently in the nature of a penalty, inserted for the benefit of the creditor." It was also held that, by accepting the payment of the interest after default has been made, the creditor waives all benefit from the default, and thereafter the rights and obligations of both parties continue, without regard to the forfeiture. That case is directly in point here, and we think it correctly declares the law applicable to such cases, and should be followed. See, also, Watts v. Creighton, 85 Iowa, 154, 52 N. W. 12; Richardson v. Warner, 28 Fed. 343; Plow Co. v. Webb, 141 U. S. 616, 12 Sup. Ct. 100; 8 Am. & Eng. Enc. Law, 192. It follows that the court did not err in sustaining the demurrer to defendants' answer.

2. Appellants also contend that the court erred in rendering a personal judgment against them for the amount found due for attorney's fees, for the reason that the stipulation in the note for attorney's fees was void. It has been several times held by this court that such a stipulation in a promissory note renders the note nonnegotiable. Adams v. Seaman, 82 Cal. 636, 23 Pac. 53; Bank v. Babcock, 94 Cal. 96, 29 Pac. 415; Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866. In so holding, the court could not have considered the stipulation void, since, if it were void, it could not have the effect attributed to it. This contention cannot, therefore, be sustained. But, if this be so, it is still insisted that no judgment for the attorney's fees could be entered in this action for foreclosure, and that plaintiff must recover the same, if at all, in an action at law brought for that purpose. Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032, was an action similar to this, and the court, speaking upon the point in hand, said: "As the obligation for the payment of attorney's fees, although not secured by the mortgage, was included in the instrument by which the secured debt was evidenced, and provided that judgment might be entered for counsel fees in such suit, it was properly included in the same action; but the right to a judgment for such fees was the same as it would have been in an action upon a promissory note with such a clause, of which no part was secured by mortgage." If in that action the obligation for the payment of attorney's fees was "properly included," then it was so in this action, and we see no reason why the relief demanded and awarded might not be granted. See, also, Hildreth v. Williams (Cal.) 33 Pac. 1113. We advise that the decree and judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the decree and judgment are affirmed.

116 Cal. 254

## CALIFORNIA SAV. BANK OF SAN DIEGO v. PARRISH et al.

(L. A. 183.)

(Supreme Court of California. March 11, 1897.)

VENDOR'S LIEN—LIMITATIONS.

In consideration of the transfer of lands, the purchaser agreed to pay an outstanding note of the vendor. It was agreed that, in case of default at the maturity of the note, the vendor might collect from the purchaser the amount of the defaulted payment. The purchaser failed to pay the note. *Held* that, since the right to collect the purchase money accrued at the maturity of the note, the vendor's lien was barred after four years from that date, under Civ. Code, § 2911, which limits the life of a lien to the time within which an action can be brought on the principal obligation.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the California Savings Bank of San Diego against W. Parrish, D. Choate, and others. From a decree giving defendant Choate a superior lien, and from an order refusing a new trial, plaintiff appeals. Reversed.

N. J. Pillsbury, D. Collier, Jr., and D. L. Murdock, for appellant. T. Z. Tucker, for respondents.

BELCHER, C. This is an action to foreclose a mortgage made by the defendant W. Parrish to the plaintiff on certain lots in the city of San Diego. Defendant D. Choate answered, and filed a cross complaint, in which he set up and asked to have foreclosed, a vendor's lien upon the lots described in plaintiff's mortgage. Plaintiff demurred to the cross complaint, upon the ground, among others, that the lien set up, if any existed, was barred by sections 339 and 343 of the Code of Civil Procedure. The demurrer was overruled, and thereupon plaintiff answered the cross complaint, alleging in substance that the said lien had been waived by Choate. The case was tried, and the court found the facts, and, among other things, the amount due from defendant Parrish to the plaintiff and to the defendant Choate, and, as a conclusion of law, that Choate had a vendor's lien on each and every part of the lands involved in the action, and had not waived the same, and that said lien was not barred by the statute of limitations. A decree was accordingly entered that the mortgaged premises be sold, and the proceeds of the sale, after paying the costs and expenses thereof, be applied—First, to the payment of the amount found due to Choate and his costs; and, second, to the payment of the amount found due to plaintiff and its costs. From this decree, and an order refusing a new trial, plaintiff appeals.

The only question in the case is: Did Choate have a vendor's lien, which was prior to the lien of plaintiff's mortgage, and was he entitled to be first paid out of the proceeds of the sale? The facts of the case are in substance as follows: On September 12, 1888, defendants Choate and Parrish executed to one Lillian M. Cullen their joint promissory note for $3,000, payable two years after date, with interest at the rate of 10 per cent. per annum, payable monthly, and, if not so paid, to be compounded. This note was given for a balance due to Cullen from Choate for the transfer by her to him of an interest claimed by her in certain lands, including those involved in this action. On September 29, 1888, Choate was the owner in fee of all the lands involved herein, and on that day he sold and transferred the same, by a grant deed to said Parrish, for the sum of $2,500; but no part of this purchase price was then or has ever since been paid by him. At the time of the transfer, and as a part of the transaction, Parrish executed and delivered to Choate a written agreement by which he undertook to pay for Choate $2,500 of the Cullen note, and he stipulated that "in case I shall fail at any time to pay the interest on $2,500 of said note when it falls due, or shall fail to pay the $2,500 of the principal of said note when it falls due, then and in that case the said D. Choate, his heirs or assigns, shall be entitled to collect of me on this agreement the sum I am so in default of paying." Parrish failed to pay any part of said sum or the interest thereon, and on September 1, 1892, Choate was compelled to pay, and did pay, the whole thereof. Prior to August 5, 1891, Parrish was indebted to the National Bank of San Diego in a large sum of money, for which he had given to the bank his promissory notes. This indebtedness one J. W. Collins had assumed and undertaken to pay, and at his request, for the purpose of paying it off and transferring the indebtedness to the plaintiff savings bank, Parrish obtained from the savings bank a loan of $8,500, for which, on the day last named, he executed the note and mortgage in suit. At the time of making the loan, Collins was a director of the savings bank, and acted as its general manager. He attended to the business of making its loans, and all negotiations and conversations in regard to this loan were had with him; and, before the mortgage was executed, he was informed by Parrish of the condition of the property to be mortgaged, and that its purchase price had not been paid. Prior to February 13, 1892, Choate learned that Parrish had mortgaged the property to the savings bank, and made complaint to him about his having done so before he had paid the purchase price of said lands. Parrish then informed Choate that he was fully protected by his vendor's lien, and that the mortgage was subject to such lien. Choate was not satisfied with this, but, fearing that purchasers or incumbrancers in good faith and for value might intervene, he insisted on having a mortgage executed by Parrish to himself. Thereupon Parrish executed to Choate a mortgage, bearing date February 13, 1892, on the lands mortgaged to the plaintiff and certain other lands, which were also subject to a prior mortgage, to secure payment by him of that part of the Cullen note which he obligated himself to pay by his written agreement of September 29, 1888. When that mortgage was executed, it was expressly agreed between the parties to it that Choate would not, and did not thereby, waive his vendor's lien; and at that time the value of the land involved in this action did not exceed the sum of $1,500, and the value of the other lands covered by the mortgage did not exceed a like sum. On August 28, 1894, Choate, fearing that the Cullen note was about to be barred by the statute of limitations, filed a complaint to foreclose his said mortgage, making Parrish and the savings bank parties defendant, but no summons was issued, and nothing further was done in the case. On May 26, 1895, plaintiff filed its complaint in this action, and on July 27, 1895, Choate filed his answer and cross complaint.

The first question to be considered is: Did it appear upon the face of Choate's cross complaint that his right to foreclose his vendor's lien, if any existed, was barred by the statute of limitations? If it did so appear, then the demurrer to the cross complaint upon that ground should have been sustained, and the other questions discussed by counsel as to the waiver of the lien may be disregarded. The facts are set out in the cross complaint, and it appears, therefore, that when, on September 28, 1888, Choate conveyed the land in question to Parrish, the latter was to pay the purchase money ($2,500) on the Cullen note, which was to become due two years after its date; and he obligated himself to so pay the money by a written agreement which provided that if he should fail to pay the interest as it fell due, or the principal sum when the note fell due, then Choate should be entitled to collect from him the money which he had neglected to pay. The purchase money, therefore, became due and payable when the note matured, and a cause of action to recover it then arose in favor of Choate. It was not necessary for him to wait, before he could institute such an action, till he paid the note himself. But the note matured, and the cause of action accrued, more than four years before this action was commenced and the cross complaint was filed.

Our Civil Code contains the following provisions:

"Sec. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

"Sec. 2911. A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

Here it appears that the time within which, under the provisions of the Code, an action could have been brought upon the principal obligation, had expired before the cross complaint was filed. The lien was therefore extinguished, and the demurrer should have been sustained. The decree and order appealed from should be reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the cross complaint.

We concur: **SEARLS, C.**; **BRITT, C.**

**McFARLAND** and **HENSHAW, JJ.** For the reasons given in the foregoing opinion, the decree and order appealed from are reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the cross complaint.

**TEMPLE, J.** I concur in the judgment.

(116 Cal. 179)

## PEOPLE v. DURRANT. (Cr. 196.) [1]

(Supreme Court of California. March 3, 1897.)

Murder—Selection of Jury List—Special Venire—Impaneling of Jury — Review of Verdict—Proof of Motive—Contempt Proceedings—Evidence — Trial — Argument of Counsel — Grounds for New Trial — Newspaper Articles.

1. The minutes of the secretary of the judges of the superior court of San Francisco county, showing the selection and return of the jury list, as required by Code Civ. Proc. §§ 204–208, may be amended, when incomplete, to conform to the facts.

2. On a challenge to the panel, on the ground that the jury list was not legally selected by the judges, the testimony of the presiding judge is admissible to supplement the record when incomplete, and to show the action actually taken.

3. The fact that some of the persons selected as jurors in making up the jury list do not possess the necessary qualifications is not a ground for challenge to the panel.

4. Under the provision of the present constitution (article 22, § 11) retaining in force all existing laws relative to the judicial system, and making them applicable to the new system, Code Civ. Proc. § 204, providing for the selection of jurors in San Francisco county, did not become unconstitutional, and the subsequent amendments to make it conform to the present system are valid.

5. The fact that jurors were summoned by special venire, without having first exhausted all the names upon the regular list, is not ground for challenge to the panel.

6. The action of the court in disallowing a challenge to a juror for cause will not be reviewed where the defendant did not challenge the juror peremptorily, nor exhaust his peremptory challenges.

7. Under Pen. Code, § 1068, providing that a court may for cause permit a challenge to be taken to a juror after he is sworn, and before the jury is completed, a court may permit the re-examination of a juror by either the people or the defendant on a matter coming to their knowledge after his acceptance, and before the completion of the panel, and may, in its discretion, allow a peremptory challenge to be taken, though such examination discloses no ground of challenge for cause.

8. The allowance of a peremptory challenge to a juror by the prosecution is without prejudice to the rights of the defendant, where none of the jurors subsequently selected are challenged by him, and he has not exhausted his peremptory challenges.

9. The correctness of a verdict which has been sustained by the trial court will not be reviewed on appeal on arguments directed to the

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[1] Rehearing denied. Beatty, C. J., dissents.

credibility of the witnesses or the weight to be given to their testimony.

10. A verdict of conviction will not be disturbed on appeal, as unsupported by evidence, unless the evidence to sustain it is so slight as to make clear the inference that it must have been rendered under the influence of passion or prejudice.

11. While absence of proof of a motive for the commission of a crime is a circumstance in favor of the defendant, such proof is not indispensable to a conviction.

12. The issuance of process for contempt charged to have been committed by the publishers of newspapers during the progress of a cause rests entirely in the sound discretion of the court, and cannot be controlled by the parties, nor have they any right of appeal from the court's action in the matter.

13. Proof that a witness is a practicing physician and surgeon, and that he performed an autopsy on the body of a dead person, qualifies him to give an opinion as to the means used to produce death, it being conceded that the question is a proper one for expert testimony.

14. The use of a dressmaker's frame in court for convenience in exhibiting the clothing of a murdered woman, which was introduced in evidence, and in regard to which much testimony was taken, was not prejudicial to the defendant, no claim being made that the frame represented the height, size, or figure of the deceased.

15. It is the right and duty of a trial court, on its own motion, to curtail the cross-examination of a witness on a collateral matter, which is wholly irrelevant, and as to which the witness could not be impeached.

16. Under Code Civ. Proc. § 2066 (which gives a witness the right to be protected from irrelevant, improper, or insulting questions), where a lady as a witness had stated that she had seen the defendant since a date named, a following question, "That is, you imagine you have?" was properly excluded by the court.

17. A photograph of a person charged to have been murdered, though taken two years before her death, is admissible in evidence when shown to be a fair representation of her as she appeared at the time of her death.

18. Where a witness has given testimony in apparent variance with his testimony on the preliminary examination, it is not improper for the party calling him to call his attention to his former testimony, for the purpose of refreshing his recollection.

19. It is not error to overrule an objection to a question the answer to which may be relevant, though, when given, it proves not to be.

20. While a hypothetical question must be based on facts in evidence, it need not embrace all the facts shown, nor be limited to such facts, but may be addressed to any reasonable theory which may be drawn from them.

21. While an opinion is not admissible on a matter of common knowledge or experience, its admission is harmless error where it accords with such common knowledge.

22. A witness for the prosecution testified that he fitted certain tools, found apparently in the possession of another than defendant, in marks on a door, which they did not fit, after which defendant introduced the tools in evidence. *Held*, that it was proper to permit the prosecution to introduce the door in evidence on rebuttal, and to have the witness fit the tools to the marks in the presence of the jury.

23. A question to a defendant as a witness, asking if he had not prepared a statement, which he sealed and delivered to his attorneys, with certain instruction as to opening it, is not subject to objection on the ground that such statement would be privileged, the question being merely preliminary, and such contents not being privileged as to any one acquiring a knowledge of them otherwise than through the attorneys.

24. Where a question to a witness by the prosecution is admitted over objection, on the ground that it is preliminary, with a statement by the court that, if not followed up, the testimony will be stricken out on motion, and, the answer being adverse to the prosecution, the matter is dropped, the defendant is not prejudiced, and will be presumed to have been satisfied to allow the testimony to remain unless he moves to strike it out.

25. The fact that a person was brought before the court for contempt during the trial of a defendant for murder, charged with having said to a juror in the case, "If you don't hang him [defendant], we will hang you," and was given a hearing in the presence of the jury, and punished for the contempt, was not prejudicial to the rights of defendant, who did not instigate nor conduct the proceeding, and made no request that the jury be excluded.

26. The use by a district attorney, in argument, of an empty box, to illustrate the quantity of gas which could leak in a given time and under circumstances testified to, was not error prejudicial to the defendant; the jury being cautioned by both the attorney and the court that the box was not in evidence, nor any proof of its capacity, and that the statements of the attorney were merely by way of argument.

27. The fact that the newspapers of a city where a murder was committed continued to publish sensational articles in regard to the crime, and after defendant's arrest, both before and during his trial, treated him as the undoubted criminal, and aroused public sentiment strongly against him, does not alone show that he did not have a fair trial, and will not require the granting of a new trial, where a satisfactory jury was obtained without defendant's having exhausted his peremptory challenges, and each juror makes affidavit that he neither read nor heard read any of the publications during the trial, and at all times obeyed the injunctions of the court, and was not influenced in any way by anything outside the evidence, and where it does not appear that defendant was prevented from making his full defense.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

W. H. T. Durrant was convicted of murder, and, from the judgment and an order denying a new trial, appeals. Affirmed.

John H. Dickinson and Eugene N. Deuprey, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, for the People.

HENSHAW, J. The defendant, convicted of the murder of Blanche Lamont, prosecutes these appeals from the judgment, and from the order denying him a new trial.

Reviewing the specifications of error in their natural sequence, rather than in the order of their presentation in argument, the first which invite attention are defendant's challenges to the panel. He contended that the list of trial jurors had not been selected or returned as required by sections 204 to 209 of the Code of Civil Procedure. In support of this contention, he offered the record of the proceedings of the judges of the superior court in the matter. This record, kept by the secretary of the judges, was incomplete. Under direction of the presiding judge, the secretary amended his record, and, as amended, his minutes showed a compliance with the law. The presiding judge was permitted to testify to the facts attending the selecting and listing of the trial jurors, from which it appeared that the proceedings of the judges were due and regular. Defendant's objection that the original minutes of the secretary were the sole evidence admissible upon the question cannot be sustained. It was the inherent right of the court to correct its records to make them comport with verity. Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393. The secretary's minutes are not made exclusive evidence of the proceedings they undertake to record. It was the duty of the trial judge to determine the facts, and no better evidence could have been offered than that of the presiding judge, himself an actor in and creator of them.

The further objection that the judges failed to comply with the law, in that, of the jurors selected, some did not possess the requisite qualifications, is equally untenable as a ground of challenge to the panel. People v. Young, 108 Cal. 12, 41 Pac. 281. To hold mandatory the provisions of section 205 of the Code of Civil Procedure, and thus to require of the judges the strictest compliance with the law in the matter of the selection of jurors, would be to the last degree unreasonable. They would then be obliged to lay aside all other business, and devote their time for days, and perhaps weeks, to personal inquiry, inspection, and examination of 3,600 men (the number of jurors called for), and, after this labor, to decide, at the peril of a rejection of the whole panel, that to the final name upon the list each man possessed all the qualifications of a juror. The provisions of the section are directory, and a substantial compliance with them is here shown, and is all that may be demanded.

Section 204 of the Code of Civil Procedure provides that in counties, and cities and counties, of more than 100,000 inhabitants, the judges of the superior court shall select and return trial jurors. Though the section was amended in 1881, and again in 1893, the provisions relative to cities and counties of over 100,000 inhabitants continued unchanged so far as affects this consideration. Before the present constitution went into operation, the jurors were selected by the district judges of the several judicial districts within the city and county of San Francisco, the county judge, the probate judge, and the judge of the municipal criminal court. The amendments to the section made after the adoption of the present constitution were designed to meet the new judicial system provided for by that instrument. This section was a part of the Code before the adoption of the existing constitution, and by that instrument (article 22, § 11) all laws relative to the judicial system then in force were made applicable to the new system therein provided for. Section 204 of the Code of Civil Procedure was not unconstitutional under our earlier organic law, and did not become unconstitutional by virtue of the present one. To the contrary, the section was expressly retained in force.

The court summoned jurors by special venire. To the panel thus formed, defendant objected. The objection was not based upon section 1064 of the Penal Code, but upon the ground that the regular jury list had not been exhausted. This is not a ground for challenge. Code Civ. Proc. §§ 226, 227; Levy v. Wilson, 69 Cal. 111, 10 Pac. 272; People v. Vincent, 95 Cal. 425, 30 Pac. 581. The court may summon jurors by special venire without exhausting all of the names upon the regular list.

To the jurors Crocker and Nathan challenges were interposed for actual bias, under subdivision 2 of section 1073 of the Penal Code. The challenges were disallowed. Whether or not the jurors Crocker and Nathan, or either of them, were shown to be disqualified by actual bias against the defendant, and, therefore, whether or not the trial court erred in disallowing the challenges interposed to them, is not, under the facts presented by the record, a subject for consideration by this court. The challenges for cause having been disallowed, the defendant did not see fit to exercise his right of peremptory challenge upon either of the jurors, but accepted them both. When the jury was completed, defendant still had in reserve, and unemployed, 8 of his 20 peremptory challenges. It has in this state been held in numerous instances that if the judge errs in disallowing a challenge for cause, and the defendant thereafter excuses the obnoxious juror under a peremptory challenge, and the jury is completed without the exhaustion by the defense of all of its peremptory challenges, the error of the court will not be reviewed upon appeal, because no injury could have resulted to the defendant. People v. Gatewood, 20 Cal. 146; People v. Gaunt, 23 Cal. 156; People v. Weil, 40 Cal. 268; People v. McGungill, 41 Cal. 429. The situation here differs somewhat from that presented by the cases last above cited. But the reasoning which governed those decisions is strictly applicable to present consideration. The defendant may not have reviewed an error which he has invited or has failed to avoid by the legal means at his command. If the defendant feared to put himself upon trial before the jurors whom he had challenged, it was his duty to have availed himself of the liberal aid which the law affords, and to have excused them from the box. If, in so doing, he lessened the number of his peremptory challenges to such an extent that it appears they were exhausted before the completion of the jury, he may well be heard to urge in argument that, by reason of the erroneous ruling, the number of his peremptory challenges was improperly curtailed, and he was deprived of a legal right; but if it is shown, as here, that the two jurors in question were accepted and allowed to remain, when the defense could have exercised peremptory challenges upon them, and, further, that, at the time when the jury was completed, there was still held in reserve by the defense nearly half of its peremptory challenges, if, under these circumstances, error was committed by the trial court, it was either permitted by the defense, or acquiesced in by its failure to exercise its legal right, and the ruling will not be reviewed. There will be found in the cases some slight diversity of opinion upon the question, but the great weight of authority is in support of the view above expressed. Thompson on Trials (section 120) thus declares the principle: "It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. If his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint." The rule above stated finds overwhelming support from the authorities, of which a few may be cited: State v. Gooch, 94 N. C. 987; Williams v. State, 30 Tex. App. 354, 17 S. W. 408; State v. Le Duff, 46 La. Ann. 546, 15 South. 397; State v. Yetzer (Iowa) 66 N. W. 737; State v. Hartley (Nev.) 40 Pac. 372; People v. Aplin, 86 Mich. 393, 49 N. W. 148; Brumback v. Bank, 46 Neb. 540, 65 N. W. 198; Prewitt v. Lambert, 19 Colo. 7, 34 Pac. 684; Spies v. People, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898.

Nine jurors had been sworn to try the case. At this stage of the proceedings the district attorney sought and obtained permission of the court to reopen the examination of one of these (Brown), and to question him upon matters which had come to his knowledge since his acceptance as a juror. Permission was granted over objection and exception of defendant. At the conclusion of the examination, the district attorney asked leave to interpose a peremptory challenge to the juror. Leave was given, and this ruling is assigned as error. Section 1068 of the Penal Code provides that a challenge (either peremptory or for cause) must be taken when the juror appears, and before he is sworn to try the cause; but the court may, for cause, permit it to be taken after the juror is sworn, and before the jury is completed. It was not error, therefore, for the court to permit a re-examination of the juror upon matters coming to the knowledge of the people or defendant after his acceptance, and before the completion of the jury. The course here pursued was that followed in People v. Bemmerly, 87 Cal. 117, 25 Pac. 266, and approved by this court.

The new matter upon which the juror Brown was questioned touched his connection with the case of one Howell, who had been tried in a federal court for passing counterfeit money. Brown had been a juror in the case, and, with others, had voted for Howell's acquittal. The result was a disagreement of the jury, and a mistrial. Rumors that the Howell jury had been approached and corrupted were current, and the next federal grand jury instituted an investigation. Brown was summoned before it, and interrogated as to his knowledge of the matter; but, in justice, it should be added that the record before us does not disclose that his own integrity was under assault. There was undoubtedly not enough in this to warrant the interposition of a challenge for cause; but section 1068 of the Penal Code contemplates also the taking of a peremptory challenge, as was done in this case. When the Code says that the court may, for cause, permit the challenge to be taken, it means, as the language has been interpreted, that it is not a matter of right to either party, but may be permitted in the exercise of a sound discretion (People v. Reynolds, 16 Cal. 128; People v. Montgomery, 53 Cal. 576; People v. Bemmerly, 87 Cal. 117, 25 Pac. 266); and, as said in People v. Montgomery, in granting or refusing permission it will not be presumed that the court has abused its discretion. In all matters not ordered by inflexible rule, no set formula applicable to every case may be laid down to govern and measure the exercise of discretionary power. As each case arises, its determination must rest upon its peculiar facts, and what might be an abuse under one set of circumstances might be a fair exercise under another. In every case careful regard will be had to see whether or not the substantial rights of a defendant have been jeoparded or impaired, but, if they have not, then the ruling is not to be disturbed, for, at the worst, it could be but a technical error, which the courts are commanded to disregard. Pen. Code, § 1404. Having in view the nature of the district attorney's inquiry, and his manifest suspicion that the juror was or had been approachable and venal, it might well be that, as a result of the inquiry, the juror was left in a state of extreme hostility to the prosecuting officer. He, upon his part, had failed to establish ground for a challenge for cause, and, if he could not exercise a peremptory challenge, would be compelled to try and to argue his case before a juror whose attitude naturally was one of bitter antagonism to him. It may safely be said that, however disinterested a juror might be as between the litigants, no advocate cherishing his client's interests would willingly accept one whom he believed to be his personal enemy. These obvious considerations were in the mind of the trial judge. Moreover, the defendant had not exhausted his peremptory challenges. Four other jurors were obtained, to none of whom was any challenge taken by the defense; and, as has been said, when the jury was finally completed, there remained to the defense, unexercised, 8 of its 20 peremptory challenges. The ruling by which the prosecution was allowed to interpose the peremptory challenge worked no hardship to the defendant. His right was to a fair and impartial jury, not to a jury composed of any particular individuals. When it appears that a fair and impartial jury was obtained, it is the general rule that an error of the court in allowing a challenge, and permitting a juror to be excused, is not subject to review. Territory v. Roberts, 9 Mont. 12, 22 Pac. 132; State v. Klauseman, 53 Minn. 541, 55 N. W. 741; State v. Chin Ling, 16 Or. 419, 18 Pac. 844; Snow v. Weeks, 75 Me. 105; Tompson v. Douglass, 35 W. Va. 337, 13 S. E. 1015; John D. C. v. State, 16 Fla. 554; State v. Ward, 39 Vt. 225; Watson v. State, 63 Ind. 548; Tatum v. Young, 1 Port. (Ala.) 298; Richards v. State (Neb.) 53 N. W. 1028. It cannot be said, under the circumstances shown, that any injury resulted to defendant from the ruling, or that any abuse of discretion is shown. People v. Arceo, 32 Cal. 40; People v. Murray, 85 Cal. 350, 24 Pac. 666; People v. Murphy, 45 Cal. 137.

The contention of appellant next to be considered is that the evidence is insufficient to justify the verdict, and that the verdict is contrary to the evidence, in this: that the evidence fails to show how, when, or where Blanche Lamont was murdered, or that the defendant in any way was instrumental in causing her death. No small part of appellant's argument herein is devoted to an attack upon the credibility of the witnesses for the prosecution. In this attack the personal characters of many are assailed, and the unreliability of the evidence of nearly all is insisted upon. It here again becomes necessary to repeat that arguments touching the credibility of witnesses and the weight to be given their testimony—arguments eminently proper to be addressed to the jury or to the judge upon motion for a new trial—are not for our consideration. This court sits in criminal cases solely for the correction of errors at law. If, in any criminal case, there be evidence adduced logically tending and legally sufficient to prove the guilt of a defendant, this court cannot and will not disturb the jury's determination, even under a claim that there is conflicting evidence which might have raised a reasonable doubt of his guilt. The province of the jury in weighing evidence, and determining the degree of credibility to be accorded the testimony of witnesses, is, under the rules of law, exclusive. A judge may not instruct upon matters of fact. If a witness should absolutely discredit his own testimony by swearing to opposite statements, so that one or the other must be false, under our laws his testimony is not of necessity to be rejected. It is still evidence in the case. Under such circumstances, the jury must receive and weigh it. They are bound to look upon it with suspicion and distrust, and may reject it. But, upon the other hand, they may, as they determine, accept as true one or the other of the contradictory asseverations. Thus, upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited, or that their evidence is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522. "Ad questionem juris respondent judices, ad questionem facti respondent juratores;" and than this no maxim of the old law has been more carefully preserved in its integrity under our system. Where it is not clear that the verdict must have been rendered under the influence of passion or prejudice, our examination of the record is only to determine whether legal evidence has been offered sufficient to warrant a conviction, for the verdict of the jury is their declaration that it is this evidence which has been by them accepted. People v. Ah Loy, 10 Cal. 301; People v. Vance, 21 Cal. 400; People v. Strong, 30 Cal. 151; People v. Dick, 32 Cal. 214; People v. Manning, 48 Cal. 335; People v. Estrada, 53 Cal. 600; People v. Mayes, 66 Cal. 597, 6 Pac. 691; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595; People v. Freeman, 92 Cal. 359, 28 Pac. 261.

The following facts were presented in evidence:

Upon April 3, 1895, Blanche Lamont was living with her aunt, Mrs. Noble, in the city and county of San Francisco. She was in person rather tall and slight, and weighed about 120 pounds. Her age was 21 years. She was a school girl, attending the High School and Normal School, and, upon the morning of April 3d, left her home, with her strap of books, to join her classes. She met defendant while on the way (such is his testimony), and he accompanied her for a part of the journey. She was at school during the day's session, and at its close, about 3 p. m., left with the other pupils. She did not return home, and never after that day was seen alive. Shortly after 9 o'clock upon the morning of April 14th, two police officers and the janitor attempted to open the door leading to the belfry of the Emmanuel Baptist Church. They were prosecuting a search for Blanche Lamont. The knob of the door was gone, and the lock mutilated, so that the janitor's key could not open it. They forced the door, and one of the officers, ascending the stairs, found the body of a girl lying on the top landing, in the southeastern corner of the belfry. It was that of Blanche Lamont. The body was naked, lying upon its back, the feet close together, the hands folded upon the breast, the head inclined a little to the left. There were two small blocks, apparently employed to hold the head in an upright position. Decomposition was well advanced, and, by medical testimony, life had been extinct for about two weeks. An examination and autopsy of the corpse revealed seven fingernail incisions upon the left side of the throat, and five upon the right, a depression of the larynx, and a congestion of the trachea, larynx, lungs, and brain. Strangulation was the cause of death. A search brought to light the clothing and apparel of the girl, hidden in and about the rough woodwork of the belfry, and also her book strap and schoolbooks.

Upon April 15th the defendant was arrested, and charged with this murder. At that time, Durrant was a young man, 24 years of age, a student of the Cooper Medical College of San Francisco, and a member of the signal corps of the National Guard of the state. He was interested in religious work, was an attendant, if not a member, of the Emmanuel Baptist Church, was a member of the Christian Endeavor Society, was assistant superintendent of the Sunday school, and was librarian of the church library. As is abundantly testified to, he bore the esteem of his fellows as a zealous, earnest, and upright young man, of commendable character, and of sincere Christian life. When arrested, he was upon service of the signal corps to which he was attached. Upon the trial his defense was an alibi. He declared that he had seen Blanche Lamont in the morning of April 3d, when she was on her way to school, but never again thereafter; that he himself had gone to his medical college, and there had attended a lecture at the time when, under the contention of the prosecution, the girl had been by him murdered in the church. By the prosecution it was shown that Blanche Lamont was a regular attendant of the Emmanuel Church, and belonged to the Society of Christian Endeavor, of which Durrant was also a member. The two were well acquainted. Indeed, they seem to have stood in their intercourse upon terms of cordial and trusting friendship. They met at religious and social gatherings, to or from which Durrant frequently escorted the girl, in company with her sister and others of their social circle. Durrant had a key to the side door of the church, and was thoroughly familiar with the building and premises. Mrs. Mary Vogel lived across the street from the school which Blanche Lamont was attending. She saw defendant a little after 2 o'clock of the afternoon of April 3d in front of the schoolhouse, walking up and down, apparently in waiting. When school closed, she noticed two girls coming out together. One of them carried books in a strap. They walked to the corner of the street, where they stopped for a car. The defendant joined them as they were about to board it. One of the girls went inside. The other sat outside upon the dummy. The defendant joined this girl, and seated himself beside her. Minnie Edwards testified that it was she who accompanied Blanche Lamont from school that afternoon. They were joined by Durrant at the corner. Blanche Lamont and he sat together outside, while she found a seat within the car. Blanche Lamont had her schoolbooks with her. Mrs. Alice Dorgan, at the time of these occurrences, was a pupil of the same school. Upon that afternoon, she, too, saw Blanche Lamont upon the dummy in company with the defendant. May Lanigan, another of the schoolgirls, also saw the two upon the dummy. This was from 5 to 10 minutes after 3 o'clock. Mrs. Elizabeth Crossett had known the defendant for about 4 years. Between half past 3 and 4 o'clock of this afternoon, while she was upon a Valencia street car, traveling towards Twenty-Fifth street, she saw defendant. He was seated upon the dummy of her car, in company with a young lady whom she did not know, but whose description answered to that of the murdered girl. The two were in conversation, and left the car at Twenty-First or Twenty-Second street, and walked in the direction of Bartlett street. The Emmanuel Baptist Church is situated upon Bartlett street, between Twenty-Second and Twenty-Third streets. Martin Quinlan, between 10 and 20 minutes after 4 o'clock of this afternoon, saw the defendant and a young lady, whose description corresponded to that of the girl, and who carried a loose package in her hand by a string or strap, walking along Bartlett street, from Twenty-Second street, towards Twenty-Third street. They were upon the same side of the street as the church, and were walking towards it. Mrs. Caroline Leake lived upon Bartlett street, almost directly opposite the church. She had been an attendant there at divine service for many years. She had known defendant for the past 3 or 4 years. She also knew Blanche Lamont. Between 4 and half past 4 of this afternoon, she saw Durrant and a young lady pass through the gate into the churchyard, and on towards the side door. His companion she could not identify positively, but from her appearance thought at the time that it was Blanche Lamont, or another young lady of similar size and height. This young lady testified that she was not with defendant at any time upon that day, and no pretense is made that she was. George King was a member of the church, and its organist. He knew defendant, and the two were very friendly. At 5 o'clock on this afternoon, he entered the church by the front door, letting himself in with his key. He noticed a strong smell of gas, and went forthwith to the library, to see if it was escaping there. He failed to find the leak. Thence, closing the library door, he proceeded directly to the Sunday-school room, and, sitting at the piano, began to play. He played for two or three minutes, when defendant came through the folding doors to the rear, and stood looking at him. "I asked him what was the matter, because of his pale condition. He had his coat off, and his hat off. His hair was somewhat disheveled. He came through, and then told me that he had been fixing the gas above the auditorium, and had been overcome by it to such a degree that he could hardly descend the ladder. He seemed ill. He handed me a fifty-cent piece, and asked me to go and get some bromo seltzer." Witness procured the seltzer, and upon his return found the defendant either standing in the lobby or lying upon the platform in the Sunday-school room. He thinks, however, that defendant was lying down. Defendant took a dose of the seltzer, which seemed to nauseate him somewhat. The two sat, and talked together for a few minutes; then went upstairs to the choir loft, and carried down a small organ. Defendant appeared weak, and had to stop two or three times to rest. Then they went to the library door, which Durrant unlocked, and, entering, put on his hat and coat, which were lying on a box in the corner. Witness had not seen the hat or coat when he went into the library the first time that afternoon. They then left the church, and, walking some distance together, separated, and went to their respective homes. It was then about 6 oclock.

Upon the morning of April 13th, ten days after the disappearance of Blanche Lamont, and one day before the discovery of her body, her aunt, Mrs. Noble, received through the mail a package which contained all of the rings worn by her when she left her home. The rings were inclosed in a copy of a daily newspaper, the Examiner, and upon the paper were written the names of George King and Prof. Schernstein. King was a common friend of Durrant and Blanche Lamont. Prof. Schernstein was her music teacher. Neither of the two wrote the names. The paper and wrapper were exhibited to the jury, together with admitted exemplars of defendant's writing. Upon a morning between the 4th and 10th of April, Adolph Oppenheimer, a pawnbroker, was offered for sale a gold ring containing a diamond chip. The ring was identified as one worn by Blanche Lamont at the time of her disappearance, and subsequently returned to her aunt through the mail. The person offering the ring for sale was the defendant. William Phillips testified that, upon a day in the first part of April, he saw defendant standing in front of Oppenheimer's place, between 10 and 11 o'clock in the morning. Dr. G. F. Graham was a student and classmate of Durrant's at the Cooper Medical College. From 3:30 to 4:15 p. m. of April 3d, Dr. Cheney, of that college, delivered a lecture to his class upon the sterilization of milk. Dr. Graham attended that lecture, and took notes of it. The defendant, in support of his alibi, claimed to have attended the lecture, and likewise to have taken original notes, which were admitted in evidence. Dr. Graham testified that after Durrant's arrest, and before the trial, he visited him with a friend. Durrant requested his companion to withdraw, that he might talk to Dr. Graham alone. When he had done so, defendant informed Dr. Graham that he had no notes of the lecture, and requested the doctor to lend him his, saying that, if he could get them, he could establish an alibi. Defendant told him that he could take the notes to Durrant's house, get his book, and put them in it, and the book could be brought to him in jail, or that the witness could commit his notes to memory, come to the jail, and repeat them to him.

This summarization of the evidence is not designed to be exhaustive. Much that is cumulative upon the part of the people is omitted. No analysis is made of the alibi of the defense, nor of the claim of the prosecution that, when not completely demolished, it stands upon the unsupported word of the defendant. Enough has been set forth to show that the verdict and judgment find support from legal and sufficient evidence, and, when that point is reached, the inquiry of this court comes to an end, saving in those exceptional cases (of which this is not one) where the evidence against the defendant is so slight as to make clear the inference that the verdict must have been rendered under the influence of passion or prejudice. People v. Vance, 21 Cal. 400; People v. Manning, 48 Cal. 335.

By this evidence, the defendant and Blanche Lamont (she with her strap of books) entered the Emmanuel Church at about half past 4 o'clock in the afternoon of April 3d. At 5 o'clock defendant is seen there, and explains his distressed condition as caused by the inhalation of gas. At 6 o'clock he leaves the church. Blanche Lamont is never again seen alive. Two weeks after, her nude and decomposing body is found in the church. She had been strangled, and her corpse dragged to the belfry. The clothes which she wore on leaving home are secreted about the floors and rafters. Her books are found, still tightly strapped. These facts, with the others set forth, are sufficient to justify the hypothesis of defendant's guilt, and to exclude every other reasonable hypothesis than that of his guilt. Such evidence is clearly sufficient to warrant and uphold the determination that the girl was strangled to death at the hands of the defendant upon the afternoon of April 3d.

The evidence of defendant's previous good character, so fully established, was a circumstance making strongly in his favor. We are asked to say that the jury disregarded it in reaching their verdict, but this we cannot do. They were fully and fairly instructed upon the matter, and it must be presumed that the instructions were regarded.

Appellant further urges that the evidence fails to disclose any motive for the crime; that proof of motive is essential to support a conviction; and that, therefore, the judgment must be reversed. If by this is meant that proof of a particular motive must be as clear and cogent as proof of the crime, the proposition finds no support in either reason or authority. To the act of every rational human being pre-exists a motive. In every criminal case proof of the moving cause is permissible, and oftentimes is valuable; but it is never essential. Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory; and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury; and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction. People v. Bennett, 49 N. Y. 137; Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410; Johnson v. U. S., 157 U. S. 320, 15 Sup. Ct. 614; Clifton v. State, 73 Ala. 473; Sumner v. State, 5 Blackf. 579. The wellsprings of human conduct are infinite, and infinitely obscure. An act may owe its performance to complex and multitudinous promptings. Who

> Knows each chord its various tone,
> Each spring its various bias?

Or the deed may be due to a single dominant impulse. In this case, what the motive may have been it is not the province of this court to inquire.

During the impanelment of the jury, the defense made application for citations against certain newspaper editors, to show cause why they should not be punished for contempt because of their publications relative to the trial. The court refused to interrupt the proceedings to consider the matter then, and postponed action, stating that at a proper time it would, upon request, take such steps as might be contemplated by law. Again, during the impanelment of the jury, the application was renewed, and the court's response was the same. No further request was made, and there the matter was allowed to stand. This is urged as reversible error. While a contempt proceeding, for convenience, is presented in the cause out of which it grows, it is a separate and distinct matter, and no part of the original case. Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380. Power to punish for contempt is vested in courts for their own protection. Its object is to insure respect for their rules and orders, obedience to their processes, and freedom from disturbance or interference with the due and regular course of their proceedings. 5 Am. & Eng. Enc. Law, p. 780; Thomp. Trials, § 124. A publication during the course of a trial which reflects on the court, or assails the litigants, or seeks to intimidate witnesses, or spreads before the jury an opinion upon the merits of the controversy, or threatens them with public odium, or attempts to dictate the decision, or in any improper way endeavors to influence the determination, is unquestionably a contempt of court (In re Shortridge, 99 Cal. 532, 34 Pac. 227); but at the same time a litigant has no appeal from the action of the judge in dealing with the matter. The litigant may not control this process, which is designed for the protection of the court, and which is to be invoked or not, as its discretion may dictate, but which should be employed freely where the interests of justice and the rights of litigants demand it. "The doctrine is well nigh without exception that the issuance vel non of contempt proceedings lies in every instance in the sound discretion of the court." 4 Enc. Pl. & Prac. p. 774. If, by the failure of the court to proceed against the editors or any of them, defendant has failed to obtain the fair and impartial trial to which the law entitles him, he may make that appear upon his motion for a new trial, and the question will thus come before us properly for review. In this case the question is raised in the manner indicated, and it will be considered upon its merits in the proper place.

Numerous objections were made and exceptions reserved to the court's rulings in admitting and rejecting evidence. These rulings have been subjected to critical examination, including those which in appellant's brief receive no discussion, but are grouped by number, and collectively assigned as error. While none, therefore, have been ignored, we will here consider only such as merit particular mention.

(a) Dr. Barrett was shown to be a practicing physician and surgeon. He performed the autopsy upon the body of the dead girl, gave evidence of its condition, and expressed his judgment that the cause of death was strangulation. He was then asked, "What, in your judgment, was the means used for the strangulation?" Objection was made, upon the sole ground that no proper foundation had been laid for the question. The objection was properly overruled. The objection does not present the point that the fact sought to be elicited was not the subject of expert inquiry; nor is that proposition argued in the briefs. That being conceded, the objection that a proper foundation for the question had not been laid could not be sustained, when the witness was a physician and surgeon, whose competency had been abundantly shown. The witness answered: "I think the means used were hands." The appellant insists that the court erred in refusing to strike this answer out, as the question called for the witness' judgment, and he only gave his thought. The expressed thought of the expert was clearly his judgment.

(b) The clothing of Blanche Lamont, admitted in evidence, was draped upon a dressmaker's frame, which itself was not in evidence. It was not claimed that the frame represented the height, size, or figure of the girl. Error is predicated upon the use of the frame and the refusal of the court to order the garments removed from it. The frame afforded a convenient mode for displaying the wearing apparel, concerning which much testimony was taken. We can discern no more impropriety or irregularity in the plan pursued than would have existed if the garments had been hung upon a clothesline, or huddled into a corner.

(c) Mrs. Vogel, cross-examined by the defense, and asked how she fixed the date upon which she saw Durrant as being April 3d, replied that it was because of a postal card which her husband received that day, and which had been directed to 732 Natoma street. "That place we own, but is occupied by tenants. I have never lived there. Q. Well, is that your property, or your husband's property? A. What he got is mine; what I got is his. Q. Do you understand my question? I asked you, in whose name does the title to this property on Natoma street stand?" Here the judge interposed, and, stating that he could see no possible materiality or relevancy to the question, instructed the witness that she need not answer. There was in this no error. Indeed, it is the duty of a court, and one not often enough performed, to expedite business by curtailing cross-examinations upon immaterial and irrelevant matters. We cannot perceive the slightest pertinency to the inquiry. No question of right or title to property was even collaterally or remotely involved, and, had the witness answered, the subject being immaterial matter educed on cross-examination, the defense would have been bound by her statement, without right to impeach it, even had it been false. Code Civ. Proc. § 2048.

(d) Mrs. Crossett declared that, to the best of her recollection, the young lady whom she saw with defendant wore a broad-brimmed hat, light, with large bows and feathers in front. She did not recognize the hat exhibited to her, which had been proved to be the one worn by the dead girl. She was then asked: "Can you tell whether it was a hat similar to that, this young lady wore?" Objection was made that the witness had already stated that she could not recognize it. The court permitted the question, saying: "I think they have a right to ask whether there is any similarity, and, if so, what similarity there is, between the hat shown to her and the hat she saw the young lady wear." The manifest soundness of the ruling renders comment unnecessary.

The same witness was interrogated on cross-examination as follows: "Q. Have you seen him [Durrant] at all since last September, 1894? A. Yes, sir. Q. That is, you imagine you have? Mr. Barnes: I object to the question. The Court: That would not be proper. The lady is telling what she has seen. I do not think, when a lady says, 'I have seen him since September,' that counsel has a right to say, 'You imagine you did?' * * * It disconcerts the witness, and throws a very serious doubt upon the statement. You should have the right to cross-examine this witness and all other witnesses, but I do not concede that this is a proper way to do it. Mr. Deuprey: We will have to take an exception. The Court: You have your exception, certainly, to every ruling of the court; but I say that this and all witnesses in this court are to be treated fairly. Mr. Deuprey: I did, sir, treat this witness fairly. The Court: The court does not believe you have. Mr. Deuprey: I take an exception to the court's remarks." Upon this ruling and these remarks error is affirmed. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh and insulting demeanor; to be detained only so long as the interests of justice require; to be examined only as to matters legal and pertinent to the issue. Code Civ. Proc. § 2066. The protection which the Code thus affords to witnesses could be more often extended by judges with a salutary effect upon judicial proceedings. The witness (a lady) had testified courteously and positively that she had seen defendant since the date named. The interjection of counsel was not legitimate cross-examination, and justified the interposition of the court.

(e) Blanche Lamont's sister Maud was living with her at the time of her disappearance. She was shown a picture of Blanche taken about three years before the date of her testimony, and was asked whether or not the photograph was a fair representation of her sister as she was upon April 3d. Over objection and exception, she was permitted to answer. It is a general rule, without contradiction, that, where the photograph is shown to be a faithful representation of what it purports to reproduce, it is admissible as an appropriate aid to the jury in applying the evidence, and this is equally true whether the photograph be of persons, things, or places. Rice, Cr. Ev. p. 154; Whart. Cr. Ev. (9th Ed.) § 544; Thomp. Trials, § 869. The fact that the photograph was taken two or more years before the date of the girl's death did not justify its exclusion after the testimony of the sister that it fairly represented Blanche at the time of her disappearance.

(f) George E. King, upon direct examination for the people, testified that, when he returned to the church after buying the bromo seltzer for Durrant, he found him either standing in the lobby or lying on the platform in the Sunday-school room, but in which place he could not remember. For the purpose of refreshing his memory, the district attorney, over objection and exception by the defense, was permitted to read the following question and answer from the testimony of the same witness upon the preliminary examination in the police court: "Q. When you returned, what occurred then? A. I met Durrant in the vestibule of the church by the front door, and he took the seltzer, and took a dose of it. He went into the kitchen to do that." The witness responded: "I did so testify. I don't think that testimony was correct. In the cross-examination I was asked if he was not lying on the platform, and that created a doubt in my mind, and now I am not sure either way." The witness would have had the undoubted right to have read his testimony given upon the examination for the purpose of refreshing his memory. Code Civ. Proc. § 2047. Such a transcript may at least be regarded as a private memorandum. Reid v. Reid, 73 Cal. 206, 14 Pac. 781. When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury. The answer above quoted affords a good illustration of this. The witness admits the discrepancy between his former and his present testimony, and candidly explains it as arising from a doubt created by his former cross-examination. There was here no impropriety and no injury to defendant.

(g) The janitor of the church was asked upon direct examination if any one beside himself had a key to his room. He replied: "I have sometimes left my room door locked, and found it open. Therefore I conclude that some one had a key to it." The refusal of the court to strike this answer out is assigned as error, "because, by its nature, the answer only had a tendency to cloud the minds of the jury," and "necessarily injured the case of defendant." We are unable to perceive any force in these objections.

(h) The body of Blanche Lamont was found nude and prone upon its back, with a small wooden block upon each side of the head, apparently used to hold it in an upright position. Dr. Charles E. Farnum was called for the people, and testified that he was the demonstrator of anatomy at the Cooper Medical College, which defendant attended, and that wooden blocks were employed for purposes in relation to dead bodies. He was next asked: "For what purpose are they used?" Objection was made that the question was irrelevant, immaterial, and incompetent for any purpose. The line of proof sought to be established by the prosecution was quite apparent. It was an endeavor to show, by the demonstrator of anatomy under whom defendant was studying, some technical or peculiar use of wooden blocks in connection with dissecting room corpses, similar to the use made of blocks about the head of the body of the dead girl. The court could not foresee the answer, and properly overruled the objection; for, if the proposition could be established, it was clearly competent for the people to do so. In this, however, there was a signal failure. The answer disclosed no possible connection between the facts in the case of the dead girl and the custom of the dissecting room. While the question was pertinent, the answer thereto failed to furnish the required proof. It would unquestionably have been stricken out on motion of the defense. But no motion was made; doubtless because the answer not only worked no injury to the defense, but was an affirmative advantage to it.

The record next discloses the following question, objection, exception, and answer: "Q. Let me put a hypothetical case to you for a moment: Suppose you had in your custody or care a body which had but recently died, and it was still almost warm with life. You are acquainted with anatomy and surgery, and you know that in a certain length of time rigor mortis would set in, when the body and the members of the body would become stiff. Now, if you wanted to keep the head—the face and neck—in an upright position, in a straight position, not turned to one side or the other, what would you do in order to keep it in that position? Mr. Deuprey: We object to that, as not a hypothetical question involving any elements in this case. (Objection overruled. Defendant excepts.) A. I would place it first in the position in which I wanted it, and, if it did not remain there, I would prop it by supports in the desired position. * * * My last answer is what I, as an individual, would do." The objection, it will be noted, is not upon the ground that the inquiry is not a subject of expert evidence, but is based upon the one proposition "that the hypothetical question does not involve any elements in the case." In strictness, therefore, this consideration might begin and end with a disposition of the single ground of objection urged; and when it appears, as by fair inference it does, that some one had murdered the girl, and that some one was present with her still warm body, and that some one placed the blocks for the purpose of holding the head upright, it certainly cannot be said that none of the elements of the case were involved in the hypothetical question. Indeed, while counsel for the appellant, arguing this proposition, strenuously insist that "there is no evidence in the record that any person wanted to keep the head, the face, or the neck in an upright or any position, or in a straight position, not turned to one side or the other; there was nothing in the way of circumstance or in the way of fact established that would permit the presumption of the conditions forced into the so-called 'hypothetical question,'"—we need but turn back four pages of their brief to find the curiously destructive declaration that "the fancy struck the murderer of this girl to place the head in a certain position, and he did the most natural thing in the world,—picked up a couple of small blocks, evidently lying near, to hold the head in the position desired."

Moreover, a hypothetical question need not embrace all the facts in evidence, or even be limited to facts proved. It must be based upon facts in evidence, but may be addressed to any reasonable theory which may be taken of them. In Filer v. Railroad Co., 49 N. Y. 46, it is well said: "It is the privilege of counsel to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and base the opinion of experts upon the facts thus assumed. The facts are assumed for the purpose of the question, and for no other purpose." In Thompson on Trials (section 604) the rule is thus aptly and succinctly stated: "The rule, then, is that the hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed of certain facts assumed to be proved for the purpose of the inquiry. Such questions leave it for the jury to decide, in the first case, whether the evidence is true or not, and, in the second case, whether the particular facts assumed are or are not proved."

But as in criminal cases, and particularly in cases of capital crime, the law is reluctant to deny a defendant a full consideration of his points because of technical errors or omissions of his counsel, upon whom he must rely, we pass to the consideration of the proposition that the hypothetical question and its answer were not the subject of expert evidence,—a ground of objection not presented to the trial judge. Upon this proposition the defense is undoubtedly correct. A juryman would be absolutely deficient in common sense and common knowledge who did not know that the way to keep an inanimate object in a given position would be to support it by props or stays in that position. And the physician's answer gives expression to this when he says: "That is what I, as an individual, would do." There was here no question of professional, scientific, or technical skill or knowledge. But the question and answer were absolutely without injury. Not all matters improperly made the subject of expert evidence work harmful error. Where the ultimate conclusion is one to be reached by the jury itself from the facts before it, and so-called "expert evidence" is allowed, which presents to a jury a conclusion other than that to which they might have arrived, the admission of this improper evidence is tantamount to a declaration by the court that they may set aside their exclusive right of judging, and accept the judgment of the expert. In such cases injury is apparent. But it frequently happens that, under the form of expert evidence, answers are given which are so clearly a part of common knowledge that no injury could have resulted. The answer under consideration is one of them. Had the witness been asked: "If you throw a stone into a pond of water, will it float, or sink? If you strike a man on the head with an ax, will it injure or benefit him?"—while the questions do not call for expert evidence, their answers, particularly when, as in this case, they are correctly given, could, in the nature of things, have worked no harm.

(i) The defense showed by Police Officer Reynolds that, two days after the discovery of the body, he found a chisel and hammer in the pastor's study in the church, and that he tried the chisel upon the marks. He testified: "My recollection is that there were two marks I tried to fit the chisel to. There was no mark that filled it exactly. There was a little play. You could move the chisel up and down. I could not tell if there was any more play than would ordinarily have occurred in using a chisel for prying. * * * I saw a mark on the jamb of that door, as if at some time a blow had been struck with a hammer. * * * At some time the hammer was tried in that mark." The defense then introduced the hammer and chisel in evidence. The plain purport of this evidence was to direct suspicion to the minister. In rebuttal, the belfry door and jamb were offered in evidence by the prosecution, after testimony from the officer that they were in the same condition as when previously he had made the test, saving for the absence of the lock plate. The evidence was permissible. The witness was then asked to see if he could fit the chisel to the marks. It was objected that it was for the jury to satisfy themselves upon this matter without the intervention of the witness. It is true, the jurors could have made the experiment to their satisfaction without the aid of the officer; but, he having testified to his former experiment, the prosecution was entitled to have him repeat it before the jury. The result would be, as the jury determined, either to support or to disprove his oral testimony.

(j) The defendant offered himself as a witness, and told with much circumstantiality and detail how he had spent his time upon April 3d. Many objections were interposed to questions propounded him upon cross-examination. A minute examination fails to disclose any error in the court's rulings. The questions allowed and the scope of the cross-examination are strictly within the rule expressed in People v. Gallagher, 100 Cal. 466, 35 Pac. 80. One or two of the rulings should, perhaps, receive more particular consideration.

The defendant testified upon direct examination that, when he parted with Blanche Lamont upon the morning of April 3d, it was the last time that he ever saw her, dead or alive, and was asked upon cross-examination if he had not prepared a statement, which was put into a sealed envelope, addressed to his counsel, with the instruction: "To be opened if I am convicted, and to be returned unopened if I am not convicted." To this and several like questions objections were interposed, upon the ground that the statement, if made, was privileged. The court ruled, and properly, that the questions were preliminary. It was the fact, and not the contents of the statement, which was the subject of inquiry, and no effort was made to extort from the witness any information of the latter. The court further declared that, if the people failed to follow this preliminary inquiry by proper proofs, it would, on motion, strike out the evidence. The witness answered that he had made no such statement, and there the matter rested, presumptively to the advantage of the defendant, certainly not to his injury. From the fact that no motion was made to strike out the evidence, it must be concluded that defendant acquiesced in its remaining in the case. Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625. The court was further justified in its ruling by the consideration that it could not foretell the line of proof which the people might take in rebuttal. The contents of the statement, while privileged matter between the client and attorney and all who had acquired knowledge of it through a relation of legal confidence, would not be privileged if known to one who had acquired his knowledge under other circumstances. The court could not know that it was not some such evidence which would be proposed at the proper time.

The prosecution then asked the witness, with specifications of time, place, and circumstance, if he had not told Miss Carrie Cunningham that he saw Blanche Lamont upon the second landing, and that she was murdered upon the second landing. This was in rebuttal of defendant's testimony that he had never seen the girl after the morning of April 3d. It is argued by appellant's counsel that the communication, if made, was privileged. But considering that Miss Cunningham was a newspaper reporter, and is not shown to have been the wife or to have stood to the defendant in any other relation of legal confidence, the claim scarcely merits comment.

(k) Miss Cunningham, called in rebuttal, was asked whether defendant did or did not make to her the statement above mentioned. It is asserted that the allowance by the court of these questions was a "gross outrage," and "bore down to the ground all the rules of evidence." It was strictly rebuttal evidence, by way of impeachment, under well-settled rules of law, and under the express declaration of section 2052 of the Code of Civil Procedure.

The foregoing are all of the alleged errors in receiving and rejecting evidence which call for especial comment.

It came to the knowledge of the court, during the progress of the trial, that one H. J. McCoy had said to a juror: "If you don't hang him [meaning defendant], we will hang you." For this flagrant contempt, McCoy was at once cited to appear. An examination was held. By this it was disclosed that the language was used jocularly, and without serious significance. At least, so the juror to whom it was addressed testified that he received and understood it. For this contempt, McCoy was promptly and properly punished. The proceedings were conducted in the presence of the jury. This circumstance is now for the first time charged as error. Doubtless, had the defense desired the jury excused during the investigation, the court would have acceded to the request, but no such suggestion was made. We fail to see how the defendant could have been injured by this. The mode pursued, we think, had a salutary, rather than malign, effect. The claim that defendant could have been prejudiced in the minds of the jury is completely answered by the facts—First, that it was not the defense which either instituted or conducted the contempt proceedings; and, second, by the affirmative declarations of each of the jurors under oath that he reached his verdict from a consideration of the evidence in the case, and from that alone.

We perceive no abuse of his office or unfairness to defendant in the argument of the district attorney. In showing an empty box to illustrate the amount of gas which, under the evidence, would leak in a given time, both the district attorney and the judge were careful to inform the jury that the box was not an exhibit; that no proof of its capacity was before them; and that they were not to accept the district attorney's statement as evidence. The box was used simply for purposes of illustration, and, while the practice is not commended, its exhibition to the jury could have worked no injury in this case, under the cautions of the court, and, in strictness, could no more be regarded as error than would have been the like employment of any ordinary physical object in the courtroom.

Error is assigned for the court's refusal to give certain instructions proposed by the defense, in number 36. Argument is addressed to but few of them. These will be considered. The others not argued have not been overlooked, but they either contain manifest errors of law, or are so completely covered by those given of the court's own motion that it may with safety be concluded that counsel's failure to discuss them is a tacit recognition that as to them no error was committed.

Of the proposed instructions, No. 6 was refused because substantially given in the charge of the court. It was so given.

No. 8 deals with the danger to be avoided and the caution to be exercised in reaching a conclusion upon circumstantial evidence. Upon this subject, also, the jury was fully and fairly advised by the court.

The propositions of law contained in the first portion of No. 10 were given by the court with more elaboration and exactness than appear in the proposed instruction. It was not error for the court to decline to give the last portion. It is quite true that the law never requires the sacrifice of a victim. But the jurors had been carefully instructed as to their duties, and had been repeatedly told that unless, upon clear and cogent proof, satisfying their minds beyond a reasonable doubt, they believed defendant guilty, it was their duty to acquit him. It was not incumbent upon the court to instruct the jury, as matter of law, that "it is safer to err in acquitting."

Proposed instructions 11–16, upon the subject of alibi, were fully embraced in those given by the court, as was also the law upon the matter of identification. Of the remaining instructions the same may be said.

It may here be noted that the appellant does not make serious complaint that any of the instructions actually given by the court were erroneous in point of law, but contends that in some instances the propositions which he sought to have laid before the jury were not adequately presented. The jury, however, was ably, carefully, and elaborately instructed. and we can discern no just ground of complaint in this regard.

The grounds for a new trial presented by defendant have for the most part been covered by what has been said. One of them, however, still remains for consideration. This is that the proceedings were so conducted as to deprive defendant of his constitutional right to a fair and impartial trial. Under this head it is urged that, by the repeated publications in the newspapers of San Francisco, public feeling was unjustly aroused to bitter hostility against the defendant; that witnesses who would otherwise have given valuable testimony in his favor were so intimidated that either they refused to testify, or, in testifying, gave colorless and worthless evidence; and that the jury itself, impelled by fear, yielded to the public clamor and demand that the defendant should be convicted. Many hundreds of pages of the transcript are given over to a presentation of the newspaper articles complained of.

The murder of Blanche Lamont was a crime of so atrocious a character that the community was greatly aroused. Its ghastly and sensational features were seized upon with avidity by the newspapers, and daily paraded and exploited before their horrified readers. When Durrant was arrested for the crime, there was no reservation of judgment upon their part, but they proceed with unanimity to hold him up to the public as the guilty man. During the trial of the case they vied with each other in sensational discoveries and prophecies concerning new evidence and strange witnesses. They maintained throughout the attitude which they originally assumed, and from first to last continued to treat defendant as the undoubted criminal. All this the record presented by appellant abundantly establishes. But when a community is deeply stirred over the commission of some appalling crime, and the public and the public prints are clamoring that punishment shall be meted out for it, unless we must say that, under such circumstances, as matter of law, a defendant cannot have the trial guarantied him by the constitution, such a showing does not conclude the question. Under these circumstances, all men do not forsake reason; some still preserve a dispassionate judgment; and if it be made to appear that the defendant was tried by a jury of such, uninfluenced by aught save the evidence, then in this regard none of his rights has been violated. After rigorous examination by prosecution and defense, it appears that such a jury was obtained without exhausting more than three-fifths of defendant's peremptory challenges. Each juror makes solemn affidavit that he did not at any time during the trial of the cause, and while he was impaneled and sworn as a juror, read or hear read any of the articles, statements or comments published in any of the newspapers concerning this case; that he at all times heeded the admonition of the court given at each adjournment thereof, and was at no time influenced in any way, shape, or manner by any extraneous matter whatever while a juror, either by newspapers, conversations, or public sentiment, if any such sentiment existed; that he received no impression as to the defendant's guilt or innocence outside of the court room, but decided the case, after deliberation, solely according to the law and the evidence, to the best of his ability and understanding, and not otherwise. It cannot be said that there was any error in refusing a new trial under such a showing.

The claim that witnesses for the defense were intimidated, and kept from testifying, is not supported. It was expected to prove by a witness (Clark) that in the afternoon of April 3d he saw, upon a Market street car, Blanche Lamont, with a young man, not the defendant. Clark was in one of the Eastern states during the trial, and his deposition was there taken. It was to the effect that he saw Blanche Lamont and a young man, not answering the description of defendant, together upon a car upon a day in the latter part of March or the first part of April, but the date he could not fix with positiveness. He said that he believed that he had told a lawyer that it was upon April 3d, but that subsequent consideration had convinced him that he was mistaken in this. There is here no suggestion of undue influence or intimidation.

The witness Lenahan, called for the defense, testified, from all that appears, precisely as the defense expected.

Mrs. Monnier, it is claimed, was expected to testify that, upon the afternoon of April 3d, she saw a young man, whom she would identify as defendant, enter the Emmanuel Church alone; that, because of newspaper publications and interviews with her, her husband became afraid that his business would be injured, and, between fear and anger, so talked with his wife, and had others do so, "that she became uncertain as to the time." This declaration is made upon the information and belief of defendant. It is not supported or corroborated. Even the source of affiant's information is not mentioned. It does not appear that Mrs. Monnier was not at all times within reach of process; yet no attempt was made to introduce her testimony. This showing is certainly insufficient to call for a reversal of the case.

Upon a consideration of the whole case, we discern no error to the prejudice of any of the substantial rights of defendant; wherefore the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

McFARLAND, J. (concurring). I have signed the opinion of Mr. Justice HENSHAW, and thereby concurred in his opinion and in the judgment of affirmance. But, while I can see no legal ground for a reversal of the judgment, I desire to say that the conviction of appellant would have been much more satisfactory if he had been tried in some county far beyond the reach of the threatening atmosphere which surrounded him at the place of his trial, and where the active and long-continued attempts to forestall judicial inquiry, and compel a hostile decision, could not possibly have had much force. As the case stands, it is somewhat difficult to feel sufficiently assured that outside adverse pressure did not have some insensible influence. But whether or not appellant had a substantially fair trial, notwithstanding circumstances which certainly made it difficult for him to have such a trial, is a question which addressed itself, in the first instance, to the presiding judge of the trial court; and it is not so apparent that he abused his discretion in determining that question in the affirmative as to give this court warrant to reverse the order denying a new trial. As to the other points involved in the appeal, I am clear that no substantial error was committed.

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## PEOPLE v. SIERP. (Cr. 180.)

(Supreme Court of California. March 10, 1897.)

HOMICIDE—EVIDENCE—DEPOSITION.

1. Const. art. 1, § 13, providing for the taking, in the presence of defendant and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, "when there is reason to believe that the witness, from inability or other cause, will not attend at the trial," does not prohibit the admission, on a murder trial, of testimony given by an absent witness on the preliminary examination. People v. Oiler, 4 Pac. 1066, 66 Cal. 101, and People v. Chin Hane, 41 Pac. 697, 108 Cal. 597, followed.

2. On the preliminary examination, the entire examination of a witness was in English, except that, as to one question, the court requested an interpreter to ask him if he understood, and the interpreter, having asked him, replied, "He says he does understand." *Held*, that the testimony of the witness on such examination was not inadmissible on the trial, on the ground that the examination was conducted through an interpreter, especially where the interpreter testified on such trial. People v. Lee Fat, 54 Cal. 527, and People v. Ah Yute, 56 Cal. 119, distinguished.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

William Sierp was convicted of murder in the second degree, and he appeals from the judgment and from an order denying a motion for a new trial. Affirmed.

Alex. Campbell, Jr., for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.

McFARLAND, J. The defendant was convicted of murder in the second degree, and appeals from the judgment and from an order denying his motion for a new trial.

1. As to the first point made for a reversal, it is sufficient to say that the evidence fully enough shows that Manuel Moreno, the person killed, made his dying declaration under a sense of impending death, and that, therefore, the court did not err in overruling defendant's objection to said declaration.

2. The contention, based on the cases of People v. Lee Fat, 54 Cal. 527, and People v. Ah Yute, 56 Cal. 119, that the testimony of Secundino Varela, given at the preliminary examination, was improperly admitted, because it was conducted through an interpreter, cannot be maintained. The entire examination was in the English language, except that, as to a single question, the court requested an interpreter to ask the witness if he understood the question, and the interpreter, having asked him, replied: "He says he does understand." Moreover, the interpreter was present at the trial in the superior court and testified. The case at bar is therefore not at all within the rulings in the Lee Fat and Ah Yute Cases, and the court did not, for the reason urged under this contention, err in admitting said testimony.

3. The third and only other point made by appellant is that the admission in evidence of the testimony given by said Varela at the preliminary examination was erroneous, because prohibited by section 13 of article 1 of the state constitution, and because any statute providing for the admission of such testimony in a case of homicide is violative of said section of the constitution, and void. This point was decided against the contention of appellant in People v. Chin Hane, 108 Cal. 597, 41 Pac. 697, and People v. Oiler, 66 Cal. 101, 4 Pac. 1066; but as the point has been strenuously urged in another case recently submitted, and we are asked to overrule the cases above cited, it is proper, perhaps, to give it a little further notice.

It is said that in the Chin Hane Case the point was not much discussed, and the decision was based on People v. Oiler; that the opinion in the Oiler Case contains statements which are not sound law; and that, moreover, the latter case did not involve a crime arising out of a homicide. But in People v. Chin Hane, which was decided in bank, and was a case of murder, a petition for rehearing was filed, in which this point was strongly pressed and most elaborately argued; and the court, after a full consideration of the subject, denied the rehearing. We see no additional reason for now holding otherwise. It is to be observed that our constitution does not provide—as many other state constitutions do—that a defendant in a criminal case is entitled to be "confronted with the witnesses against him," or, as the Massachusetts constitution has it, "to meet the witnesses against him face to face." The only provision of a like character here is found in subdivision 3 of section 686 of the Penal Code; but it is immediately followed by the exception and provision that the testimony of a witness taken at a preliminary examination before a committing magistrate by question and answer, "in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness," may be used on the trial in the event of the subsequent death, etc., of such witness. This provision embraces all kinds of criminal cases, and, under its express terms, the testimony objected to in the case at bar was clearly admissible. The contention, however, is that to apply this provision to an alleged crime arising out of a homicide is to violate that part of said section 13 of article 1 of the constitution which reads as follows: "The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, *when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.*" The language which we have italicized shows that the clause was not intended to relate to, and does not embrace, testimony given at the judicial proceeding known as a "preliminary examination," where the purpose of the testimony is to enable the judicial officer to determine whether or not the party charged should be committed. The clause in question clearly refers to an ordinary extrajudicial deposition, taken, as it is called, "de bene esse" (that is, conditionally), before a commissioner, or some officer authorized to administer oaths, and based upon the theory of danger of the witness dying, or for certain other reasons not being able to come to court at the trial. And while it was universally held that such a deposition could not be used against a defendant in other states, where the constitution provided that a defendant must be confronted with his witnesses, yet it was just as firmly established, both there and in England, that the testimony of a witness taken at a preliminary examination could be so used, provided the defendant had been present and had an opportunity to cross-examine. The whole subject is elaborately discussed, and the distinction pointed out, in the opinion of Judge Bronson in People v. Restell, 3 Hill, 289. That learned jurist, with respect to a deposition proper, says: "Can the public prosecutor have depositions taken de bene esse in criminal cases, and read them in evidence, without the consent of the defendant? I think he cannot. The general rule certainly is that the witnesses must appear in court and be confronted with the accused." But with respect to testimony of witnesses taken at a preliminary examination, which is also sometimes called "depositions," he says: "They are admitted on the ground that they have been taken in the course of a judicial proceeding expressly authorized by law, when the defendant was present and had the right of cross-examination. It is sometimes said in the books that the deposition is admissible because it is not extrajudicial. But that is only a part of the true reason, and is calculated to deceive. * * * The deposition must not only be taken in a judicial proceeding, but it must be taken when the defendant is present and has had the opportunity to cross-examine the witness; otherwise it will not be received." In Bish. Cr. Proc. the same rule and distinction are declared. In section 1197 the author says: "Within this rule, when the law provides for a preliminary examination before a magistrate, what the witnesses testified to therein may, in the circumstances already detailed, be shown. The manner of the showing will depend on the form of the provision." And in section 1206 he says: "Under statutes, or by consent of the prosecuting officer, evidence may be taken for the defendant by ordinary deposition." This being the general state of the law at the time our constitution was adopted, there is no room for the strictures of counsel upon the following language used in the opinion in People v. Oiler: "This clause invests the legislature, under the circumstances mentioned in it, with power to authorize the taking of depositions in criminal cases, other than those of homicide, of witnesses not called on the preliminary examination. It was not intended to take away a power long exercised by legislatures in regard to the depositions of witnesses taken on such preliminary examinations." And see cases there cited. It is argued that the clause in question cannot be held as conferring any authority on the legislature, because a state constitution is a limitation and not a grant of powers. But that is not true in any absolute sense. The legislature gets all its powers from the constitution; it would not exist if there were no constitution. It is a mere rule of construction—distinguishing the nature of state constitutions from that of the federal constitution—that the creation of a legislative department by a state constitution confers upon the legislature all necessary and usual legislative powers not prohibited in some other part of the instrument. But other parts of a complicated constitution may leave it doubtful whether or not a certain legislative power was intended to be limited, and in such case it is quite common to insert in the instrument an express declaration upon the subject. And, considering the condition of the general law on the subject of the power to provide for the use of ordinary depositions on the part of the prosecution in criminal cases, and the various provisions of the constitution itself guarding personal rights, it was quite natural for the convention to make an express declaration that the legislature should have the power to provide for such depositions except in cases of homicide; and its clear intention to do so is not at all darkened by the shadow of the rule of construction invoked. And, as before said, the language employed in the clause of the constitution in question clearly shows what was meant by the word "deposition" as there used. Indeed, there could have been no plausible doubt upon the subject if section 686 of the Penal Code, after speaking of the testimony of a witness at a preliminary examination, and then adding another provision about something having apparently no reference to a preliminary examination, did not close with the word "deposition." But the real nature of testimony given at a preliminary examination is not changed in any respect because it is called by a particular name. Indeed, in most of the cases where such testimony is held admissible it is called a "deposition." We are convinced, therefore, that no good reason is shown for departing from the rule declared in People v. Chin Hane. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE. J.

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(116 Cal. 278)

## BRACKETT v. BANEGAS et al. (L. A. 120.)

(Supreme Court of California. March 12, 1897.)

MORTGAGES — FORECLOSURE — DECLARATION OF HOMESTEAD—SEARCH OF RECORD—OMITTED INCUMBRANCE—NEW ACTION.

1. Where a declaration of homestead has been made by the mortgagor, a married man, residing with his family on the mortgaged premises, an action to foreclose, and the decree rendered therein, are void, if the mortgagor's wife is not a party to them.

2. Where a mortgagee, who has no knowledge that a declaration of homestead has been made by the mortgagor on the mortgaged premises, forecloses without making the mortgagor's wife a party, and the foreclosure is therefore void, the mistake is one of fact, authorizing a second action to foreclose.

3. Where an incumbrance is overlooked by an abstract company whom a mortgagee has employed to search the records for incumbrances on property against which he is about to foreclose, and the mortgagee forecloses without making the omitted incumbrancer a party, the abstract company's mistake is, as to plaintiff and parties not injured by it, a mistake without negligence, and does not bar a second action to foreclose.

4. As the doctrine of constructive notice applies only to those persons interested in the property who will be injured by the assertion of ignorance as to the record, it does not affect the right to a second foreclosure.

5. A mortgagee foreclosed relying on the report of an abstract company that there was no other incumbrance on the property, and purchased at foreclosure sale. By agreement with the mortgagor, the time for redemption was extended. Plaintiff's writ of assistance was dismissed on a showing of a homestead record which rendered the foreclosure void. Plaintiff's remedy by motion to set aside the judgment having been barred by a lapse of six months, under Code Civ. Proc. § 473, he began a new action to set aside the former judgment and to foreclose, making both husband and wife parties. *Held*, that there was no such laches as would preclude him from maintaining the action.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by J. B. Brackett against Manuel Banegas and another. From a judgment in favor of plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

J. B. Mannix, for appellants. Patterson Sprigg and W. T. McNealy, for respondent.

SEARLS, C. This is an action to foreclose a mortgage. Plaintiff had a decree. Defendants appeal from the judgment and from an order denying their motion for a new trial. The prominent facts are as follows: On the 5th of January, 1891, plaintiff brought an action in the superior court in and for the county of San Diego to foreclose a mortgage executed by the defendant Manuel Banegas, to secure the payment of a promissory note made by him, the said Banegas, for $1,700. Before bringing such action plaintiff, as was the general practice, applied to an abstract company for a search of the records, and received a report that the only incumbrances on the mortgaged property, other than plaintiff's mortgage, was a judgment lien in favor of one J. M. Lucas. There was, in fact, at the time of such search of record, a declaration of homestead made by defendant Manuel Banegas (who was a married man, and resided with his family on the premises) upon the mortgaged premises. This was not discovered by the abstract company, and plaintiff, having no knowledge thereof, made Manuel Banegas and J. M. Lucas parties defendant in said action, and did not make Nievas Banegas, who is and was the wife of Manuel Banegas, a party defendant. A decree of foreclosure was rendered in said action, and the mortgaged property was sold thereunder, and purchased by plaintiff. The time for redemption was by agreement between plaintiff and Manuel Banegas extended for six months, upon the expiration of which time, and no redemption having been had. plaintiff obtained a writ of assistance. Thereupon, and in April, 1892, defendant moved the discharge of said writ, and set up the homestead record as a cause therefor. This was the first knowledge which plaintiff had of the homestead proceedings. The writ was discharged. Thereupon plaintiff moved the superior court for an order setting aside the decree in the case, and all proceedings subsequent thereto, and for leave to file an amended and supplemental complaint bringing in the wife, Nievas Banegas, as a party defendant. This motion was granted, but on an appeal therefrom to this court, and from an order refusing to set aside said first order, the orders were reversed, upon the ground that, more than six months having expired between the date of the decree and the order setting the same aside, the court was not, under section 473 of the Code of Civil Procedure, authorized or empowered to make said order. Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344. Thereupon plaintiff instituted this action to foreclose the same mortgage, making the wife a party defendant, and setting out in extenso the foregoing facts as ground of equitable relief in addition to the ordinary statement of a cause of action in foreclosure. The prayer of the complaint also asked that the former judgment, and all subsequent proceedings thereunder, be set aside, which prayer was granted.

The mortgaged property having been made a homestead, the action to foreclose and the decree rendered therein were void as against the wife, who was not made a party thereto. Watts v. Gallagher, 97 Cal. 47, 31 Pac. 626. In Revalk v. Kraemer, 8 Cal. 66, it was held that where a mortgage was executed by the husband alone upon the homestead, and there was a judgment of foreclosure in an action in which he alone was defendant, neither the rights of the husband or wife were affected by the proceedings. As the homestead rights of the husband and wife can only be foreclosed in an action in which both are made parties, the plaintiff acquired no title under his purchase in the action against the husband alone. Had plaintiff a right, under these circumstances, to maintain another action against Manuel Banegas and wife to foreclose? Jones, in his work on Mortgages (at section 1679), enunciates the rule as follows: "If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the costs of the previous sale." The author cites the cases of Bank v. Abbott, 20 Wis. 570, Stackpole v. Robbins, 47 Barb. 212, and Shirk v. Andrews, 92 Ind. 509, in support of the doctrine. The author adds in the same section: "Although a new action is the proper remedy for a foreclosure imperfect through failure to make all persons interested in the equity of redemption parties to the suit, the courts have allowed the original suit to be reinstated upon an amended petition, even after an interval of several years." Loftin v. Strow (Ky.) 4 S. W. 180. Courts of equity will not, save in exceptional cases, in a separate action relieve a party from errors of law, but will grant such relief in the original action upon motion or supplemental bill. Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, Id. 560. In this case, however, the mistake is not one of law, but of fact. The mistake consisted, not in the legal effect of the homestead, but in its existence. In such a case, the original decree having been void for the want of jurisdiction of the court below to enter it without the presence of the wife, or, what is the same thing, such service upon her as required her to appear and defend, if any defense she had, no good reason is perceived why an independent action may not be had to adjust the equities of all the parties. Manuel Banegas is not injured by the institution of the second action. The original judgment against him was for $2,449.08, with costs. The present judgment is for the $2,449.08, without the costs of the original action, and without the conventional interest or any interest thereon, from the date of the original judgment, in 1891, until the entry of the judgment herein, in 1894, a period of over three years.

Appellant contends that a counsel fee was allowed in the case against the defendant. The mortgage provided for a counsel fee, but we cannot determine from the record that one was allowed. In Ede v. Hazen, 61 Cal. 360, which was a bill in equity for relief against a judgment, brought within five months after the entry of such judgment, the court said: "The assistance of equity cannot be invoked so long as the remedy by motion exists; but when the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity." Bibend v. Kreutz, 20 Cal. 109, is to like effect. See, also, Sugar Co. v. Porter, 68 Cal. 369, 9 Pac. 313; Lapham v. Campbell, 61 Cal. 296; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232. We are of opinion there was no such laches or want of diligence imputable to plaintiff as will preclude his maintaining the action.

Concede that the mistake of the abstract company was his mistake, and it only proves, as was said in Sidener v. Coons, 83 Ind. 183, that "the most careful and expert calculators (persons) make mistakes." Had plaintiff himself examined the records, and failed to ascertain the existence of the homestead filing, it might with more propriety be said he was negligent in not calling to his aid persons versed in the business; but when, as was the custom, he called to his aid a company whose business it was to make such examinations, and whom he had a right to suppose was expert in the business, and such examiner accidentally failed to discover the record of homestead, it was as to plaintiff, and as against the defendants here who are not injured thereby, a mistake without negligence.

Appellants argue at some length the doctrine that the record imparted notice to plaintiff, and therefore there is a conclusive presumption of notice on his part as to the homestead having been declared. This doctrine is correct when applied to purchasers or lienholders upon the property who will be injured by the assertion of ignorance as to the record, but is not applicable to a case like the present. A like question was involved in Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196, and McFarland, J., speaking for the court, dismissed the question with the remark that "the fact that the deed of trust was recorded is of no value"; citing Rumpp v. Gerkens, 59 Cal. 496, and Brooks v. Rice, 56 Cal. 428, as cases in which the junior mortgages against which relief was sought were of record. The court also quotes from Pearce v. Buell, 22 Or. 29, 29 Pac. 78, where it is said: "The principle running through all cases of this class, says Barculo, J. (Barnes v. Camack, 1 Barb. 392), is that, when the legal rights of parties have been changed by mistake, equity restores them to their former conditions when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons." See, also, Curtis v. Gooding, 99 Ind. 47.

We have examined the long array of authorities cited by appellants' counsel in support of the proposition that an application for relief from a judgment in this state for excusable neglect can only be had by motion in the action to be had within six months. None of them support the proposition in its entirety. Some of them hold that where action is taken within six months it must be by motion, and not by separate action. Others declare that where a party had knowledge of the grievance complained of in time to have proceeded by motion, and failed to do so, it is such laches as will preclude the maintenance of a separate action. We should be inclined to hold that in a case where a valid decree of foreclosure against the mortgagor and a sale thereunder had been had, omitting from the action a party having rights in the premises which could only be foreclosed by his being made a party to the action, the proper practice would be to bring such party into the original action by a supplemental bill. But the status of the husband and wife as to the homestead is sui generis. A foreclosure as to one of the spouses is ineffectual for any purpose without the joinder of the other, except in those cases where the homestead has a value in excess of $5,000. The judgment is void so far as the security is concerned, and the purchaser thereunder does not take with notice, as in cases of sales under ordinary execution. Being thus void, a new action may be brought.

The contention that the complaint does not ask that the original judgment be set aside, and that the decree herein does not set it aside, is not supported by, but is in direct conflict with, the record. The prayer of the complaint is "that the said decree, sale, order of sale, and the satisfaction of said judgment be vacated and set aside," etc. The decree follows, in substance, the language of the prayer of the complaint. The findings are supported by the evidence, and we recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

116 Cal. 325

## DAVEY v. SOUTHERN PAC. CO. (No. 15,999.)

(Supreme Court of California. March 22, 1897.)

EXCLUSION OF EVIDENCE—REVIEW.

A judgment will be sustained notwithstanding exclusion of evidence on objection that it was "irrelevant, immaterial, and incompetent," when the proper objection was variance between pleading and proof. Beatty, C. J., and Henshaw, J., dissenting.

In bank. For opinion in department, see 45 Pac. 170.

VAN FLEET, J. Appeal by plaintiff from a judgment of nonsuit and an order denying a new trial. The action was for damages for personal injuries, and the complaint alleged, in substance: That defendant operated a railroad upon a public highway in Alameda county, known as "Stanford Street"; that there was a culvert or drain crossing said street, and extending under the tracks of defendant's road, which was securely and safely covered with planking and earth; that defendant caused this drain to be opened and excavated to a greater depth and width, and thereafter negligently left it open and unprotected, and in a dangerous condition, for the whole distance across said street and under defendant's track; that while it remained in this dangerous condition, plaintiff, without knowledge thereof, in proceeding in the nighttime to "cross said railroad track on said street," fell between the rails of said track into the excavation, and received the injuries of which she complained. At the trial, plaintiff, without amendment of her complaint, offered evidence tending to show that the point where the drain or culvert crossed beneath defendant's track, and where the accident occurred, instead of being, as alleged, on a public street, was in fact on the private right of way of the defendant, running over land admittedly owned by it in fee; but that at the point in question there was a footpath crossing said railroad, which was then, and had been for many years, constantly and continuously used by the people of the neighborhood, under circumstances such as authorized the inference that it was so used by the consent and license of the defendant. This evidence was all excluded under the objection of the defendant that it was "irrelevant, immaterial, and incompetent"; and, the plaintiff resting without offering other proof, the nonsuit followed.

The only question arising is whether this evidence was properly rejected, since, if it was, the nonsuit was logical, and the judgment and order should be affirmed. In support of the ruling the respondent now urges that the evidence was properly rejected, because it did not tend to establish any issue joined by the pleadings; that the complaint sought to charge the defendant for injuries inflicted through its negligence in opening and leaving exposed and unprotected a dangerous excavation upon a public street; while the case sought to be made by the offered evidence was that of an injury resulting from such an excavation made upon the private property of defendant, but at a point where plaintiff was privileged to pass by the defendant's license. That there was thus presented a material variance between the pleadings and the proof is quite obvious, and, indeed, is not denied by appellant. But appellant contends that the question of variance which is now relied upon by respondent was not raised in the court below; that no such specific objection was there made, nor was it fairly included within the general objection interposed; that, had it been called to the attention of counsel for appellant at the time the evidence was offered, plaintiff would have had an opportunity to conform her pleading to the proof, and thus have obviated the objection; and it is urged that respondent should not now be heard to make such objection for the first time in this court, and thus cut off plaintiff's right to so amend, and have her case tried upon its merits. It does not appear that this specific objection was suggested at the trial, but the objection there made, and the ruling had, would seem to have proceeded upon a different theory from that upon which respondent now rests. But, unfortunately for appellant, this fact of itself constitutes no sufficient ground for reversing the ruling of the court. The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. Thus in Chabot v. Tucker, 39 Cal. 434, it is said by Mr. Justice Temple for the court: "The proper subjects of review in this court are the rulings and decisions of the district court, but not the reasons given for such rulings. The fact that the statute requires the judge to state in writing the grounds upon which the motion was granted or denied does not make it incumbent on the prevailing party to defend the logic of the judge. It is enough if the decision be correct." And again by the same learned judge in Re Kingsley's Estate, 93 Cal. 576, 577, 29 Pac. 244: "With the process of reasoning by which the court reached its conclusion we have nothing to do. That may have been erroneous, and the ruling correct.

To justify a reversal, it is incumbent upon the appellant to show an erroneous ruling, and not merely bad reasoning or mistaken views of the law." See, also, People v. Crowey, 56 Cal. 39; White v. Merrill, 82 Cal. 15, 22 Pac. 1129; Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; Groome v. Almstead, 101 Cal. 425, 429, 35 Pac. 1021. In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter.

This principle must result in sustaining the ruling in question. That the offered evidence was inadmissible under the complaint, and was for that reason properly excluded, is manifest, since it had no tendency to establish the facts therein alleged. Assuming it to be true that it was rejected for another and insufficient ground, that fact cannot affect the propriety of the ruling. An objection to evidence is but a reason offered for its exclusion. The objection may be untenable or insufficient, yet, if sustained, and there appears any other reason for which the evidence should have been excluded, the ruling must stand. And even where no objection is made, but the court excludes evidence of its own motion, the ruling will be sustained, if the evidence was for any reason inadmissible. "If the court decides correctly in rejecting the testimony, it is not important whether the best objection was made or whether any objection was made." People v. Graham, 21 Cal. 266. And see Parker v. Smith, 4 Cal. 105; People v. Wallace, 89 Cal. 166, 26 Pac. 650; Clark v. Huber, 25 Cal. 594, 598. Nor does the fact that a party has made an improper or insufficient objection in the court below preclude or estop him in this court from justifying a ruling in his favor upon any other ground. In Clark v. Huber, supra, the appellant, as here, objected to the respondent being permitted to make in this court, in support of the ruling, an objection not made in the court below. The facts upon which the objection arose were precisely similar to the circumstances involved here. The defendant in that case had in the court below offered certain evidence to show an estoppel, which was excluded on a general objection of the plaintiff. In this court the plaintiff, while conceding that the facts offered would have established an estoppel, justified the ruling on the new ground that no estoppel had been pleaded, and hence the evidence was properly rejected. In response to the contention of the defendant that the plaintiff should be confined to the objection made below, it is there said: "The reasoning, pushed to its consequences, would preclude the respondent from submitting any argument in favor of the ruling. It is unnecessary, however, to consider the question upon principle, for it is well settled that the burden of showing error is upon the party who alleges it. The error alleged here is the exclusion of the defendant's testimony. The respondent is at liberty to suggest any ground that he may choose to show that the ruling was right, whether advanced in the discussion below or not. If the testimony had been admitted, and Clark had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment and that of a party resisting the attempt." The cases of Dikeman v. Norrie, 36 Cal. 94, McKay v. Riley, 65 Cal. 623, 4 Pac. 667, and Howland v. Railway Co., 110 Cal. 513, 42 Pac. 983, relied upon by appellant, in which it is held that the party is restricted to the specific objection taken below, all present instances where the objecting party was seeking to overthrow the judgment. The distinction between the rule applied in those cases and the one which must govern here is aptly stated in Clark v. Huber, supra. This distinction springs from the familiar rule that all intendments run in support of the judgment.

While it is matter of regret that the plaintiff may be debarred, by the predicament in which the case is found, from having her facts submitted to a jury, yet primarily the fault lies with her. It was incumbent upon her to foresee the danger of taking a ruling upon the evidence offered without amending her complaint. The variance presented was so manifest that it should have been perceived without suggestion; but, moreover, it was suggested, although not in express terms, by the objection made. In Strong v. Patterson, 6 Cal. 157, 158, where the court below had admitted evidence of a fact not pleaded, over an objection that it was "irrelevant," the judgment was reversed on that ground, and the court, by Mr. Chief Justice Murray, said: "While we hold that a general exception to the admission of testimony is insufficient, because the party offering it is entitled to know the ground of such objection, so that he may supply other evidence or obviate it, we think that an objection that testimony is irrelevant is sufficiently explicit, as it can mean but one thing, viz. that the testimony does not fit the case, or is not proper under the issues framed." For these reasons the judgment and order must be affirmed. It is so ordered.

We concur: HARRISON, J.; TEMPLE, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice VAN FLEET. It is proper to say that, owing to the peculiar condition of the record, and the wrong reasons given for excluding certain evidence, the department, on the former hearing, very naturally overlooked the distinction between the position of a party seeking to reverse a judgment and that of a party seeking to maintain it.

BEATTY, C. J. (dissenting). I dissent. The only real objection to the evidence offered by plaintiff was upon the ground of variance, and that objection was not made. Not being specifically made, it was waived, because by section 469, Code Civ. Proc., it is expressly declared that "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party, has been so misled, the court may order the pleading to be amended, on such terms as may be just." There can be no better evidence that a party has not been misled to his prejudice by a variance in the proof than is afforded by his failure to object to it on that ground. His failure to object is a tacit admission that he will not be prejudiced, and makes it the duty of the court, under the section quoted, to disregard the variance as immaterial. If he does object on that ground, and it appears that he has been misled, it then becomes the duty of the court to order an amendment on such terms as may be just. In this case, if this law had been observed, the worst that could have happened to the plaintiff would have been a continuance at her cost. By disregarding it, her action is defeated, regardless of its real merits. I do not think we are warranted in ignoring this provision of the statute in such a case.

I concur: HENSHAW, J.

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(116 Cal. 273)

## FORD et al. v. BUSHARD et al. (L. A. 169.) [1]

(Supreme Court of California. March 12, 1897.)

PARTIES—SUBSTITUTION—PLEADING.

1. Objection to an ex parte order of substitution is waived by answering the supplemental complaint of the substituted plaintiff.

2. Where one is substituted as plaintiff on the ground of an assignment of the cause of action by the original plaintiff, the assignment must be alleged in the supplemental complaint, and, if put in issue, must be proved.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by H. A. Ford and another against J. J. Bushard and another. Carrie E. Ford was afterwards substituted for H. A. Ford. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendants appeal. Reversed.

Isidore B. Dockweiler, for appellants. Frank James, for respondents.

SEARLS, C. This action was brought June 16, 1894, by H. A. Ford and Edwin Clark to recover damages from J. J. Bushard and Joseph Mesmer for the violation of a written contract entered into by said defendants with the plaintiffs on September 11, 1890, for the sale and delivery by defendants to plaintiffs of say 2,000 budded orange trees; 500 thereof to be of the variety named "Mediterranean Sweets" and the remainder "Washington Navels." Plaintiffs claimed that, excepting a small number, the trees delivered were not of the varieties named in the contract. Defendants answered separately, raising issues of fact, and defendant Mesmer denied the execution of the contract. Thereafter, and before the trial of the cause, upon the application of Carrie E. Ford, she was substituted as a party plaintiff in the cause in the place and stead of H. A. Ford, who it was shown had departed this life since the commencement of the action, and had, before his death, assigned all his right and interest in the contract to said Carrie E. Ford. The order of the court also granted her leave to file a supplemental complaint, which she did, setting out the death and assignment as aforesaid. Defendants answered the supplemental complaint, specifically denying the death of H. A. Ford, and the assignment by him to Carrie E. Ford. The cause was tried before a jury, and a verdict rendered in favor of plaintiffs for $2,000. At the trial no evidence was offered to show the assignment by H. A. Ford to Carrie E. Ford. The failure of evidence was assigned by defendants as one of the causes for a new trial. The motion for such new trial was denied, and defendants appeal from the judgment, and from the order denying their motion for a new trial.

Defendants claim that the order of substitution of Carrie E. Ford was made ex parte. There is no showing in the record on the subject. If the order was made without notice, the answer of the defendants to the supplemental complaint without objection was a waiver of the error. Smith v. Curtis, 7 Cal. 584. Were it otherwise, we are, in the absence of any showing on the subject, to presume in favor of the regularity of the proceedings that notice was given. The point is this: Plaintiff Carrie E. Ford having been substituted as plaintiff, not as the personal representative of H. A. Ford, but as his assignee, and having set up an assignment of the contract to her, which assignment was denied by the defendants, was it necessary for her to prove such assignment in order to a recovery against defendants? We think this question must be answered in the affirmative. In Taylor v. Railroad Co., 45 Cal. 324, it was held that the substitution of an executor or administrator could be made on ex parte motion. In Campbell v. West, 93 Cal. 653, 29 Pac. 219, it was said: "The other provisions of this section (section 385, Code Civ. Proc.) relating to substitution in case of any other transfer of interest, when set in motion by a plaintiff, or the person to whom the transfer is made, or by the defendant, if for any reason he desires to avail himself of such transfer for any purpose, must be made by a supplemental complaint or answer." In case of an assignment the supplemental complaint should set out such assignment, which is an issuable fact, and, if denied, its proof in such a case, as in all cases of assignment, is vital to a recovery. Murdock v. Brooks, 38 Cal. 596; Read v. Buffum, 79 Cal. 77, 21 Pac. 555; Bowman v. Keleman, 65 N. Y. 598. In case of an alleged assignment of the cause of action the assignee is entitled to be substituted upon a showing of probable cause, but the defendant is not thereby precluded from denying such assignment, and, if he does so, the fact must be determined by the preponderance of evidence, as in the case of other issues. Suppose, for instance, that in a case like the present the motion for substitution is based, as is often the case, upon a supplemental complaint, duly verified, and setting out the issuable facts. Would it be contended that a defendant was thereby debarred from denying the facts alleged therein, or that, in case of such denial, the plaintiff was absolved from proving them? Manifestly, as we think, he would not. Were it otherwise, a defendant would be liable to pay a demand a second time, should it turn out and be shown by a preponderance of evidence that no assignment had in fact been made. The issues in a case are not to be tried upon affidavit, but by such evidence as the law recognizes in open court. A defendant may, for the purposes of an injunction, or other ancillary process, admit all the allegations of a complaint to be true, but such admission would not serve as evidence in a trial upon the merits in the face of an answer denying such allegations. For the total failure of testimony showing an assignment the judgment and order should be reversed, and we so recommend.

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[1] Rehearing denied.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

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116 Cal. 287

## PEOPLE et al. v. EAGAN. (Cr. 136.)

(Supreme Court of California. March 13, 1897.)

ELECTIONS—INDICTMENT—EVIDENCE.

1. An indictment which charged that defendants conspired to add to the votes cast for one candidate and to subtract from those cast for another, contrary to St. 1893, p. 25, § 27, and did violate said law by doing certain acts constituting the substantive crime, was not bad for duplicity.

2. The indictment charged defendant and five others with adding to the votes cast for one candidate and subtracting from those cast for another. The only part taken by defendant in the count was "calling off" from the ballots, successively with others, the names of candidates voted for, of which tally was kept by others, and he signed the certificate of totals, which were false. The other defendants testified for the prosecution, and defendant for himself, that they had honestly counted and returned the votes; and it was not shown that the error, which must have occurred in "calling off" or tallying, was not made by others than defendants. *Held*, that the indictment was not sustained.

Commissioners' decision. Department 1. Appeal from superior court, San Francisco county; George H. Bahrs, Judge.

James Eagan was convicted of felony committed in violation of the act to promote the purity of elections, and appeals. Reversed.

Dunne & McPike, S. H. Regensberger, and John L. Love, for appellant. W. F. Fitzgerald, Atty. Gen., Charles H. Jackson, Dep. Atty. Gen., and William S. Barnes, Dist. Atty., for respondent.

BRITT, C. Six persons, inclusive of appellant, who were officers of election in and for a certain precinct of the city and county of San Francisco at the general election held November 6, 1894, are jointly accused by the indictment in this cause of felony committed in violation of the "Act to promote the purity of elections" (St. 1893, p. 25). Eagan was tried separately, and convicted.

1. It is provided in section 27 of said act that "every person who willfully adds to or subtracts from the votes actually cast at an election, in any official or unofficial returns, or who alters such returns, is punishable by imprisonment," etc. Disentangled from the verbiage with which it is embarrassed, the substance of the charging part of the indictment is that defendants confederated and conspired together to sign, certify, and attest as true and genuine the tally lists and returns of said election in said precinct, and did knowingly act in violation of the laws relating to elections by signing, certifying, and attesting as true and correct tally lists and returns which showed that M. C. Haley had received 63 of the votes cast at said election in said precinct for the office of county clerk, and that C. F. Curry had received 143 of such votes; whereas, in truth and in fact, Haley had received 91 votes for said office, and Curry had received 102 votes; that each of the defendants knew the returns signed and certified by him to be false and untrue in the particulars specified; contrary to the form of the statute, etc. The indictment might have been improved in the quality of distinctness, but there is no duplicity in it, as urged by appellant. The defendants are accused of a single offense, viz. adding to the votes cast for Curry and subtracting from those for Haley, contrary to the provision of said section 27. The allegation that the defendants confederated and conspired, etc., was not the statement of a substantive offense, as appellant supposes. A completed felony was charged, and in this the precedent acts of conspiracy were merged. When several acts together con-

stitute one offense, they may be alleged in a single count; and the present indictment does no more than this. 1 Bish. Cr. Proc. § 438; People v. Gusti, 113 Cal. 177, 45 Pac. 263.

2. But our examination of the record has compelled the conclusion that the evidence did not warrant the verdict of guilty. The board conducting the election at said precinct consisted of three inspectors and three judges. There were, besides, six clerks. Eagan was one of the inspectors. The law (Pol. Code, § 1142) allows members of the board to relieve one another in the duty of canvassing the vote, but requires the final certificate to be signed by a majority of the whole. The offices to be filled at said election were numerous, and the count of the vote proceeded continuously for more than 30 hours after close of the polls. The only part taken by Eagan in the count was "calling off" for a few hours; that is, he read from the ballots the names of candidates voted for, while mark or tally was kept by others of the votes announced by him. He was thus engaged at intervals which together comprised but a comparatively small portion of the time occupied in the count. Other members of the board of election and some of the clerks—eight or nine in all—were successively engaged in the business of "calling off." Eagan signed the certificate of the totals which was prepared by some of the clerks. Such certificate varied from the fact in the matter of the vote for county clerk as alleged in the indictment. The discrepancy was detected, it seems, upon a contest instituted in court where a recount from the ballots was had. Each of the codefendants of appellant was introduced as a witness by the people, and each testified that he himself had honestly performed his part of the work of counting and returning the vote. This was virtually the sum of the evidence for the prosecution. There was no evidence—aside from the error in the returns—that appellant ever indicated by word or act an intent or desire to falsify the vote, or that he had any motive to do so. "Watchers," who scrutinized the count, were in attendance during the progress thereof, but none suggested that appellant was perpetrating wrong. He was sworn in his own behalf, and testified that he read the ballots correctly and honestly, and had, when he joined in certifying the return list, no knowledge of any error; that he did not know Curry, and had no interest in his election. The case for the prosecution was circumstantial. It was not claimed that the returns were altered in any particular, or did not correspond with the tally lists; so that the error, whether fraudulent or otherwise, must have occurred in reading from the ballots or in tallying. There was a gross error in the returns, and appellant had the opportunity for its commission. But others had had the same opportunity. We are not dealing with the conditions which might be presented if all the persons who had facilities for perpetrating the crime charged had been sworn, and all had alike purged themselves as did the six defendants aforesaid. Possibly, in such a case, it would be solely for the jury to determine whether there was fraudulent error, and where the responsibility lay; but here several persons who, as members of the board, or as clerks, had "called off" votes, or had kept tally, were not before the court, and their work was in no manner vindicated. It is elementary law that circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion. Ordinarily, the deduction to be drawn from the circumstances is for the jury, but in this instance it is manifest that every fact proved is consistent with the reasonable conclusion that the false return resulted without appellant's connivance, from the acts of persons who had equal opportunity with him, and that there is no evidence tending to exclude this inference. There is, therefore, a failure of proof in a particular necessary to conviction, and the question is one of law for the court. People v. Martin, 2 Cal. 484; People v. Jones, 31 Cal. 565; People v. Darr, 61 Cal. 554; Burrill, Cir. Ev. 181 et seq. We are fully sensible of the flagrancy of the offense charged, and of the need and importance of strictly enforcing the law designed for its prevention and the prevention of all similar practices. They justly excite the alarm and resentment of upright citizens. But while these considerations incite to vigilance for the detection and suppression of such evils, they suggest also caution, lest the result of a trial is reached through the operation of sentiment noted by Sir Matthew Hale in treating of another crime: "The heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the persons accused thereof." The judgment and order denying a new trial should be reversed.

We concur: BELCHER, C., SEARLS, C.

PER CURIAM. For the reason given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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116 Cal. 47

## STORKE v. STORKE. (L. A. 206.)

(Supreme Court of California. March 16, 1897.)

In bank. On rehearing. Denied.

For opinion in department, see 47 Pac. 869. Affirmed.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this case, not because I consider that the propositions discussed in the department opinion are incorrectly decided, but because I think that the plaintiff is estopped by his own acts to ask a reversal of the order appealed from. When that order was made, the defendant, at whose instance it was made, became so doubtful of its validity that she deemed it a necessary precaution to take an appeal from the judgment, and that appeal was dismissed by this court, upon motion of the plaintiff, on the ground that, the judgment having been set aside, there was nothing to appeal from. Storke v. Storke, 111 Cal. 514, 44 Pac. 173. Having succeeded in depriving her of a hearing upon the merits of her appeal from the judgment, on the ground that there was no judgment in existence when her appeal was taken, the plaintiff has now succeeded in obtaining a decision that the order vacating the judgment was void, and, in effect, that the judgment has all the time been in full force; or, if this is not the meaning of the decision, the plaintiff has at least succeeded in having the judgment restored to life after the defendant's right of appeal has been taken away, upon his suggestion that an appeal from a vacated judgment could not be taken.

I am entirely agreed with the court that the order setting aside the decree of divorce was invalid, and that it ought to have been reversed, except for the fact that the plaintiff adopted it, and necessarily asserted its validity in moving to dismiss the former appeal. Having taken that position, and having deprived the defendant of her right of appeal, upon the theory that there was no judgment, he should not be allowed now to claim, as against her, that there is a judgment.

It is but just to counsel for plaintiff to say that, in presenting their motion to dismiss the defendant's appeal, they were perfectly frank with the court. They kept nothing back. Everything connected with the making of the order vacating the decree of divorce was as fully presented then as it is in this record, so that the invalidity of the order was just as apparent then as it is now; and their purpose to have it reversed upon appeal (this appeal) was distinctly avowed. In other words, they told the court plainly that they intended to rely on the order vacating the decree only so long as it was useful to them for the purpose of depriving the defendant of her right of appeal, and, as soon as that purpose was accomplished, they would ask us to annul the order, and put the judgment in full force. The answer the court ought to have made to this proposition is obvious. Counsel should have been plainly informed that they would not be allowed to blow hot and cold about the order, as might suit their convenience; that they would be required to take one position or the other as to its validity, once and for all; that, if they asserted its validity for the purpose of dismissing the defendant's appeal, they would not afterwards be heard to question its validity for the purpose of enforcing their judgment; and that if they asserted, or intended to assert, its invalidity or procure its reversal, they should not be allowed to dismiss, as superfluous, an appeal which might be the only means of vindicating the rights of the defendant. That the court did not make this answer to the plaintiff's motion does not, however, excuse the plaintiff. He sought the order, and, notwithstanding it ought to have been denied on his own showing, he obtained it and all the advantages flowing from it, and it does not lie in his mouth to say that the court made a mistake in granting his request. Having, by the aid of the court, cut off his adversary from her right of appeal, upon the theory that there was nothing to appeal from, he should not be heard to say that this was an erroneous theory, or allowed to take any proceeding in this forum to put in force a judgment against her from which he induced us to say she had no need to appeal.

It is suggested that this reasoning may be turned against the defendant; that she, in appealing from a judgment which, upon her motion, had been vacated by the trial court, was just as inconsistent as the plaintiff has been in relying upon the order for one purpose, and then seeking to set it aside after taking advantage of it. But the difference between the two cases is obvious. Defendant took two proceedings to accomplish the same object, i. e. to set aside the judgment; and the most that can be said is that, if the first was effective, the second was superfluous. She did not, by either step, seek to deprive the plaintiff of any legal remedy for the enforcement of his rights. Doubting the efficiency of one order, she sought another, of the efficiency of which there could be no doubt. Her appeal from the judgment was an avowal of her distrust of the order. The order had not harmed the defendant, or induced him to change his position in any respect, or forego any advantage. To justify plaintiff's change of front, on the ground that he is only following in the path where the defendant led the way, is to confound the distinction between the act of a party who takes a perfectly proper proceeding to accomplish a legitimate end, and the party who says to the court, "You must not allow this lawful means of redress to my adversary, because she has sought redress by another means," and who announces in the same breath his claim, and his intention to enforce it, and that the former proceeding was inefficacious.

If it be said that the judgment on the former appeal (111 Cal. 514, 44 Pac. 173) and that on the present appeal are consistent, because, when the defendant took her appeal from the judgment, no appeal had been taken from the order vacating it, and therefore there was no judgment to appeal from, I say that this proposition is answered by all the reasoning of the court in Pierce v. Birkholm, a decision by the court in bank, reported in 110 Cal. 669, 43 Pac. 205. In that case the plaintiff had obtained an order for a new trial, from which the defendant had appealed; whereupon the plaintiff appealed from the judgment, which, upon his motion, had been vacated by the order granting a new trial. A motion was made by the defendant to dismiss the plaintiff's appeal from the judgment, upon the ground that, when the appeal was taken, there was no judgment in existence. But the motion was denied. It is true that this case differs from that in the fact that the appeal from the judgment was taken before the appeal from the vacating order; but that is a wholly immaterial circumstance. A vacating order is just as much in suspense until the time for appeal has elapsed as it is after a timely appeal has been taken. To hold otherwise would be to make a distinction where there is no difference, and to put it in the power of a party to do just what he was not allowed to do in Pierce v. Birkholm in every case in which an order granting a new trial is made less than 60 days before the expiration of a year from the judgment.

It may be said that the only effect of this argument, if sound, is to prove that the former decision was wrong, and the present decision correct. This is very true, but it remains equally true that a party who has obtained an advantage over his adversary by an erroneous decision which he has invoked should not be allowed to escape any of the consequences of that decision in the same litigation, with the same adversary, in the same forum, when it is no longer in his power, or that of the court, to restore the right which has been taken away. If the principle of estoppel means anything, this was a case for its application.

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116 Cal. 292

## LAMBERT v. DAVIS et al. (Sac. 207.)

(Supreme Court of California. March 16, 1897.)

LIEN ON THRESHING MACHINE — CONSTITUTIONAL LAW.

1. Under St. 1885, p. 109, § 1, providing that every person performing work in or about any threshing machine while engaged in threshing shall have a lien thereon for his services, a person so performing work at the employment of one who is lawfully in possession and operation thereof, under contract with the owner, is entitled to such lien.

2. St. 1885, p. 109, § 1, is not unconstitutional, as authorizing a deprivation of the property of the owner without due process of law, because it gives a lien to one not employed by the actual owner.

Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by J. W. Lambert against Frank E. Davis and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Frank H. Short, for appellants. W. D. Crichton and W. D. Foote, for respondent.

VAN FLEET, J. An act entitled "An act to secure the wages of persons employed as laborers on threshing machines," approved March 12, 1885 (St. 1885, p. 109), provides: "Section 1. Every person performing work or labor of any kind, in, with, about or upon any threshing machine, the engine, horse-power, wagons or appurtenances thereof, while engaged in threshing, shall have a lien upon the same to the extent of the value of his services." It also makes provision for the method of enforcing such lien, by sale of the property, etc. The single question presented by the appeal under the facts is whether a laborer performing labor in and about the operation of a threshing machine and outfit, at the employment of one not the actual owner, but lawfully in the possession and operation of the machine under contract with the owner, can have and maintain against the property the lien for his services provided by the act. Appellant's contention is that to so construe the act, and give to one not employed by the actual owner the benefit of the lien, would render it obnoxious to the constitutional objection of authorizing a deprivation of the property of the owner without due process of law. This precise question was presented and decided by the court in bank in the case of Chuch v. Garrison, 75 Cal. 199, 16 Pac. 885, where it was held that the statute applied to exactly such a case, and that the lien could be constitutionally maintained; "that the actual ownership of the property was an immaterial circumstance,"—the obvious theory, and, as we deem it, the correct one, being that one lawfully holding from the actual owner the possession and right to operate the machine is to be deemed, for the purposes of the statute, the owner of the property.

Appellant contends that this point was not squarely involved or necessarily decided in Chuch v. Garrison, but that, if it was, that case should be overruled. But, as we read that case, it was the exact and only question in the case, and was necessary to its determination; and we find nothing in the reasoning or authorities presented by appellant which tends to shake our conviction in the correctness of the views there expressed, and, upon the authority of that case, the judgment herein must be affirmed. It is so ordered.

We concur: HARRISON, J.; BEATTY, C. J.

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113 Cal. 283

## PEOPLE v. WICKHAM. (Cr. 103.)

(Supreme Court of California. June 17, 1896.)

INFORMATION—TIME FOR FILING.

The burden on the state to show "good cause" (Pen. Code, § 1382) for failing to file an information within 30 days from commitment (Id. § 809) is not satisfied by a showing that the committing magistrate failed to file the papers with the clerk of court within said time, since the information might have been filed before a return of such papers.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; A. L. Frick, Judge.

One Wickham was convicted of embezzlement, and appeals. Reversed.

W. F. Aram, for appellant. W. F. Fitzgerald, Atty. Gen., and Charles H. Jackson, Dep. Atty. Gen., for respondent.

BELCHER, C. This is an appeal from a judgment made and entered in the superior court of Alameda county, convicting the defendant of the crime of embezzlement. The only point made for a reversal is that the court erred in denying defendant's motion to dismiss the prosecution, upon the ground that the information against him was not filed within 30 days after he was held to answer. The constitution provides that a party accused of crime "shall have the right to a speedy and public trial." Const. art. 1, § 13. And the Penal Code provides:

"Sec. 809. When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information," etc.

"Sec. 1382. The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him within thirty days thereafter. (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information."

It appears from the bill of exceptions that the defendant was examined before a committing magistrate upon a charge of embezzlement, and that an order holding him to answer before the superior court of Alameda county for the said offense was made and indorsed on the deposition by the magistrate on June 25, 1895; that the complaint, depositions, etc., remained in the custody and possession of the said magistrate until August 1, 1895, when they were returned to and filed in the office of the clerk of said court; that the information against the defendant was filed by the district attorney on August 21, 1895, and on that day the defendant moved the court to dismiss the prosecution, because the information was not filed within the 30-days time required by the statute; and that the only cause shown by the district attorney why the information was not filed within the time prescribed was that the said papers were not filed by the magistrate until August 1st. It further appears that the defendant, at the hearing of his motion, offered to prove that a deputy district attorney of the county attended the said examination, and conducted the same on the part of the people, and heard the order made holding the defendant to answer, but the court refused to hear the offered evidence, and thereupon denied defendant's motion, to which ruling he excepted.

It was the duty of the magistrate to return to the clerk of the court the papers in the case "without delay" (Pen. Code, § 883); and if no cause existed, other than appears in the record, for his failure to return them earlier than he did, he was guilty of inexcusable negligence. It was not, however, necessary, that the papers be returned before an information could be filed. People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Ah Sing, 95 Cal. 657, 30 Pac. 797. If there was any good cause for not filing the information sooner, the burden was on the prosecution to show it; but the mere fact that the papers were not returned by the magistrate did not constitute such cause. In People v. Morino, 85 Cal. 515, 24 Pac. 892, the motion to dismiss the prosecution was made under the second subdivision of section 1382 of the Penal Code. It was said: "The statute is imperative: 'The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed.' Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it. The court could not presume it. Under the facts as shown, the case should have been dismissed, and it was error to deny the motion." The decision in that case is applicable to this, and it follows that, upon the showing made, the court below should have granted the defendant's motion, and dismissed the prosecution against him. The judgment should be reversed, and the court below directed to dismiss the prosecution, unless, upon a further hearing, good cause is shown for the failure to file the information within the time prescribed by the statute.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to dismiss the prosecution, unless, upon a further hearing, good cause is shown for the failure to file the information within the time prescribed by the statute.

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116 Cal. 298

## Ex parte LAWRENCE et al. (Cr. 273.)

(Supreme Court of California. March 16, 1897.)

STATE SENATE—INVESTIGATION—WITNESSES — REFUSAL TO ANSWER — CONTEMPT—PRIVILEGED COMMUNICATION.

1. Where the state senate is investigating the conduct of its members, under a published

charge that some of them, whose names were not given, have taken bribes, and has called as witnesses the editor and a reporter of the paper which published the charge, it is a contempt of the senate's authority for the witnesses to refuse to give the names of those from whom they had received information touching the charge of bribery, and the nature of that information.

2. The information was not a privileged communication, within Code Civ. Proc. § 1881.

In bank. Habeas corpus proceedings on the relation of A. M. Lawrence and L. L. Levings, imprisoned for contempt of the authority of the state senate, before whom they had been called as witnesses. Writ discharged, and prisoners remanded.

Garret W. McEnerney and Knight & Heggerty, for petitioners. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for respondent.

PER CURIAM. The senate of the state was engaged in an investigation of the conduct of its members under a published charge that some of them, whose names were not given, had taken bribes for aiding in the passage of a certain bill. The news editor and one of the reporters of the paper which published this charge were called upon to testify in the matter, and refused to answer certain interrogatories propounded to them, upon the ground that the information sought to be elicited was privileged, and that the evidence, if given, would be irrelevant and hearsay. The questions, in substance, contained a demand that the witnesses should give the names of those from whom they had received information touching the charge of bribery, and the nature of that information. The inquisitorial investigation upon which the senate was engaged was one strictly within its jurisdiction to prosecute. It had the undoubted power to examine into the alleged criminal conduct of some of its members, with a view to their expulsion or other punishment if found guilty. Ex parte McCarthy, 29 Cal. 395. Under such an investigation, these witnesses, who were shown to have been responsible for the published charge, and who at the same time disclaimed personal knowledge of the facts, were asked to give the names of their informants. It was a natural and logical method for the senate to follow in its endeavor to arrive at the truth. If the witnesses, first answering that they had no personal knowledge of the matter, were to be justified in refusing to give the names of their informants, the senatorial inquiry must necessarily come to an end. Upon the other hand, if they stated the names of their informants, and the nature of their information, the senate could summon those persons and so trace the charge to a just conclusion. The evidence, then, was relevant and pertinent. The case differs from those presented in courts where the interests lie between conflicting parties, and where improper evidence sought to be introduced in the interests of one must be to the injury of the other. Here the inquiry was inquisitorial, to arrive at the truth concerning the charge of corruption, silent as to names, indefinite as to facts, but specific in its assertion of bribery. There were no parties to this proceeding. The senate was investigating the conduct of its own members, and it was a contempt of its authority for the witnesses to refuse to give the names of those who were responsible for the promulgation of the charge. It cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give these names upon the ground that the communication was privileged. Code Civ. Proc. § 1881. The writ is discharged, and the prisoners remanded to the custody of the sheriff of Sacramento county.

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116 Cal. 300

## PEOPLE v. CHURCH. (Cr. 210.)

(Supreme Court of California. March 17, 1897.)

ROBBERY—LARCENY—INSTRUCTIONS.

Where the evidence on a trial for robbery was that, while talking to prosecutor, defendant suddenly snatched prosecutor's watch chain, and ran away, and that at the same time prosecutor started backward, and his hat fell, it was a question for the jury whether sufficient force was used in the taking to constitute the offense a robbery, and it was therefore error to charge so as to eliminate the question of grand larceny, the property being of sufficient value.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Harry Church was convicted of robbery, and appeals. Reversed.

Chas. G. Nagle, for appellant. W. F. Fitzgerald, Atty. Gen., and Charles H. Jackson, Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant was charged with the crime of robbery, alleged to have been committed by taking from the person of one Smith a certain gold watch, of the value of $90, one gold chain, of the value of $30, and one gold knife, of the value of $5. It is further charged that the property belonged to Smith, and that force and intimidation were used in the taking. He was convicted, and now prosecutes this appeal.

The offense here charged is claimed to have been committed in a saloon, in the presence of various habitués of that resort, and all the evidence of the prosecution bearing upon the actual taking of the property may be summed up as follows: One witness testified: "Saw some difficulty between defendant and Mr. Smith. Saw defendant grab a watch from Mr. Smith's vest, and run through the door with it. I did not notice whether the chain was gold or silver. It was a kind of reddish or yellow color. I saw a watch attached to it." Cross-examination: "At the time the watch was taken, we were standing around the bar. The first I saw of Church [defendant] after we were standing up at the bar was when he grabbed for the chain. I saw him make a motion towards it. Mr. Church [defendant] was standing with his back towards Mr. Smith, and in conversation at the bar. I could see the chain, and saw the defendant take hold of it and pull it. I don't know whether the chain broke or not. I never saw any part of it afterwards. The reason I know the watch was attached to it was because I saw it about ten minutes before. I did not see him take the watch from his pocket, but I saw the watch hanging to the chain about ten minutes before. I saw him grab for the chain, and take it. It was done so quick that I could not swear that I saw the watch being taken." Another witness said: "I saw some trouble between Smith and defendant, Church. I was standing alongside the bar, just behind the defendant, about the time the affair occurred; and I saw— Well, I could not say he made a grab. I did not see him grab the watch, but I saw Harry Church make a grab at the watch, and run out the door. I did not see him grab the watch, but I saw him make a grab, and run out the door shortly afterwards. I did not notice anything remarkable before the alleged grab." Another witness said: "I saw the difficulty between Smith and the defendant. I was at the end of the bar nearest the door, and Church called Smith aside to where I was standing; and, not wishing to overhear the conversation, I moved to the other end of the bar, and, after a few minutes elapsed, I saw Smith start back, and his hat fell off, and Church made a break to the door. That is all I saw of it or know about it. He ran out of the door."

In instructing the jury as to the law which should govern their deliberations when engaged in arriving at a verdict, the trial court, among other things, said: "You are brought here to weigh the testimony. You are brought here to apply your judgments to a consideration of what the testimony established, and when you have ascertained what it does establish, if it does establish the guilt of the prisoner beyond a reasonable doubt, you will find him guilty. No question of precise value is involved here. If a man is wearing a watch chain, it is his personal property; it is in his possession. If another feloniously take it from him against his will, by violence,—by force snatches it, and runs away with it,—it is robbery. The question of precise value has nothing to do with an offense of that sort. It is not like a case of larceny. Where larceny is charged, value becomes material, but here robbery is charged." This instruction is erroneous, and demands a reversal of the judgment. Conceding defendant took Smith's watch and chain, or either the watch or chain, still, under the evidence we have set out, it is a close question whether such taking constituted robbery or grand larceny. That question was dependent upon the absence or presence of the use of force in the taking; and the use or nonuse of force by defendant was a question of fact essential for the jury to determine in fixing the crime of which the defendant should be convicted. Grabbing or snatching property from the hand has often been held to be grand larceny, and not robbery. See Routt v. State (Ark.) 34 S. W. 263, and cases there cited.

This defendant was convicted of robbery, and sentenced to 20 years' imprisonment. The maximum punishment for grand larceny is 10 years; hence the materiality of this issue as to the particular offense committed. It is settled law that robbery involves grand larceny, and that, upon an information for robbery, grand larceny may be found. Many cases of robbery may be disclosed by the evidence where the trial court would be justified in refusing an instruction to the effect that the defendant could be convicted of grand larceny. Such cases would be those where the evidence, without contradiction, indicates the offense to have been accomplished by means of force or fear; but, as already suggested, such is not this case. Again, in every trial upon a charge of robbery, where the evidence justifies it, the court should of its own motion, in the absence of request upon the part of counsel, inform the jury that larceny is included in the offense of robbery, and that their verdict may be framed upon those lines. While this court has refused to set aside verdicts by reason of the trial court's failure to so instruct, holding that the defendant has no cause of complaint where he sits idly by without request upon his part to give the instruction, still, the better practice, and the only strictly correct practice, is for the court to inform the jury of all offenses which are necessarily included in the principal offense charged.

Returning to the instruction here involved, we find its vice in the following language: "The question of precise value has nothing to do with an offense of that sort. It is not like a case of larceny. Where larceny is charged, value becomes material; but here robbery is charged." In effect, it is said: "The offense here charged is not a case of larceny, for in larceny the value of the property taken is material, and here the value of the property is not material. Hence, if a crime is proven, it is robbery." The value of the property taken, or the fact that it has a value, in no sense marks the difference between robbery and grand larceny. Force or fear is the essential element that differentiates these two crimes when the property is taken from the person, as is charged in the present instance. There is but one construction to be placed upon the language of the court, and that is, it had the effect to eliminate any question of larceny from the case. Under the evidence disclosed by the record as to the facts occurring at the immediate time of the taking, the jury should not have been deprived of the right to find the defendant guilty of grand larceny, if they so saw fit.

We deem it unnecessary to pass upon the other questions raised by the record. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

116 Cal. 304

## In re RUFFINO'S ESTATE. (S. F. 569.)

(Supreme Court of California. March 20, 1897.)

COMMON-LAW MARRIAGE — CONSENT — CONSUMMATION—DECLARATION—EVIDENCE—WILLS—UNDUE INFLUENCE—EVIDENCE — ILLEGAL RELATION — MISTAKE.

1. Civ. Code, § 76, providing if no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a declaration showing certain things, and section 77, prescribing that it must be acknowledged and recorded like a grant of land, do not make such declaration essential to the validity of a marriage without solemnization.

2. Under Civ. Code, § 55, authorizing marriage by consent, and subsequent assumption of marital rights and duties, and section 57, providing that such consent and assumption may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases, a contract of present marriage (constituting consent), followed at any time by the parties assuming the rights and duties of the marital relations, both understanding and intending thereby to consummate the marriage contract, make a valid marriage.

3. Assumption by the parties to a contract for present marriage, subsequent to the contract, of the rights and duties of the marital relation, with the intention of executing the contract, constitutes the necessary present consent.

4. Assumption of the rights and duties of the marital relation is evidence of present consent to marriage, which is supported by a previous contract of the parties for present marriage.

5. Though one influencing testator in making his will in favor of her be his mistress, this will not invalidate the will, but the question, as in other cases, is, was there undue influence, —influence destroying testator's free-will? and the illegal relation is material only as bearing on the character of the beneficiary, which may be important in determining the effect of her influence.

6. As bearing on the question of undue influence, it may be shown that a portion of the property disposed of by will had been conveyed to testator without consideration, to give him credit in business, by his sisters, to whom he left nothing by his will.

7. That testator left nothing to heirs, because of a mistaken belief that they were hostile to him, is not ground for avoiding the will, but there must have been an insane delusion.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

The will of Louis J. Ruffino was contested, and there was a judgment for contestants; and from an order denying a new trial, Kate S. Ruffino, proponent, appeals. Reversed.

Geo. C. Sargent and Sheldon G. Kellogg, for appellant. M. M. Estee, E. H. Webb, and A. G. Fiske, for respondents.

TEMPLE, J. This is the contest of a will. The testator died suddenly, while traveling in the East, June 5, 1895. The proponent, with the exception of two trifling bequests, is the sole beneficiary, and appellant. She claims to have been the wife of the testator, but this is denied by the contestants, who claim that the relation between her and the testator was illicit. The contest was tried with the aid of a jury, to whom several questions were propounded, and the verdict was approved by the court, and judgment therein entered for the contestants.

The jury found as follows: "(1) Was the deceased, Louis J. Ruffino, of sound mind at the time of the execution of the alleged will, to wit, on the 5th day of June, 1895? Yes. (2) Was the said Louis J. Ruffino, when the said instrument of June 5, 1895, was signed by him and the witnesses thereof, and prior and subsequent thereto, laboring under or affected with or by any delusion or illusion as to the members of his own family, and especially as to his sisters, Francisca Ruffino and Fortuna Ruffino, or as to their affection for him or his affection for them? Yes." After finding facts showing that the will was wholly written and signed by the testator, and also its proper execution as a will duly witnessed, the verdict continues as follows: "(11) Was the said will procured to be made through undue influence exerted upon the said deceased by the proponent, or by any other person, and, if so, by whom? Yes. (12) Was the said will procured to be made through the fraud or fraudulent representations of the said proponent, or by any other person, and, if so, by whom? No. (13) Was Louis J. Ruffino married to the proponent? No. (14) Was a contract of marriage ever entered into between L. J. Ruffino and the proponent? No. (15) Did unlawful relations exist between Louis J. Ruffino and proponent prior to July, 1884? No."

In the contest it was charged: (1) At the time of the execution of the will deceased was of unsound mind. (2) Deceased had been habitually intemperate, and his reason thereby unseated. (3) The will was not properly executed. (4) The will was executed through the undue influence of proponent, and under this head is specified: (a) The proponent cohabited with the deceased for many years, but was not his wife. (b) While so living with him she poisoned his mind as to contestants, who were his sisters, by falsely asserting that they were inimical to him, and they were intent on exposing the relations between deceased and the proponent; that deceased believed these assertions, and was laboring under the delusion that they were true, but they were false. (c) Proponent took advantage of the unlawful relations and the confidence of the deceased, and caused him to make the will in question. (d) Proponent obtained such control over deceased while he was intoxicated as to unduly influence him. (e) Through such false assertions, and by reason of his weak mental condition, deceased was made to believe by proponent that the contestants were attempting to get the control of his property and injure his business, and deprive him of his property, and by reason of the misrepresentations and fraud the testator was induced to make the alleged will.

All these allegations of fraud and undue influence were denied by the proponent. The appeal is from an order denying a new trial. Many rulings of the court are objected to, and it is claimed that the evidence was insufficient to sustain the findings, which are adverse to the appellant.

The proponent testified that she was married to the testator by contract, and that the contract was in writing, and read as follows: "Dated October 5, 1883. We, the undersigned, hereby agree to be husband and wife. [Signed] Louis J. Ruffino. Kate L. Staufer." She also testified that they entered upon the marital relation in July or August, 1884. Upon this subject the court instructed the jury as follows: "Under our law marriage is a civil contract, to which there must be the consent of the parties, but consent alone will not constitute a marriage. It must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations. In this case I instruct you there is no evidence tending to show a solemnization. Section 76 of the Civil Code prescribes the manner by written declaration as follows: 'If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing: (1) The names, ages and residences of the parties. (2) The fact of marriage. (3) That no record of such marriage is known to exist. Such declaration must be subscribed by the parties, and attested by at least two witnesses.' Also section 77 of the Civil Code prescribes that such declaration of marriage must be acknowledged and recorded in like manner as grants of real property. The above is the law of this state governing declarations of marriage. The paper testified to by proponent in this controversy is not such a declaration. [Sections 68, 69, 70, 75, and 76 were read.] The proponent bases her claim of marriage upon an alleged contract of October 5, 1883, claiming it to be a contract in præsenti. If you find that such a contract was entered into between the parties at that time, you must also find that they entered into their marital relations; otherwise no marriage takes place. You are not allowed to presume from the fact that long subsequent to said time they lived together that such cohabitation was under a new contract. Marriage is not proven by the declaration of the woman that it was agreed between her and the man that they were to live together. If the relations between the parties were in the first place illicit, the presumption is that such relations continued, unless satisfactory evidence is produced to show a change from the illicit to the licit or matrimonial relations. In this connection I instruct you that the law prescribes that no one shall derive profit by reason of any unlawful relations. The natural and ordinary influence of an unlawful relation is unlawful. You are therefore to consider all the circumstances of this case, and if from the testimony you believe that Louis J. Ruffino and proponent were not husband and wife, then their relations were unlawful, and the law presumes that if she exercised any influence over him it was an unlawful influence."

This instruction was objected to, and I think it was erroneous in several respects.

1. In the first place, section 76, Civ. Code, had no real bearing upon any issue in this case. It was not claimed that the document sworn to by proponent was intended to be the declaration provided for in section 76, and no such declaration was required. A jury could only have understood the instruction as meaning that when there is no solemnization this declaration must be made, or the marriage is void. Such is not the law, and the jury must have been misled. There was no occasion for any explanation of section 76, because compliance or noncompliance with it was wholly immaterial.

2. It was also error to tell the jury that they were not allowed to presume from the fact that long subsequent to the contract the parties cohabited as husband and wife that such cohabitation was under a new contract. There was evidence tending to prove, and the jury found, that there had been no unlawful relation between the parties prior to the alleged assumption of marital rights and duties in 1884. At that time they commenced living together as husband and wife. They always represented that they were married, and were universally so regarded by their acquaintances. Under such circumstances there is a very strong presumption of marriage. Having held themselves out as husband and wife, and having lived together as only married persons could lawfully do, this presumption, which prevails everywhere, of marriage, is especially strong here, where marriage may be constituted by consent and subsequent assumption of marital rights and duties, and where such consent and assumption may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases. Civ. Code, § 57. All intercourse in form matrimonial is presumed, until the contrary is shown, to be matrimonial.

But I think there is an implication in this instruction still more injurious to appellant. It is that the assumption of marital rights must be immediate, or, as counsel say, within a reasonable time after the contract constituting consent. There is nothing of the kind in the statute, and no authority for the proposition is cited. Of course, there must be a contract for a present marriage. That is, the parties must stipulate that they are now husband and wife, and not that they will at some future day become such. But if at any length of time thereafter they assume the rights and duties of the marital relation, both understanding and intending thereby to consummate the marriage contract, it will be a lawful marriage, under the statute. And it is not necessary to hold that consent is manifested only by the former contract. The very assumption of the relation, with the intention of executing such a contract, would of itself constitute the consent which is requisite, and the former contract would tend to characterize the act of the parties in the assumption of the relation, and complete the evidence of a present consent, which need not be in writing. Perhaps we cannot go so far under our statute as some of the Scotch authorities, which hold that cohabitation and repute themselves prove a tacit consent which constitutes a lawful marriage, for it may be that evidence would be admissible to show nevertheless that the parties did not intend marriage; that is, that there was no consent to marriage. But where both parties do intend marriage, and assume the rights and duties of the relation in the face of the world, I do not see why it is not a legal marriage. Surely, the mere assumption of the rights, duties, and obligations of the marital relation, with the intention thereby to be married, is as clear an indication of consent as there could be.

The next paragraph in the instruction, that marriage is not proven by the declaration of the woman that it was agreed between her and the man that they were to live together, was not justified by any evidence or by the contention of the proponent. The transcript does not show any such evidence, and it is a most injurious misstatement of the position of the proponent. It was a plain intimation that she had no other foundation for her claim of marriage, whereas the evidence shows without controversy that she based her claim upon a contract of marriage, followed by a mutual and public assumption of the rights, duties, and obligations of that relation.

The part of the instruction which has been most discussed by counsel is to the effect that the law prescribes that no one shall profit by an unlawful relation, and that the influence of an unlawful relation is unlawful, and, if the proponent was not married, and exercised any influence over the deceased, it was unlawful. Taken by itself, this part of the instruction is unintelligible. Taken in connection with the facts of the case, however, it could only mean one thing, to wit: If the proponent was not married to the deceased, and he was induced by the illicit relation to make his will in her favor, it was unlawful, and the will void; and, further, if she exercised any influence as to the will, such influence was unlawful, and rendered the will void. There was no issue in the case as to any unlawful influence other than undue influence. And in this instruction the phrase seems to be used as though it was something other than undue influence,—as though, like an illegal consideration, it rendered void everything that could flow from it, and without reference to the degree of it, or whether it had the effect of subjecting and controlling the will of the testator or not. And so I have no doubt the jury understood it. While I cannot doubt that the jury must have understood the instruction as above, I do not think the learned trial judge intended to so instruct the jury. The intention undoubtedly was to follow the line of decision, commencing with Dean v. Negley, 41 Pa. St. 312. That was a contest of a will, and in that case it appeared that the testator was taken from his family by an adulteress, and, when weakened by disease, was made to execute a will in favor of the adulteress. The court, after quoting a few Latin maxims, such as "Ex turpi causa non oritur actio," says they may all be summed up in one sentence: "No one shall derive any profit through the law by the influence of an unlawful act or relation." The court then proceeds to say: "The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions, for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation, and unfavorably to the lawful heirs." Here, too, the word "unlawful" is used, and naturally produces great confusion. But in this opinion the unlawful influence is plainly put upon the same plane as an unlawful consideration, from which no action can arise. Therefore such influence is unlawful, whether it has destroyed the free will of the testator or not. Under this rule there could be no valid bequest to one who has had illicit relations with the testator, if it was induced by the relation. If one had seduced a woman theretofore virtuous, he could neither provide for her nor her offspring by his will, for such bequest would be induced by the natural and ordinary influence of the relation, although not by any actual attempt to influence the testator by the beneficiary. The case of Dean v. Negley has been followed in Ohio, Iowa, and in several cases, but in each case the facts were such as would have warranted a finding of undue influence, as well as of unlawful influence, in the sense in which the phrase is used in that case; and certainly, if this unlawful influence must be such as has deprived the testator of his free will, there is no room for this strange doctrine. The question, in the absence of fraud, always is whether the proposed will is the spontaneous act of a competent testator. If not, it makes no difference what the moral qualities of the influence may be which has overcome the will of the testator. If the importunities of a wife have destroyed the free will of a testator, the will is void. If the importunities of a mistress have not overcome the will of a testator, the will is not void, though made in favor of the mistress. Influence which has prevented an unnatural, an unjust, and a vicious will, by overcoming and controlling the testator to the extent that the will is not the spontaneous act of the testator, is unlawful,—as much so as the same influence would be if exerted in the opposite direction. The question is as to the effect of the influence upon the testator's mind, not as to its moral character or its source, although in some cases the character of the person exerting the influence may be an important factor in determining its effect.

I do not see how a will can be said to be unnatural which is in favor of a person for whom a sane testator entertained a strong affection. That a will is what would be called "undutiful" is only material when the circumstances are such as to show that the testator, if uninfluenced, would most likely have made what is called a "dutiful" will. The line of authorities alluded to has not been generally followed. The cases upon the subject are collected in a note to the case In re Hess' Will (Minn.) 31 Am. St. Rep. 665 (s. c. 51 N. W. 614), and this opinion need not be extended by a citation and discussion of them. The remark in Re Flint's Estate, 100 Cal. 391, 34 Pac. 863, is obiter.

There is no evidence in the record to show of what the estate consisted, or its value, but it seems that a portion of it consisted of property which the testator's sisters, contestants here, conveyed indirectly to him, without consideration, to give him the necessary credit to enable him to carry on business. At the time the conveyance was made there was no understanding as to a reconveyance. The appellant objected to evidence of these facts as immaterial. I think, however, that the court properly admitted the evidence. If some of the property morally belonged to the contestants, and was really only loaned to their brother through their affection for him, such fact would make the will seem more unnatural, and, although it would not prove undue influence, it would be a proper circumstance to be considered in connection with other facts tending to prove such influence.

Appellant objects to the finding as to delusion, on the ground that the contest does not aver that the testator was subject to any insane delusion, and also on the ground that no insane delusion is found to have existed. I think this contention must be sustained. A mere mistake on such a subject will not invalidate a will. No will would be past attack, if it could be set aside merely upon the testimony of interested parties that the testator believed the heir hostile to him, and that such was not the case. The jury found that the testator was not insane.

There is also no evidence of an insane delusion. The allegation is that proponent persuaded testator that his sisters were hostile to him, and that they would expose their relations,—the relations existing between the proponent and the testator,—and interfere with his property, and injure his business. The evidence shows that the testator had long been very hostile to his sisters, but beyond that there is no evidence whatever that he thought his sisters hostile to him. It is not shown that proponent ever spoke an unkind word with regard to the sisters, but, to the contrary, that she always sided with the sisters in their controversy with their brother. The contestants themselves seem to have believed that the proponent and the testator were actually married. There is not a syllable of testimony tending to show that the testator thought they intended to expose the relation, or that he ever doubted that he was lawfully married to the proponent. These facts, however, would constitute fraud if they existed, and the jury found that there was no fraud. The order is reversed, and the cause remanded.

We concur: McFARLAND, J.; HENSHAW, J.

116 Cal. 318

## O'BRIEN v. BALLOU et al. (L. A. 188.)

(Supreme Court of California. March 20, 1897.)

SALE—GROWING CROPS—DELIVERY—JUDGMENT.

1. Growing crops, not being capable of manual delivery, are not "in the possession or under the control of the vendor," within the statute requiring an immediate delivery and continued change of possession to render a sale valid, and a sale of growing wheat is valid where the purchaser took a bill of sale, and, as soon as the grain was harvested, took possession, and marked the sacks with his initial, and continued to exercise such acts of ownership as are usual under the circumstances.

2. Where a defendant, sued for a tort as an individual, defended in a representative capacity as assignee of an insolvent, the effect of a judgment against him in terms both as an individual and as assignee is simply to hold him liable individually.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action in replevin by John O'Brien against S. D. Ballou, as sheriff, and J. B. Blake. Judgment against defendant Blake for the value of the property, and he appeals. Affirmed.

Wilcoxon & Bouldin, for appellant. Wm. Shipsey, for respondent.

SEARLS, C. Replevin to recover possession of 638 sacks of wheat, or their value if possession cannot be had. Plaintiff had a verdict for 571 sacks, of the value of $571, upon which judgment was entered. Defendant J. B. Blake (the action having been dismissed as to defendant Ballou) appeals from the judgment, and from an order denying his motion for a new trial.

It appears that during the year ending, say, with the harvest of 1894, plaintiff had labored as a ranch hand for one Bruce, who was farming about 320 acres of land sown to wheat. Some 60 to 70 acres of this land was rented from one Wyman, and the residue, which was adjoining, from one Jack. The land was not separated by fence. The crop of 1894 was a failure, and Bruce was unable to pay plaintiff his wages. Bruce then proposed to plaintiff that if he would continue to labor for another year, he (Bruce) would convey to him sufficient of the crop to pay his wages. Plaintiff accepted the proposition. The land was all cultivated to wheat. Jack had a crop mortgage on the wheat growing upon his own land. On June 21, 1895, Bruce, being indebted to plaintiff in the sum of $574.75, made to the latter a bill of sale of the 60 acres, more or less, of wheat growing on the Wyman tract, in payment of the sum due him. Bruce also, in view of the fact that it was doubtful if the grain would pay plaintiff in full, agreed verbally to furnish sacks for the grain, and to pay the harvesters; plaintiff to pay all incidental expenses. The wheat was harvested, kept separate from that on the Jack ranch, and placed in a pile, where it was marked by plaintiff with his initial. He paid for gathering it, and the board, etc., of the harvesters. While in this condition, and some two weeks after it was harvested, the wheat was attached by defendant S. D. Ballou, as sheriff, under a writ of attachment against Bruce. Bruce thereafter went into voluntary insolvency. Defendant Blake was appointed assignee in insolvency, and the wheat was turned over to him by the sheriff.

1. The appellant contends in favor of reversal that the transfer of the crop from Bruce to plaintiff was void under the statute of frauds. Growing crops are chattels not susceptible of manual delivery until harvested, and are not "in the possession or under the control of the vendor," within the meaning of the statute requiring an immediate delivery and continued change of possession. Davis v. McFarlane, 37 Cal. 634. When the crop was harvested, it was the duty of plaintiff to take immediate possession of the grain, and to retain such possession. The evidence on the part of plaintiff tended to show that Bruce did not live upon the land where the wheat was grown, but resided some six miles distant, was never at the situs of the wheat but once after the sale, and exercised no control or dominion over it as owner. Plaintiff, after gathering and marking the wheat, camped close to, but not on, the Wyman land, at a point where he could get water, until the wheat was attached. He also hauled away and sold for seed some 70 sacks. This was after the levy of the attachment, but before it was served upon him. The sale passed the title to plaintiff without a delivery of possession. When it was harvested, plaintiff exercised such dominion over it as is usual in such cases. The ground upon which it was grown was, so far as appears, vacant and unoccupied. The brand upon the sacks was sufficient to notify the public of plaintiff's ownership. We attach little importance to the fact that plaintiff was working for Bruce. Bernal v. Hovious, 17 Cal. 542; Visher v. Webster, 13 Cal. 58. The evidence was sufficient to support the verdict, and on the showing of plaintiff the contract was not void under the statute of frauds.

2. Appellants urge that the written transfer from Bruce to the plaintiff was a mortgage of a growing crop, and not a sale. This contention has no support in the record, and we need not discuss it.

3. It is further urged that the court erred in instructing the jury, and in its refusal to instruct as requested by defendant. The court, upon its own motion, instructed the jury, and, after stating the nature of the action, proceeded as follows: (1) "Plaintiff claims to have purchased it [the wheat] when it was a growing crop, and, after it was harvested, to have reduced it to his possession. If you find that he did so in good faith, and was in possession thereof when it was levied upon, your verdict should be for plaintiff; that he is the owner of the property, and entitled to the possession thereof, and the value thereof is $571." (2) "If you find from the evidence that A. L. Bruce sold a crop of growing wheat to the plaintiff, from which came the wheat in controversy; that after said wheat was harvested said Bruce continued to exercise acts of ownership over the wheat, continued to control and manage the same, and retain possession thereof,—your verdict should be for the defendant." The only objection urged to these instructions is that the first of them ignored the continuous character of the possession necessary to satisfy the law. There was nothing in the evidence to give point to this objection. The only question was whether plaintiff took such possession as the law required. But, conceding appellant's objection under such circumstances to be good, the court did instruct the jury in the second instruction that if the vendor, after the wheat was harvested, continued to exercise acts of ownership over it, or controlled or managed it, and retained possession thereof, they should find for defendant. This was sufficient to indicate to the jury, and did indicate to them more clearly than the language of the statute would have done, the necessity of an exclusive and continuous possession in plaintiff. The defendant's third instruction, marked in the record as fifth, which was given, also covered this point, in which the jury was instructed that it was the duty of the plain-

tiff "to take immediate possession of the grain [when it was harvested], and retain such possession."

The following instructions asked by defendant were properly refused: "That the burden of proving that there was a change of possession from Bruce to plaintiff, and that plaintiff thereafter continued in the possession of the property sold until the same was attached, is on the plaintiff, and the plaintiff must show by a preponderance of the evidence that at the date of the sale he took immediate possession and control, and retained the same until the property was levied upon by the sheriff." The last clause of this instruction was objectionable, in that the property, being a growing crop, was not susceptible of an immediate possession in the sense of the term as applied to personal property capable of manual delivery; and to have given it would have tended to mislead the jury. The other instruction was as follows: "If you believe from the evidence that A. L. Bruce, after said sale to plaintiff, continued to exercise acts of ownership over said crop, continued to control and manage the same, and assumed the ownership thereof, employed the men to harvest the same, took charge and superintendence of and contracted for the labor performed on said crop, your verdict must be for the defendant." This instruction embodied the same principle, and was largely in the same language, as that given by the court, and hereinbefore set out, marked 2. It was not necessary to repeat the instruction. We need not set out the instructions given at the request of defendant. They presented clearly the law applicable to the case from the standpoint of defendant's evidence. The verdict was not against law by reason of being in disregard of the instructions of the court.

It is further urged that the judgment is erroneous in that it runs against the defendant individually and as assignee. The complaint counts against Blake as an individual. In his answer he justifies taking and holding the wheat as the assignee in insolvency of Bruce, an insolvent. The judgment, after reciting that "said Blake took, holds, and claims said property in his capacity of assignee of the estate of A. L. Bruce, an insolvent debtor," proceeds to award judgment against "J. B. Blake both in his individual and representative capacity aforesaid." It will be observed that the judgment is not against the estate which the defendant represents as assignee, but is simply against him as an assignee. Having defended in that right, and in no other, and the verdict being against him, he is not in a position to complain that the court has, by its judgment, determined the very issues he tendered for adjudication, and has concluded him thereby. There can be but one satisfaction of the judgment; and such satisfaction, being of a judgment against him as assignee, will be some evidence upon which to predicate a claim for reimbursement from the estate of his insolvent. Section 580 of the Code of Civil Procedure applies to the extent of the relief to be granted. Here the question relates, not to the extent of the relief, but to the character in which the defendant is liable. He could not, by a tortious act, be absolved from his individual responsibility, and, where he voluntarily justifies in a particular capacity, his rights in that capacity should be determined by the judgment. The judgment here does nothing beyond that. We recommend that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; BRITT, C.

McFARLAND, J. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

TEMPLE, J. I concur, but I do not think it can properly be said that the judgment is against the defendant as assignee. Defendant could not commit the trespass as assignee, and the recital in the judgment as to his character is simply surplusage. He is properly held personally liable, and it is not of consequence in this case whether he can be reimbursed from the insolvent's estate or not.

I concur: HENSHAW, J.

116 Cal. 295

### PEOPLE v. COYNE. (Cr. 221.)[1]

(Supreme Court of California. March 16, 1897.)

Jurors—Custody—Ownership—Evidence.

1. The fact that during adjournment, but before introduction of evidence, the jurors were not in custody of an officer, and had not been admonished by the court, as required by Pen. Code, § 1122, was not ground for reversal.

2. An information charging the building injured by the malicious use of explosives to be the property of prosecutor was sustained by evidence that he paid the taxes and resided on the premises with his wife, though the title stood in her name.

Henshaw, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Harry L. Coyne was convicted of felony as defined by Pen. Code, § 601, declaring that "every person who maliciously, by the explosion of gunpowder or other explosive substance, destroys, throws down, or injures the whole or any part of any building, by means of which the life or safety of a human being is endangered, is guilty of a felony"; and from the judgment and an order denying a new trial he appeals. Affirmed.

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[1] Rehearing denied. Beatty, C. J., dissents.

Byron L. Oliver, for appellant. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant was convicted of a felony, and prosecutes this appeal from the judgment and order denying a motion for a new trial.

1. The jury were selected to try the defendant at the morning session of court, and an adjournment was then taken until 2 o'clock p. m. of the same day, at which time the introduction of evidence was begun. During the time of adjournment the jurors were not in the custody of an officer; neither had they been admonished by the court upon their duty, as demanded by section 1122 of the Penal Code. Complaint is now made that the course practiced at the trial constituted substantial and material error. The fact that the jurors separated during this period of time furnishes no ground for complaint, for section 1121 of the Penal Code leaves that matter to the discretion of the court. But a failure of the court to admonish the jurors as to their duty during the hours of separation is certainly an objectionable practice, and not countenanced by the statute. It seems that such omission upon the part of the court occurred but once during the progress of the trial, and at such time the introduction of evidence had not commenced. In the trial of criminal cases the court cannot be too careful in planting itself firmly upon the statute, and a strict compliance with its provisions is always time and labor well spent. But the error in this regard is technical, and not of that importance to demand a reversal of the judgment and a new trial.

2. The information charges the building injured to be the property of T. D. Stimpson. Upon the trial it was developed that the legal title to the property stood in the name of Mrs. T. D. Stimpson (the wife). It appeared that T. D. Stimpson paid the taxes upon the property, and was residing with his wife and other members of the family in the building at the time the offense is charged to have been committed. Under such circumstances, his possession of the premises was entirely sufficient to support the allegation of the information as to ownership. There is no merit in the remaining assignment of errors. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.

I dissent: HENSHAW, J.

116 Cal. 355

## In re BULLARD'S ESTATE. (S. F. 564.)

(Supreme Court of California. March 24, 1897.)

LIMITATIONS — CLAIM MATURING AFTER DEATH OF OBLIGOR—ADMINISTRATION.

Limitation does not begin to run against an action on a claim against a decedent who died before its maturity, when no administration exists on his estate at the time the cause of action accrues. Code Civ. Proc. § 353, providing for an extension of the time for bringing an action for one year after the issuance of letters testamentary or of administration, applies only when the statute has commenced to run before the death of the debtor.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

James A. Bullard appeals from an order approving the allowance of a claim against the estate of James H. Bullard, deceased. Affirmed.

George D. Collins, for appellant. H. H. McPike, for respondent.

HARRISON, J. The decedent in his lifetime executed his promissory note to the Hibernia Savings & Loan Society, payable February 10, 1887, together with a mortgage upon certain real estate to secure its payment. Prior to the maturity of the note, viz. April 6, 1886, he died, and a document purporting to be his last will and testament, which was presented for probate in April, 1886, was finally rejected January 9, 1893. Letters of administration were issued upon his estate August 15, 1894, and notice to creditors to present their claims to the administrator for allowance was first published March 9, 1895. The Hibernia Savings & Loan Society presented its claim upon the aforesaid note and mortgage to the administrator for allowance March 28, 1895, and it was allowed by him and approved by the judge of the court, and filed as an approved claim August 7, 1895. November 25, 1895, the administrator rendered the account of his administration for settlement, and included therein the said claim of the Hibernia Savings & Loan Society. At the hearing of the settlement the appellant, one of the heirs of the decedent, contested the allowance of the claim upon the ground that at time of its presentation and allowance it was barred by the provisions of section 337 of the Code of Civil Procedure of this state. The court overruled his objections, and made an order settling and allowing the account as rendered, to which the contestant excepted. The present appeal is from this order. Section 353, Code Civ. Proc., provides: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuance of letters testamentary or of administration." This provision is identical with that contained in section 24 of the limitation act of 1850 (St. 1850, p. 346), which was construed in Smith v. Hall, 19 Cal. 85. In that case Cook made his promissory note, and died before its maturity. Letters of administration were not issued upon his estate until more than four years had elapsed after the maturity of the note, and subsequently a claim thereon was presented to the administrator and rejected. In a suit brought thereafter to establish the claim, the district court held that it was barred by the statute of limitations; but upon appeal that judgment was reversed, the court saying: "The general rule is that the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued. Danglada v. De la Guerra, 10 Cal. 386. And as the general act prescribes four years as the period of limitation on promissory notes, it cannot be held by force of this statute that this claim is barred. * * * We do not understand the twenty-fourth article (section 24) of the act of limitations as conflicting with the view we have taken. That section only applies to cases where the statute has commenced to run. This construction is evident as well from reason as from the language of the section. The words are that the plaintiff may bring his suit in the case mentioned 'after the expiration of the period of limitation,' and the additional year, etc. The object was not to curtail, but to prolong, the period for suing in the given category." The above section of the Code must receive the same construction. See, also, Wood, Lim. § 6. The order is affirmed.

I concur: VAN FLEET, J.

BEATTY, C. J. I concur in the judgment, and place my concurrence upon the proposition decided in Smith v. Hall, 19 Cal. 85, that "the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued." In making that decision the court cited Danglada v. De la Guerra, 10 Cal. 386, to sustain the proposition. That case, however, does not sustain it, and I know of no express provision of law that does. But section 1500 of the Code of Civil Procedure forbids the commencement of any action upon a claim against a decedent unless the claim is first presented to an executor or administrator, etc., and it seems to have always been considered absurd to hold that the statute would run against a cause of action which could not possibly be put in suit. Upon this ground apparently, and by mere judicial legislation, the rule above quoted has been established, and it is now too late to set it aside by a contrary decision, if a contrary decision could be justified. I have examined the cases cited by appellant, but they do not appear to support his contention. Society v. Herbert, 53 Cal. 375, is not at all in point. Tynan v. Walker, 35 Cal. 643, was the converse of this case, in which it was held that the representatives of an intestate could not keep alive a right of action indefinitely by neglecting to take out administration. The reasoning of Judge Sanderson (pages 643, 644), does seem to support the contention of the appellant, but the case was different and the point decided was different. The reason for the exception ingrafted upon the statute in Smith v. Hall does not exist when the right of action is one in favor of the decedent. In Society v. Conlin (Cal.) 7 Pac. 477, the suit was to foreclose a mortgage of the decedent given to secure another's debt. There was no personal liability of the decedent, no right in any event to a deficiency judgment, and no necessity to present the claim before action. Here a presentation was necessary in view of the personal liability of the decedent and the right of plaintiff to a deficiency judgment.

116 Cal. 336

## RICHARDS et al. v. DALEY et ux. (L. A. 100.)

(Supreme Court of California. March 23, 1897.)

LIMITATION OF ACTIONS.

Where a mortgage provides that on default in interest the whole sum shall become due, and the mortgage may be foreclosed, limitations begin to run only when the note matures according to its terms, and not on default in interest.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Charles B. Richards and others against Thomas J. Daley and wife to foreclose a mortgage. From a decree for plaintiffs, and from an order denying a motion for new trial, defendants appeal. Affirmed.

Rippey & Nutt, for appellants. J. W. Hughes, for respondents.

PER CURIAM. This is an action to foreclose a mortgage executed by the defendants, Thomas J. Daley and Sarah M. Daley, his wife, on March 3, 1890, to secure payment of two promissory notes of the same date. The notes were signed by both defendants, and each was for the sum of $6,500, payable two years after date, with interest thereon at the rate of 13 per cent. per annum, payable quarterly, and if not so paid then to become a part of the principal, and bear a like rate of interest till paid. The mortgage provided "that if default be made in the payment of the interest, or any part thereof, according to the tenor of said note, then the whole sum of principal and interest shall become immediately due, and the mortgagees may proceed with suit of foreclosure." Interest for the first quarter became due June 3, 1890, but no payment was made until December 11, 1890, when there was paid upon each note, "on account of interest," $422.50. Thereafter payments on account of interest were made, from time to time, on both notes, the last being under date of March 18, 1895. The aggregate of the payments on one of the notes was $1,993.50, and on the other $2,314.50. The complaint was filed March 20, 1895, and the defendants by their answer set up the provision of the mortgage above quoted, and alleged that the mortgagees did not on the 3d day of June, 1890, or at any time, add the interest which fell due on said day to the principal of the notes, and did not at the end of the respective quarter years after the making of the notes, or at any time, add the interest which then fell due and was unpaid, to the principal of the notes, and by the terms of the notes and mortgage the whole principal sums and the interest accrued thereon became due and payable on the 3d day of June, 1890, and that by reason of the premises the action was barred by the provisions of section 337 of the Code of Civil Procedure. The court below found, among other things, that the action was not barred, and entered its decree foreclosing the mortgage as prayed for. From this decree, and an order denying their motion for a new trial, the defendants appeal. The case, it will be observed, is in no material respect different from that of Mason v. Luce (just decided) 48 Pac. 72. We find no errors of law in the rulings of the court, and, upon the authority of the case cited, the decree and order appealed from must be affirmed. So ordered.

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116 Cal. 333

## AYERS v. GREEN GOLD MIN. CO. et al.
(Sac. 180.)

(Supreme Court of California. March 23, 1897.)

CORPORATIONS — CONTRACTS BY OFFICERS — CONSTRUCTIVE KNOWLEDGE.

The doctrine that the knowledge of a corporate officer is imputable to the corporation does not apply to work performed on the corporate property under a contract with a director in his individual capacity, and with the understanding that he shall be personally liable.

Department 1. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by C. W. Ayers against the Green Gold Mining Company and others to establish a lien for work done on the property of defendant corporation. From a judgment for defendants, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

F. W. Street, for appellant. F. P. Otis and Minor & Ashley, for respondent.

VAN FLEET, J. This is an action brought by plaintiff to charge the property of the corporation defendant with a lien for certain work done by appellant in cleaning out a tunnel on the mining property of respondent. The action was brought against M. E. Crittenden, E. C. Lyles, and respondent, it being alleged that the labor was performed at the special instance and request of defendants Lyles and Crittenden, and that the latter was at the time in charge of said mine, and acting as the agent of the defendant mining company. The court found that the work was performed for and at the special instance and request of defendants Lyles and Crittenden, but under a written contract set out in the findings; that, although defendant Crittenden was at the time a director of the corporation defendant, said contract was made with said Lyles and Crittenden "personally in their individual capacities, and not as agent or agents of defendant corporation, with the understanding and intent that the said defendants M. E. Crittenden and Dr. E. C. Lyles should be bound personally thereby, and not this defendant corporation, for all work that plaintiff might do or cause to be done on said mining property"; that neither of the two defendants entering into said contract at the time of the making thereof was in charge of said mining property, or the agent of the defendant corporation in the premises, or authorized "to employ plaintiff for any purpose whatever." It is further found that the defendant mining company "had no notice or knowledge whatever that plaintiff was performing any work whatever upon the mining property" sought to be charged with the lien. Upon these findings judgment was given in favor of the corporation defendant denying the lien, and the only material question in the case is as to whether the evidence supports the findings.

It would subserve no useful purpose to state the evidence at length, or even in substance. It is sufficient to say that upon a careful review we find in the record evidence substantially tending to support each of the findings in question, and this, under firmly established principles, concludes our further inquiry.

It is urged, however, in effect, that the mining company had constructive, if not actual, notice of the doing of the work; that the directors and officers of a corporation are its agents, through whom alone it can act, and that, the defendant Crittenden being a director at the time the work was done, her knowledge of the work is imputable to the corporation; that, having such knowledge, it was incumbent upon the latter, in order to avoid liability, to post a notice on its mine, as required by section 1192, Code Civ. Proc., that it would not be responsible for the work, which notice was never given. It may be true that the corporation would be chargeable with the knowledge of Mrs. Crittenden had she been either actually or ostensibly representing or acting for it in the transaction, but both the evidence and the findings show that she was not. It appears from the evidence that at the time of the making of the contract for the work Mrs.

Crittenden expressly stated to plaintiff that she was acting solely on her individual responsibility, and not for the corporation in any way; that the latter had no means, and would do nothing; and that whatever work was done she would have to pay for out of her own private means. In fact, the evidence shows throughout that the transaction was carried on by plaintiff with a perfect knowledge that he was dealing with Mrs. Crittenden as an individual, and wholly apart from any official relation she bore to the defendant mining company, and that he looked to her personally and alone for the payment of her share of the contract price of the work. Under such circumstances, the doctrine of constructive or implied notice on the part of the corporation of what was being done cannot obtain. The judgment and order are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

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5 Cal. Unrep. 633

## LEEDOM v. HAM et al. (L. A. 134.)

(Supreme Court of California. March 23, 1897.)

PARTNERSHIP—RIGHTS OF INDIVIDUAL PARTNER—ESTOPPEL.

1. Plaintiff, having leased a farm, and taken S. as a partner, agreed that the lessor might sell enough of the future crop to pay the rent; whereupon the latter bargained 19 tons to third persons, but nothing was paid, nor any delivery made to them or to the lessor. Subsequently the whole crop, amounting to less than 19 tons, and which constituted the entire partnership assets, was attached as the property of S., and purchased at execution sale by the attaching creditor. *Held*, that under Civ. Code, § 2405, giving each partner a lien on the assets for the payment of firm debts, and for any general balance due him, plaintiff was entitled to recover his share from the creditor.

2. Plaintiff was not estopped, though he had, through mistake of law, notified the officer at the time of the attachment that he owned one-half the crop, "less 19 tons belonging to" the lessor.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by W. T. Leedom against A. M. Ham, H. H. Ham, and Smith Leedom for an accounting of a partnership between plaintiff and the last-named defendant, and to recover the value of property converted by the other defendants. Defendant Leedom defaulted, and from a judgment for defendants Ham, and from an order denying a motion for new trial, plaintiff appeals. Reversed.

E. R. Annable and Geo. B. Cole, for appellant. T. C. Chapman and Rolfe & Rolfe, for respondents.

BRITT, C. Plaintiff leased of one Gregory 95 acres of land, and also purchased of Gregory barley to seed the same for a crop of grain hay; the lessor extending credit for both rent and seed upon an understanding that he should be paid therefor from the first proceeds of sale of the crop. Plaintiff then took one Smith Leedom as a partner in the business of raising the crop, they agreeing to share equally the net avails, Gregory to be first paid. The crop was grown by them pursuant to such arrangement, and constituted the only partnership assets. Its value was less, it seems, than the partnership liabilities. While the harvesting thereof was in progress, plaintiff agreed with Gregory that the latter might sell enough of the hay to pay the sums due him for rent and seed, and that plaintiff would deliver to the purchasers the quantity thus sold. Accordingly Gregory bargained 19 tons of the hay to certain persons at an agreed price, but nothing was paid, nor was any hay delivered either to Gregory or such purchasers. A few days later the whole crop was attached as the property of said Smith Leedom in a suit brought against him by A. M. Ham and H. H. Ham. They subsequently caused it to be sold under execution in that suit, and became the purchasers thereof, and converted it to their own use. Plaintiff prosecutes this action against A. M. and H. H. Ham and Smith Leedom for an accounting of the affairs of his partnership with said Smith (who is insolvent) and judgment against the Hams for the value of the crop. When said attachment was levied, plaintiff served on the attaching officer written notice stating himself to be the owner of an undivided one-half of the crop, "less nineteen tons thereof, due and belonging to A. Gregory." At the same time Gregory served similar notice, claiming 19 tons on the ground that such quantity was sold to him before the attachment. Defendants produced evidence at the trial that the whole crop was only 14½ tons. The court found that plaintiff had no right or interest in the hay, or any part thereof, and rendered judgment for costs in favor of defendants Ham. Smith Leedom had made default.

The plaintiff seems to have modeled his procedure upon the law as declared in Wright v. Ward, 65 Cal. 525, 4 Pac. 534, and on the facts in evidence he was entitled to prevail. By their purchase at the execution sale the brothers Ham took the interest of Smith Leedom in the property, subject to the right of plaintiff to have the same applied so far as necessary in discharge of the partnership debts, and of any balance due to him as ascertained by an accounting. Civ. Code, § 2405; Freem. Ex'ns, § 254a. Respondents seek to uphold the finding of the court on the ground that by the notice served on the attaching officer plaintiff stated the ownership of the hay to be in a third person, and claim that such a conflict in the evidence was thus created as to render the finding conclusive on appeal. But the evidence made it clear that plaintiff, as terre-tenant under Gregory, had title to the crop, modified only by the partnership interest of Smith Leedom. Under authority from plaintiff, Gregory had bargained the hay to prospective purchasers, but there was no delivery, nor agreement for a present transfer, and hence no completed sale. Civ. Code, § 1140. Therefore the declaration in the notice that Gregory owned 19 tons of the hay was but a mistaken statement of opinion on the legal effect of prior transactions, and could not operate to divest title in the crop. Keane v. Cannovan, 21 Cal. 291, 301.

It is claimed, also, that such notice had the effect to estop plaintiff from subsequently asserting right to the hay. It is sufficient to say on this point that, since the notice stated that 19 tons of the hay belonged to Gregory and one-half the overplus to plaintiff, it is impossible that the brothers Ham could have acted in good faith on the belief of the truth of this statement (Code Civ. Proc. § 1962, subd. 3), while causing the hay to be sold and purchasing the same as the property of Smith Leedom. The judgment and order denying a new trial should be reversed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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5 Cal. Unrep. 636

## VAN VLECK v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al.

(L. A. 162.)

(Supreme Court of California. March 29, 1897.)

MANDAMUS—TO STATE BOARD OF DENTAL EXAMINERS—WHEN WILL LIE—SUFFICIENCY OF PETITION.

1. Act March 12, 1885 (St. 1885, p. 110), relating to the practice of dentistry, creates a board of examiners, and provides (section 5) that, if the examination "prove satisfactory," the board shall issue to qualified persons certificates, and shall indorse as satisfactory diplomas from any "reputable" dental college, "when satisfied of the character of such institution," on the holder furnishing "evidence satisfactory to the board" of his or her right to the same. *Held*, that the duties of such board are judicial, and its action in finding an examination unsatisfactory, or refusing to indorse "as satisfactory" a diploma from a dental college, is final.

2. A petition for a writ of mandate to the state board of dental examiners alleged that petitioner presented to the board a diploma issued to him by a certain dental college; that such college then, and when the diploma was issued, "was a reputable college, and there existed sufficient evidence of such fact"; that he furnished "evidence satisfactory" that he was the person named in the diploma, and that it was issued to him; that the board refused to indorse it; and that at the time the board "were satisfied" that such college was a reputable college. *Held*, that such allegations were not the legal equivalent of allegations that the board found that petitioner furnished evidence satisfactory to the board that he was the person named in the diploma, and that the board was satisfied of the character of the institution issuing it.

Garoutte, J., dissenting.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Petition by John D. Van Vleck for a peremptory writ of mandate to the board of dental examiners of the state of California, and the individuals composing such board, to compel the issuance to petitioner of a certificate entitling him to practice dentistry. From a judgment granting the writ, and from an order denying a new trial, defendants appeal. Reversed.

W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., and J. W. Ballard, for appellants. Knight & Harpham, for respondent.

VAN FLEET, J. This is a proceeding in mandate, commenced in the superior court, against the board of dental examiners of the state, and the individuals composing said board, to compel the issuance to petitioner of a certificate entitling him to practice dentistry, under the act of the legislature entitled "An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of California," approved March 12, 1885. St. 1885, p. 110. The court below gave judgment granting a peremptory writ, and defendants appeal therefrom, and from an order denying them a new trial.

Defendants demurred to the complaint or petition, upon the ground, among others, that it did not state facts entitling petitioner to the relief sought. The demurrer was overruled, and this ruling presents the only question which need be considered, since we are of opinion the demurrer should have been sustained. The petition, omitting the formal parts and much immaterial and redundant matter, is, in substance, that petitioner is the holder of a diploma of graduation regularly issued to him on April 2, 1894, by the American College of Dental Surgery of Chicago, Ill., after a course of study therein and an examination for graduation as prescribed by the regulations thereof; that, desiring to practice his profession in this state, petitioner, on the 10th day of May, 1894, in pursuance of said act, presented to defendants his said diploma, and demanded that they indorse the same, and issue to him a certificate to that effect; that when said diploma was issued, and at the time of the application to defendants, said American College of Dental Surgery "was a reputable college, and there existed and was at the command of defendants sufficient evidence of such fact"; that with his application petitioner furnished "evidence satisfactory to the defendants that he was the person named in said diploma, and that the same had been issued to him as stated in said diploma"; that defendants, "without any lawful right or excuse therefor, refused to indorse plaintiff's said diploma, or to issue to him the certificate provided for in said act." The act referred to, which underlies the proceeding, makes it unlawful for any person who is not at the time of the passage of the act engaged in the practice of dentistry to engage therein, unless he shall have obtained a certificate as thereinafter provided. It authorizes the appointment of a board of examiners, to consist of seven practicing dentists, "whose duty it shall be to carry out the purposes and enforce the provisions of this act." After providing for the constitution and organization of the board, and for the registration of all those practicing dentistry in the state at the date of its passage, it provides: "Sec. 5. Any and all persons who shall so desire may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery, and, if the examination of any such person or persons shall prove satisfactory to said board, the board of examiners shall issue to such persons as they shall find to possess the requisite qualifications a certificate to that effect, in accordance with the provisions of this act. Said board shall also endorse as satisfactory diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same, and shall issue certificates to that effect within ten days thereafter. All certificates issued by said board shall be signed by its officers, and such certificates shall be prima facie evidence of the right of the holder to practice dentistry in the state of California." The further provisions of the act are not involved.

The contention of the attorney general, for appellants, is that the functions of the defendant board under the statute are judicial or quasi judicial, in that they involve the exercise of discretionary power,—the determination of facts from evidence; that the determination of such facts is exclusively and finally vested in said board; and that, therefore, while mandate will lie to require it to act, should it refuse, it will not require it to proceed to a particular conclusion; nor where it appears, as the complaint alleges, that it has acted and reached one result, can it be coerced by this writ to act differently. The correctness of these principles, if such be the proper interpretation of the powers vested in the board, is conceded by respondent, but respondent contends that the act will not bear such construction. His contention, in effect, is that the power vested in the board is largely ministerial, or clerical merely; that, while the board has certain discretionary power to pass upon the facts upon which its action is to be based, its determination of those facts is not final; that if the evidence presented to it is such that, in the judgment of the court, the board should have found in favor of the existence of the facts authorizing it to indorse the certificate, it can be required to so find, and make such indorsement. We are unable to coincide with respondent's construction of the act. The whole theory upon which it proceeds, and the manifest purpose intended to be accomplished thereby, are against such construction. It is very evident, as indicated not only by the title, but in the body, of the act, that the inducing consideration moving the legislature to its adoption was the protection of the public against the ills suffered at the hands of incompetent quacks, empirics, and other unqualified practitioners in this most important and essential branch of modern surgery and medical science. Until within a comparatively recent period, the practice of dentistry consisted of treatment largely, if not exclusively, of a mere mechanical nature, such as drawing, filling, and cleaning the teeth; and practitioners of the art were neither required nor expected to know anything of the pathological features or surgical necessities of those diseases which rendered their artisanship a necessity to man's relief and comfort. Indeed, the local dentist was frequently the village barber or leech, the watchmaker, or even the blacksmith,—any artisan possessed of a convenient, if not suitable, instrument, and the necessary strength to pull a tooth. In more recent years, however, the necessity for a higher and special education in the art and science of treating the teeth has become widely and generally recognized, and has given rise to a distinct, honorable, and numerous profession. Departments for the teaching of dental science and surgery have been added to the regularly established schools of medicine and surgery, while numerous special colleges of dentistry have sprung up. Many of the latter, unfortunately, as with similar institutions in other branches of learning, are more of a pretense than a fact; mere pseudo establishments, with an outward semblance of educational facilities and forms, but in reality but dishonest shams, gotten up to make money, by dispensing, for coin and without requirements of learning, pretended certificates and diplomas of graduation, which give the holder an apparent standing and character in his profession, to which he is not of right entitled. The evil resulting from this abuse has become so pronounced as to have received very general recognition, and there are now to be found in most of the states statutes intended for its correction. The statute under consideration is one of these. As expressed in its title, its purpose is "to insure the better education of practitioners of dental surgery; and to regulate the practice of dentistry." It provides a board composed of expert practitioners, with power to examine and license those who have not graduated elsewhere, and to investigate and pass upon the reputability of schools and colleges issuing certificates or diplomas, and the right of the holders of such diplomas to their possession. The powers thus conferred are broad and comprehensive, and in some respects, at least, must in their nature be final. The judgment of the board, for instance, as to the qualification of an applicant for license by examination, which is largely, if not wholly, discretionary, must of necessity be conclusive. Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871. No one would question this. Is the power to pass upon the reputability of a college, or the right of a holder of a diploma, intended to be less discretionary or final? There is nothing in the language of the act in conferring the power to indicate it. The requirement is to "indorse, as satisfactory, diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same." This implies quite as necessarily the exercise of judgment and discretion as in the examination of an applicant as to his fitness. It does not direct the board to act upon the presentation of certain specified evidence prescribed by the statute, but it requires the finding of the facts upon which their action is to be based from evidence which is to be "satisfactory to the board." If the statute required that the applicant make a prescribed showing in a particular manner, and that thereupon the board should indorse his certificate, it might with some reason be said that the act was more ministerial than judicial, and that, upon the prescribed showing being made, the board could not refuse to act. Such a case would be within the doctrine of Wood v. Strother, 76 Cal. 545, 18 Pac. 766, and Stockton & V. R. Co. v. City of Stockton, 51 Cal. 328, relied on by respondent, where the action of the tribunal depended upon a certain event, and, that event being shown to have in fact occurred, the adverse determination of the tribunal whose duty it was to act was held not so far discretionary as to conclude the question; the true test, as held in Wood v. Strother, being whether the determination of the tribunal "is intended by law to be final."

But here the question whether those facts which are to move the action of the board have been shown does not depend upon some specified piece of evidence fixed by the statute, but upon such facts as will satisfy the board. The whole question, in other words, as to the facts, is committed to its discretionary judgment; and that its determination in such a case is conclusive, and not subject to the mandatory control of the courts, there can be no doubt. In People v. State Board of Dental Examiners, 110 Ill. 180, where the statute made it the duty of the board to issue a license to a "regular graduate of any reputable dental college" having a full course of lectures and instruction in dental surgery, mandamus was sought to compel the issuance of a certificate to one who alleged that he held a diploma from a "reputable dental college," and that there was annually delivered at said college "a full course of lectures." In sustaining a demurrer to the petition, it is said: "Whether a college be reputable or not is not a legal question, but a question of fact. So, also, are the requirements in regard to the annual delivery of a full course of lectures and instruction. These questions of fact are by the act submitted to the decision of the board, not in so many words, but by the plainest and most necessary implication. Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to investigate them, and, of necessity, therefore they must do so. The act of ascertaining and determining what are the facts is in its nature judicial. It involves investigation, judgment, and discretion." And it was held that mandamus would not lie to control the discretion thus vested, and that no ground of relief was stated. Under a statute of Missouri providing for the issuance by the state board of health of a certificate to practice medicine to "all who shall furnish satisfactory proof of having received diplomas or licenses from legally chartered medical institutions in good standing," if the diploma be found to be genuine, and the person named therein be the one presenting it, etc., it was held that the board was vested with discretionary powers involving matters of judgment which could not be controlled by mandate; and that a petition alleging a state of facts which under the act should apparently entitle him to a certificate, but which showed that the application had been acted on by the board and denied, did not state a case for relief. State v. Gregory, 83 Mo. 123. To the same effect are Williams v. Dental Examiners, 93 Tenn. 619, 27 S. W. 1019, and State v. State Medical Examining Board, 32 Minn. 324, 20 N. W. 238. See, also, Berryman v. Perkins, 55 Cal. 483; Jacobs v. Board, 100 Cal. 121, 34 Pac. 630; Fairchild v. Wall, 93 Cal. 401, 29 Pac. 60.

The facts alleged do not bring the case within the doctrine of Keller v. Hewitt, supra, relied on by petitioner. In that case the board of education had examined Keller for a teacher's certificate, and, as alleged in the petition, had found that he was in all respects qualified, and in every way fit and competent, to receive a certificate; but the board had, nevertheless, determined not to issue it. We held that, upon these facts, the writ would lie to compel the issuance of the certificate; that notwithstanding the board's discretionary power in determining the question of fitness, "where, under the law and their rules, the question of an applicant's fitness to receive a certificate has been determined in his favor, the limit of the board's discretionary functions in the premises has been reached, and a plain legal duty results." In the present case the tribunal has acted, and has determined against the petitioner. The allegations that the American College of Dental Surgery "was a reputable college, and there existed and was at the command of defendants sufficient evidence of such fact," and that petitioner furnished "evidence satisfactory to defendants that he was the person named in said diploma," are not the legal equivalent of an allegation that the defendant board have so found. In the language of the court in People v. State Board of Dental Examiners, supra, on this precise point: "The demurrer here does not admit that the board of dental examiners found that the college at which the relator was graduated was reputable, although it does admit that to be the fact. But, since the board cannot be compelled to decide the question that way, although the evidence might clearly sustain it in so doing, there is no ground for mandamus." It follows that the petition states no cause of action, and the judgment and order must be reversed, and the cause remanded, with directions to sustain the demurrer. It is so ordered.

I concur: HARRISON, J.

GAROUTTE, J. (concurring). I entirely agree with Mr. Justice VAN FLEET as to the true construction of the legislative act here involved, but am compelled to dissent from the conclusion arrived at, to the effect that the petition does not state sufficient facts to entitle petitioner to the relief sought. At one stage of the proceedings the board of dental examiners has a pure ministerial duty to perform, viz. to indorse the applicant's diploma as satisfactory; and that stage of the proceedings is reached when the board is satisfied that the character of the institution issuing the diploma is that of a reputable dental college, taken in connection with the further condition that the holder of the diploma has also furnished "evidence satisfactory to the board of his or her right to the same." If the holder of the diploma complies with these two demands of the statute, then I say there is nothing remaining for the board of examiners to do but to indorse the diploma as satisfactory,—an act in no sense judicial, and one to compel the performance of which a mandate will issue. Eliminating from the allegations of the petition all immaterial matters, it still fairly shows a compliance with the two foregoing demands of the statute. It is alleged "that, at the time of making such presentation and demand, he (petitioner) furnished to defendants evidence satisfactory to the defendants that he was the person named in said diploma, and that the same had been issued to him as stated in said diploma." We also find the further allegation: "Plaintiff, on his information and belief, alleges that at the time defendants refused to indorse his said diploma and issue said certificate, that the defendants, as such board of dental examiners, were satisfied that said college was a reputable college." The latter allegation is strictly in accordance with the terms of the statute, and the former, by a fair and liberal construction, is also sufficient.

Although holding the petition satisfactory in law, still plaintiff's troubles are by no means over. Allegations of fact are not difficult to make. Proof of the facts alleged is the final test of a meritorious case. And here proof of facts to fill the measure furnished by the aforesaid allegations of the petition is wanting. In the answer to the petition, the board denied that it was satisfied that the college issuing the diploma was a reputable medical college, and also denied that satisfactory evidence was furnished to it that petitioner was entitled to said diploma. Upon these issues evidence was introduced, and, although findings of fact thereon were made in favor of petitioner, still in view of the construction of the statute, as declared in the main opinion, and in which construction I heartily concur, those findings of fact, as to one of the allegations at least, are without support in the evidence; and a reversal of the judgment necessarily results. The law delegated to the board of examiners the power to hear and determine certain facts, and its determination as to those facts was beyond review by the superior court. The question for the superior court to decide was not as to the correctness of the board's decision, but, rather, what did the board decide? The vitality of petitioner's case is found in the two allegations I have quoted from his petition; and, under the evidence introduced at the hearing before the trial court, it is a certainty that the petitioner did not furnish the board evidence satisfactory to it of his right to the diploma presented. It therefore follows that, as to one of the imperative demands of the statute, petitioner failed in his proof, and the relief asked for must be denied. For these reasons, I concur in the judgment.

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116 Cal. 351

## BUSWELL v. BOARD OF SUP'RS OF ALAMEDA COUNTY et al. (S. F. 325 and 366.)

(Supreme Court of California. March 23, 1897.)

EQUALIZATION OF TAXES—COUNTY BOARD—EXTENSION OF TIME—CONSTRUCTION OF STATUTE.

1. The state board of equalization, which is authorized by Pol. Code, § 3705, to extend the time for the sitting of a county board by an order entered on its minutes and certified to the county auditor, cannot by a resolution authorize such extensions to be made by its clerk on application, and an extension so made by the clerk is void.

2. Pol. Code, § 3672, requiring county boards of equalization to continue in session until the business of equalization is completed, "but not later than the third Monday of July," is directory only as to the limitation of time; and, under section 3885, providing that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law," an equalization completed 10 days after the third Monday of July, which does not injuriously affect the individual rights of a taxpayer, is valid.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by E. G. Buswell against the board of supervisors of Alameda county and others to have declared void an order equalizing assessments. From the judgment, and from an order denying a new trial, defendants appeal. Reversed.

**Chas. E. Snook and L. S. Church, for appellants. Wm. R. Davis and W. Lair Hill, for respondent.**

HENSHAW, J. These are separate appeals by different defendants from the judgment and from the order denying a new trial. They may be considered and disposed of together. The following facts present, in brief, the matter of plaintiff's complaint: He is a taxpayer of the county of Alameda. Within the time required by law the assessor of the county made his assessment, completed his assessment book, and duly delivered the latter to the board of supervisors. Upon the first Monday of July, 1895, the board of supervisors met as a board of equalization to examine and equalize the assessment so made, "and did then and thenceforth, until and including the 15th day of July, continue from day to day" to equalize the assessment. On the 10th and 12th days in July two pretended orders of the state board of equalization were entered upon the minutes of the state board and certified to the county auditor, which orders purported to extend the time for the sitting of the county board of equalization until the 26th day of July. The state board of equalization never in fact passed or adopted either of these orders, and they were without authority and void. The board of supervisors continued to sit as a board of equalization daily, and upon July 25th, by its order, raised the assessed valuations by the assessor theretofore placed upon certain pieces, and decreased the assessed valuations by the assessor theretofore placed upon other pieces of property, with the result of decreasing the aggregate value fixed by the assessor in the sum of over $1,500,000. A decree is sought declaring the order of the county board of July 25th, by which this reduction was effected, to be null and void, and to compel recognition, upon the part of the officers, of the assessment made by the assessor.

Many grounds of demurrer were interposed to this complaint, but they will be passed by in order that we may come to the paramount question in the case: Was the board of supervisors of Alameda county sitting as the county board of equalization upon July 25th? Section 3672 of the Political Code provides that: "The board of supervisors of each county must meet upon the first Monday of July in each year to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose from time to time, until the business of equalization is disposed of, but not later than the third Monday of July." In 1895 the first Monday of July was the 1st day of the month, and the third Monday fell upon the 15th. Section 3705 of the Political Code declares that "the state board of equalization may by an order entered upon its minutes, and certified to the county auditor of any county, extend, for not exceeding twenty days, the time fixed in this title for the performance of any act * * * by the county boards of equalization." That this section empowers the state board to prolong the time for the sittings of county boards of equalization is unquestioned. Upon the trial it was made to appear that at a date prior to these transactions the state board of equalization, by resolution spread upon its minutes, had authorized its clerk, upon application made, to issue orders for extension of time "as the act of the board." The pretended orders to the Alameda county board were issued by the clerk pursuant to this authority. The state board was not in session at the dates of the orders, and never passed or adopted them. When judicial or quasi judicial powers are vested by law in a public officer, or powers calling for the exercise of discretion, it needs no citation of authority to show that they may not be delegated, and that a pretended exercise of them in advance of a showing of need for present action and determination is nugatory. These orders, then, being without efficacy, it follows that the proceedings of the county board after July 15th must derive validity from some other source, or they are void.

Section 3885 of the Political Code provides that "no assessment, or act relating to assessment or collection of taxes, is illegal on account of informality, nor because the same was not completed within the time required by law." The equalization of the assessor's assessment by the county board is an act relating to assessment, and it is nothing else. It is a general rule, even in the absence of such a statutory enactment as the foregoing, that the provisions as to the time upon which or within which acts are to be done by a public officer regarding the rights and duties of others are directory, unless the nature of the act or language of the legislature makes it clear that the time fixed is by way of limitation. Payne v. City of San Francisco, 3 Cal. 122; Hart v. Plum, 14 Cal. 149; People v. Eureka Lake & Yuba Canal Co., 48 Cal. 143; State v. W. U. Tel. Co., 4 Nev. 338; State v. North Belle Mill & Mining Co., 15 Nev. 386. Section 3885, above quoted, transforms the general judicial interpretation into a matter of positive law, and removes any possibility of doubt. The time provisions relative to the assessment and collection of taxes, found in the various sections of the Political Code, are designed for the convenience of the officers, and furnish a fit and orderly plan by which the successive duties imposed upon them may be performed without clash or interference the one with the other. The taxpayer may only be heard to complain when by reason of delay he has been debarred of some statutory right, and thereby suffers injury. No such showing is here made. No rights of plaintiff were thwarted or impaired. The county board completed its work upon the 25th of the month, 10 days after the third Monday. It had consumed but half of the time which the statute contemplates might have been allowed to it by the state board. During that 10 days no intermediate acts looking to the assessment were to have been performed by any officer, and the rights of none of the public were interfered with. The attack of plaintiff is, therefore, purely technical, and depends upon the contention that the provisions of section 3672 of the Political Code were mandatory. That this view cannot be sustained is made apparent, not only by the general rule of interpretation for such provisions, but also by the express terms of section 3885. The sittings of the county board did not exceed the time contemplated by law to which they might have extended, interfered with no rights of the plaintiff, and were not illegal under section 3885 of the Political Code. The judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.

116 Cal. 339

## SPRECKELS et ux. v. SPRECKELS.

(S. F. 430.)

(Supreme Court of California. March 23, 1897.)

COMMUNITY PROPERTY — HUSBAND'S POWER OF DISPOSITION — CONSTITUTIONAL LAW — VESTED RIGHTS—PARTIES.

1. Under Civ. Code, § 679, providing that "the ownership of property is absolute when a single person has the absolute dominion over it"; and section 172, which, before amended (Act March 31, 1891), provided that "the husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate,"—the husband was the absolute owner of the community property, in which the wife had no vested right till the dissolution of the marriage.

2. Act March 31, 1891, amending Civ. Code, § 172, which had before provided that a husband should have the management and control of community property "with the like power of disposition (other than testamentary) as he has of his separate estate," by adding, "provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto," is unconstitutional as to community property acquired before its passage, in that it deprives the husband of a vested right.

3. The wife cannot be joined as plaintiff in an action to recover community property.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Claus Spreckels and Anna C. Spreckels, his wife, against Rudolph Spreckels. From a judgment entered on a demurrer to the complaint, and from an order dissolving an injunction, plaintiffs appeal. Affirmed.

Delmas & Shortridge, for appellants. Rothschild & Ach, for respondent.

TEMPLE, J. This is an appeal from a judgment entered upon demurrer to the complaint, and from an order dissolving an injunction. The plaintiffs are husband and wife, and sue to recover certain corporate stock. It is averred in the complaint that the plaintiffs intermarried July 11, 1852, and that on the 31st day of July, 1893, they owned the corporate stock, as community property, which on that day the plaintiff Claus Spreckels voluntarily, and without any consideration, and without the consent of his wife, the other plaintiff, transferred as a gift to the defendant. The said Anna C. Spreckels has never consented, in writing or otherwise, to said transfer or gift. The complaint contains many other allegations which, however, are not material to this discussion. The complaint was demurred to on various grounds, and among them that the complaint does not state sufficient facts to constitute a cause of action, and there is a misjoinder of parties plaintiff, in that the wife is joined with her husband as plaintiff in an action to recover community property.

The first point made by the demurrer rests upon the assumption that the complaint shows that the stock became the community property of the plaintiffs prior to the passage of the amendment to section 172 of the Civil Code, which was made March 31, 1891. The complaint does not state when the stock was acquired, and, as this is a material question, it is contended that plaintiffs must be deemed to have stated their case as favorably to themselves as the facts would warrant, and therefore it must be held that the stock was acquired prior to that date. As appellants' counsel seems to acquiesce in this claim, I shall so consider it. Prior to the amendment, the section read as follows: "The husband has the management and control of community property, with the like power of disposition (other than testamentary) as he has of his separate estate." The amendment consisted in adding the following: "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto." Respondent contends that the amendment cannot be held to apply to community property acquired prior to the amendment, nor to marriages entered into prior to that time. So construed, he contends, it would deprive the husband of a vested proprietary right in the community property, to wit, the power to dispose thereof without the consent of his wife, and without a valuable consideration; and that it also impairs the obligation of a contract. It is said that the law was at the time of the marriage that the husband had the management and control of the community property, with the like absolute power of disposition, other than testamentary, as of his separate estate, and that this became a part of the contract by which the marriage was constituted; and to deprive the husband of this power is to impair the obligation of that contract. To determine whether the amendment, if applicable to community property acquired prior to its passage, would deprive the husband of a vested right of property, it is necessary to consider what were the rights of husband and wife in the community property at the date of its passage. The constitution does not mention community property, but does define what shall constitute the separate property of the spouses. Const. art. 20, § 8. The Civil Code (section 161) provides that the husband and wife may hold property as joint tenants, tenants in common, or as community property. Then, having defined separate property, it provides that all other property acquired after marriage by either husband or wife or both is community property. Section 167 enacts that the community property is not liable for the debts of the wife contracted after marriage; section 168, that the earnings of the wife are not liable for the debts of the husband; and section 169, that the earnings and accumulations of the wife and of her minor children, who are in her custody, while she is living apart from her husband, are her separate property. Section 172 is the section now under consideration. Section 682 of this Code is: "The ownership of property by several persons is either: (1) Of joint interests; (2) of partnership interests; (3) of interests in common; (4) of community interest of husband and wife." Section 687 again defines community property. This court has held, after mature consideration, that upon the death of the husband the wife takes one-half of the community property as heir. It has been held that the husband can make a gift of the community property to the wife, and convert it into her separate estate. To this it may be added that the wife, if possessed of business capacity, can obtain permission to carry on business in her own name as a sole trader, and that the profits of such business are her separate property. Prior to the amendments of 1891 the Code vested in the husband, with reference to the community property, all the elements of ownership, and in the wife none. If the rights of the parties in the community property are the same, then the law is partial to the wife. She can easily manage that all her earnings and accumulations shall be her separate property. The husband can in no way obtain a similar advantage. If the wife is living separate and apart from the husband, through her own fault, her earnings and accumulations are her own. Yet, if the husband, during the same time, accumulates a fortune, it is community property. There is no mode in which community property can be converted into his separate property. As to all the world, except the wife, there was, prior to this amendment, no distinction between the community estate and the separate estate of the husband. If suit were brought upon a liability incurred in a business, the profits of which would be community property, and judgment recovered, execution could be levied upon the separate estate of the husband, and the debt entirely satisfied therefrom. His separate estate, during the entire marriage, is liable to be taken for community debts, and of course furnishes a credit in aid of community business. If the community loses, the loss may fall upon his separate estate, but his separate estate cannot profit by the success of the community. The separate property of the wife is exempt from all these liabilities, but, on the other hand, the community property is liable for debts incurred by the husband in the management of his separate estate. Now, all these differences point to the fact that the husband is the absolute owner of the community property. Therefore it is that his liabilities incurred in the management of the separate estate can be enforced against the common property, while those of the wife cannot be. And therefore she, under certain circumstances, can accumulate property which shall not belong to the community. If it went to the community, it would belong to the husband, and under the circumstances it is not thought just that he should have it. He needs no corresponding privilege, because the community property is his as absolutely as is his separate estate. So he cannot convert it into his separate estate, and, if the property belonged to the community, and the husband had only an agency, perhaps he could not give it to his wife.

Now, then, we have this state of the case: The statute provides that the husband and wife may hold property as community property. Section 161. It defines what shall constitute community property. It defines ownership (section 654), and then gives to the husband complete legal ownership of the community property (section 172), and confers upon the wife no element of ownership whatever. Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in Godey v. Godey, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase "a mere expectancy, * * * it is at the same time * * * so vested in her that [the] husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it." The testamentary power is not an essential incident to property, and depriving the husband of such power with reference to the community estate did not take from him any right of property. It was competent for the legislature to deny to the husband the right to dispose of his separate estate by will, and to provide that upon his death all should go to his widow, subject to the payment of his debts. Should the legislature now so provide, it would not deprive the husband of any vested right to property, or give the wife an interest in his estate during his life. If the property did not belong to the husband, there would be no occasion for a law limiting his testamentary power with reference thereto. The original statute, which practically adopted the Mexican system as to gananciales, was held to constitute such a limitation. Beard v. Knox, 5 Cal. 256. That gave the wife a nominal estate during the marriage, which became an actual estate upon its termination. If the husband cannot make a valid transfer of the property for the purpose of depriving the wife of it, that does not show a vested right in her. This is explained in the very case quoted as authority, in Godey v. Godey. In Smith v. Smith, 12 Cal. 217, Justice Field said: "Voluntary conveyances, given on the eve of marriage for the purpose of depriving the intended wife of her right of dower, where that common-law right exists, are fraudulent as against her claim. This was so adjudged in Swaine v. Perine, 5 Johns. Ch. 482. And upon the same principle, a voluntary disposition by the husband of the common property, or a portion thereof, for the like purpose of depriving the wife of her interest in the same, must be held ineffectual against the assertion of her claim." Nor can he put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony. Murray v. Murray (Cal.) 47 Pac. 37. So we see a mere expectancy, without any vested property right at the time the fraud was committed, is sufficient to enable the person who has the expectancy to maintain the action after his right has become vested. The husband's ownership of one-half of the community estate is, in a sense, conditional. It may terminate upon the happening of a possible event. Until then he is, however, absolute owner as defined in the Code. Civ. Code, §§ 678–680.

The marital community was not organized for the purpose of accumulating property, and the husband owes no duty to the community, or to the wife either, to labor or accumulate money, or to save or practice economy to that end. He owes his wife and children suitable maintenance, and if he has sufficient income from his separate estate for that purpose he need not engage in business, or so live that there can be community property. If he earns more than is sufficient for such maintenance, he violates no legal obligation if he spends the surplus in extravagance, or gives it away. The community property may be lost in visionary schemes or in mere whims. Within the law he may live his life, although the community estate is dissipated. Of course, I am not now speaking of his moral obligations. We derived the system of community estate from the Mexican law, which prevailed here before the acquisition of the territory. The system was unknown to the common law, and it has no better name for the interest of the wife during the marriage than "a mere expectancy." The Mexican jurists spoke of it as a feigned and fictitious ownership, or as merely nominal, and it is contrasted with the ownership of the husband. That is called the actual or true ownership. In Panaud v. Jones, 1 Cal. 488, it is said: "The wife, says Febrero (1 Feb. Mej. 225, § 19), is clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the marriage; but after his death it is transferred to her effectively and irrevocably. * * * The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the gananciales, since even during the marriage he has, in effect, the irrevocable dominion," etc. In Van Maren v. Johnson, 15 Cal. 308, it is said that the estate of the common property is in the husband, and he may dispose of it as he can of his separate estate; the interest of the wife being a mere expectancy. Guice v. Lawrence, 2 La. Ann. 226, is cited as authority. In Packard v. Arellanes, 17 Cal. 525, that case is again cited as authority, in which it is said that during the life of the husband the wife cannot say she has gananciales,—that is, community property,—but the husband, during marriage, is "real y verdadero dueno de todos, y tiene en el effecto su dominio irrevocable"; where, too, the interest of the wife was said to be revocable and fictitious. In Escriche, under "Bienes Gananciales," it is said that the husband owns the community property both nominally and in fact,—en habito y en acto; while the wife's ownership is only nominal,—en habito,—becoming an actual estate upon the dissolution of the marriage. In Ballinger on Community Property the Mexican law is stated as above,—the wife had only a feigned or fictitious estate, which ripened into a legal estate upon the termination of the marriage; and he adds, referring to the state of things under the former statute of this state, which provided that upon the death of the wife prior to the death of the husband one-half of the community property should go to her heirs, that, since the statute failed to provide that upon the death of the wife one-half should go to her estate, her intangible interest did not ripen into a legal estate. Section 35. Accordingly it was held in Packard v. Arellanes that under such circumstances the interest of the wife could not be administered upon, and that her heirs did not acquire the estate by inheritance from her upon her death before her husband, but took as persons designated by the statute. Speaking of the wife's interest, it is there said: "Such interest constitutes neither a legal nor an equitable estate, and there is, therefore, nothing in it for a court of probate to act upon. If, under the statute, the title of the husband, upon the death of the wife, is divested as to any portion of the property, such title passes directly to the descendants of the wife, and they take it subject to the liability of the property to be absorbed in the payment of debts."

As the law stood prior to the amendment of 1891, I doubt if a happier phrase could have been devised to express the interest of the wife in the community than that used by Judge Field in Van Maren v. Johnson, "a mere expectancy." It may be said to be a right—not to property, but as against the community—to take one-half of the residue after payment of debts in case the marriage be dissolved during her life. A somewhat similar state of things exists in France under the Code, and it has been there said that the wife is not "proprie socia, sed speratur fore. She has une simple esperance to share in such property as may be found at the dissolution of the community undisposed of by the husband." 1 Burge, Col. Law, 368. The system of the community in California, Louisiana, and Texas was inherited from Spain or Mexico, and simply continued with such changes as were deemed desirable. It was adopted in Washington, Nevada, Idaho, and Arizona. The systems are not exactly alike. In some states—Texas, Louisiana, and Idaho—profits, increase, and income of separate property also became community property. It is not so here. If the wife has separate property, the increase derived from it is also separate property; only the earnings and the profits gained in business, and the increase of property so acquired, is community property; and, as we have seen, the wife may so manage as to convert all gains derived from business transacted by her into her separate property. In Washington the husband cannot convey real estate belonging to the community without joining the wife. There the husband and wife may at any time agree as to the status of the community property, such agreement to take effect at the death of either, and either may give, grant, or sell to the other his or her interest in community property. Naturally, in that state it has been held that the wife has a vested interest in the community property. Ballinger, Commun. Prop. § 78. In no other state, so far as I am aware, has there been any such holding, although in Texas it has been said that she has an equitable interest.

It is suggested that the sole ownership of the community property—if it be conceded to the husband—is vested in him by statute, and may be taken from him by statute. All ownership has been said to be the offspring of law, but it does not, therefore, follow that all property rights can be divested by law. In fact, I see no connection between the premise and the conclusion. Whether the law of the marriage relation can be changed so as to affect the status of property acquired thereafter is another question. The community property, as a rule, constitutes the earnings, gains, and savings of a man during his whole lifetime. If he can make presents to his friends, provide for indigent relatives, or make advancements to his children, it must be from this property. To deprive him of this power is certainly to divest him of a property right. This argument need not, however, be pursued further, because counsel admit that, if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional.

Entertaining these views, it is unnecessary to consider the other contention under this head, that the amendment violates the obligations of a contract. It is clear, I think, that the operation of the amendment must be confined, at least, to community property acquired after its passage. I think the ruling sustaining the demurrer to the complaint on the ground that there is a misjoinder in that the wife cannot be joined as plaintiff in an action to recover community property, must also be sustained; and that without reference to the question as to the nature of the wife's interest in the community property. If the gift was void, the property still remained community property, and was as much under the management and control of the husband as any other portion of the community property. To hold that the wife is a necessary or proper party in this case would be to hold that she is such in every case brought to recover community property. The statute, as amended, does not give her a right of action in this case, but leaves it to the general rule. It has been held for near half a century that she is not a proper party to such actions. The judgment and order are affirmed.

We concur: HENSHAW, J.; HARRISON, J.; McFARLAND, J.

BEATTY, C. J. (concurring). I concur in the judgment, but upon a ground somewhat narrower than that taken in the opinion of Justice TEMPLE. It does not seem to me necessary, in order to sustain the ruling of the superior court upon this demurrer, to go to the extent of holding the proviso added to section 172 of the Civil Code by the act of 1891 an unconstitutional attempt to take away from the husband his vested rights in community property acquired prior to that date. I am not at all clear that it does impair any vested right. But, allowing the law to be constitutional as to all community property, irrespective of the date of its acquisition or of the marriage by which the community was formed, it still does not go far enough to sustain this action. If the husband makes a gift or voluntary transfer of community property, the transfer is good against him. He has no right of action to recover it back. The only person who, in any case, has a right to complain, is the wife, and she cannot maintain an action to revoke the gift until she has been injured by it. Upon the dissolution of the community by the death of the husband, or by divorce, I think that in estimating her share of the community property she would be entitled to have any property given away by the husband subsequent to the act of 1891 reckoned as a part of the community assets, and that she would be entitled to reclaim from the donee enough to make up her half of the whole, if less than one-half remained undisposed of. In all ordinary cases this would be the proper and sufficient remedy for any infringement of her rights. It is possible that a case might arise in which the circumstances would warrant the institution of an action by her before the dissolution of the community, but no such circumstances are shown to exist in this case. It does not appear that the amount of the gift was so disproportionate to the amount of the community property as to endanger the right of the wife to her full share on the dissolution of the community, or to deprive the husband of the means of supporting the wife and others dependent upon him. In short, it does not show any present or prospective injury to her, and he, of course, has no ground of complaint. If the wife survives her husband, she will get her full share of the community property out of that which remains. If the husband survives the wife, he will get everything that he has not voluntarily parted with. On this ground I place my concurrence in the judgment.

5 Cal. Unrep. 645

## INGHAM et al. v. WEED et al. (L. A. 211.)

(Supreme Court of California. March 31, 1897.)

Mortgage—Action to Foreclose—Parties.

1. Where one who is obligated, as between himself and a mortgagor, to pay a portion only of the mortgage debt, pays such portion, and afterwards pays the balance due, the payment does not extinguish the mortgage as to such balance.

2. The assignee of a mortgage, by an assignment absolute on its face, may maintain an action to foreclose in his own name, though, by a collateral agreement, he may be bound to account for the proceeds to another.

3. One who has transferred all his interest in mortgaged property is not a necessary party to an action to foreclose.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by E. A. Ingham and R. D. List, trustee, against J. Irving Weed, James P. McCarthy, Edward McCarthy, the McCarthy Company, L. A. Thompson, W. E. Witter, and G. P. Lyman, for the foreclosure of a mortgage. Judgment for plaintiffs, from which, and from an order denying a motion for new trial, defendants Weed, the McCarthys, and the McCarthy Company appeal. Affirmed.

H. H. Appel, and McKeeby, for appellants. Wicks & Wicks & Macdonald and H. T. Gordon, for respondents.

BELCHER, C. The plaintiffs brought this action to foreclose a mortgage, given to secure payment of two promissory notes of which they were the assignees. They obtained a judgment and decree of foreclosure as prayed for, from which, and from an order denying their motion for a new trial, the defendants Weed, the McCarthys, and the McCarthy Company, a corporation, appeal.

It appears from the record that prior to March 1, 1888, Edward McCarthy purchased the mortgaged premises from Charles E. Pittman and others. He paid part of the purchase money down, and gave to the sellers a mortgage for the balance. On March 1, 1888, this mortgage had been reduced, by payments made thereon from time to time, to $15,000, bearing interest at the rate of 10 per cent. per annum. Prior to that time Edward McCarthy had made contracts with various parties, and, among others, with respondents Thompson, Witter, and Lyman, to sell to them undivided interests in the said lands for prices agreed upon, to be paid in installments. On March 1, 1888, a written agreement was entered into between Edward McCarthy, as party of the first part, the respondents Thompson, Witter, and Lyman and all the other contractors for undivided interests, as parties of the second part, and J. Irving Weed, as party of the third part. The agreement provided that the party of the first part should convey the whole tract to the party of the third part, in trust, to make sales and conveyances and to distribute the proceeds thereof according to the agreement. It conferred upon the trustee full power "to grant, bargain, sell, and convey all or any portion of said land for such price and upon such terms as he shall deem best." And, as to his duties, it contained the following provisions: "It is further agreed that the trustee aforesaid shall receive and collect all moneys for sales of the land aforesaid, and pay all taxes, commissions, expenses of sale of all kinds, and improvements, authorized by the parties of the second part, and shall, on or before the first day of July, A. D. 1888, declare a dividend in favor of the second parties of any and all moneys in his hands, in proportion to the interests of the respective parties therein, as shown by the contracts with Edward McCarthy, aforesaid, and shall, out of said dividends, pay to Edward McCarthy the amounts due or to become due to him from second parties on said contracts; * * * and said trustee shall declare dividends and apply the proceeds in the same manner every three months thereafter, until all the installments on said contracts have been paid, and all of said property shall have been disposed of. It is further understood and agreed that whereas there is now a mortgage on said property to the amount of $15,000, with interest at ten per cent. from March 1, 1888, of which Edward McCarthy has assumed the payment, that, in case it becomes necessary or expedient to change or renew said mortgage, the trustee shall, and he is hereby authorized to, execute such mortgage in his own name, and the amount received by said trustee from said second parties, or in their behalf, applicable to the installments due to Edward McCarthy, shall be applied to the liquidation of said mortgage, and shall be credited on the contracts of Edward McCarthy to second parties in the proportions to which they are respectively entitled thereto." Contemporaneously with the execution of this agreement, Edward McCarthy conveyed the land to Weed by a deed absolute on its face, the trust being expressed only in said agreement. Subsequently, the original mortgagees, the Pittmans, demanded payment of a part of the debt and the execution of a new mortgage to secure the balance. Charles McCarthy thereupon paid $5,000 on their $15,000 mortgage, thus reducing the indebtedness to $10,000; and for that balance, on March 27, 1889, James P. McCarthy and Edward McCarthy executed to the Pittmans the two notes in suit, each for $5,000, one payable one and the other two years after date, and the said McCarthys and the said Weed executed the mortgage in suit to secure payment of said notes. Weed never sold any part of said tract of land, as contemplated by the trust agreement; but on November 1, 1892, it being then deemed expedient by all the parties to terminate the trust, he conveyed to each of the beneficiaries an undivided interest in the property, equal to his share or interest therein, as follows: To Edward McCarthy, $^{25}/_{40}$; to L. A. Thompson, $^{3}/_{40}$; to W. E. Witter, $^{2}/_{40}$; to G. P. Lyman, $^{2}/_{40}$; to Otto Freeman, $^{2}/_{40}$; and to Andrew Glassell, $^{6}/_{40}$. Subsequently the said interests of McCarthy, Freeman, and Glassell were conveyed by them to the McCarthy Company, defendant, thus vesting in it title to $^{33}/_{40}$ of the whole property. While the notes were held by the payees thereof, the Pittmans, payments of interest and principal, aggregating $7,495.86, were made and indorsed upon them from time to time. Afterwards the balance due on the notes was paid, mostly by the respondents Thompson and Witter, but in part by the plaintiffs; and thereupon, at the request of said respondents, the notes were assigned by the payees to the plaintiffs.

In support of their appeal, appellants contend that the plaintiffs cannot maintain this action to foreclose the mortgage for several reasons: First, because Thompson and Witter were bound by contract to pay off the mortgage, and did so, and it was then extinguished; second, because the plaintiffs have no interest, legal or equitable, in the notes and mortgage, but are acting simply as the agents of Thompson and Witter; third, because the deeds of the trustee to the several parties who had contracts for interests in the land were to be delivered only upon certain conditions, which were never complied with, and hence they were delivered without authority of the grantor, and passed no title to the grantees; fourth, because the only remedy of Thompson, Witter, and Lyman was to file a bill for contribution against their associates in the transaction; fifth, because Charles McCarthy was a necessary party to the suit.

1. There is no evidence in the record showing or tending to show that Thompson and Witter ever personally undertook to pay the mortgage debt. They did not execute the notes or mortgage, and the only obligation resting upon them in this regard is that evidenced by the agreement of March 1st, to the effect that Weed, as trustee, might execute the mortgage, and might receive the amounts due from the parties of the second part on their contracts with Edward McCarthy, and should apply the same to the liquidation of the said mortgage. This at most created an obligation on the part of each of the parties of the second part to pay his proportion of the debt. But the evidence shows that Thompson, Witter, and Lyman each paid his proportion of the debt, and then paid or caused to be paid the balance thereof. This did not extinguish the mortgage as to such balance, but left it a subsisting lien to secure its payment.

2. The evidence shows that each of the plaintiffs paid or obligated himself to pay a part of the money used to take up the notes from the Pittmans. But assuming it were otherwise, and that Thompson, Witter, and Lyman paid to the Pittmans the full amount due on the notes, and then had them assigned to the plaintiffs as their agents for collection, still the plaintiffs were not thereby deprived of the right to sue upon the notes and mortgage in their own names. The assignment vested in them the entire legal title, and they became the real parties in interest. Speaking upon this subject, Mr. Pomeroy, in his work on Code Remedies (3d Ed., § 132), says: "It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action, is absolute in its terms, so that, by virtue thereof, the entire apparent legal title vests in the assignee, any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds, 'and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional,' does not render him any the less the real party in interest. He is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account. This is the settled doctrine in most of the states,"—citing authorities. And see, also, to the same effect, McPherson v. Weston, 64 Cal. 275, 30 Pac. 842; Grant v. Heverin, 77 Cal. 263, 18 Pac. 647, and 19 Pac. 493; Toby v. Railroad Co., 98 Cal. 490, 33 Pac. 550.

3. That the deeds were executed by Weed with the consent of all the beneficiaries sufficiently appears from the evidence, and it also appears that they were in fact delivered to the grantees, and by them placed on record. And, so far as appears, no objection to the validity of any one of them, for want of delivery or other reason, was ever raised by any party until after the commencement of this action. Under the circumstances shown, it must therefore, in our opinion, be held that the delivery was sufficient to pass title to the grantees. See Witter v. McCarthy Co. (Cal.) 43 Pac. 969, Thompson v. McCarthy Co., Id. 971, and Lyman v. McCarthy Co., Id. 971 et seq., where the validity of three of the said deeds was called in question, and upheld. But assuming that the deeds were not properly delivered, and that no title to undivided interests in the property was passed by them to the grantees, then the title to the whole property still remained in the grantor as trustee. No objection to the validity of the notes and mortgage is raised, and, under these circumstances, this action can and should be sustained as one brought against the holder of the legal title to the property and the several parties having beneficial interests therein under contracts of purchase.

4. If this action could not be maintained, then, clearly, the only remedy of Thompson, Witter, and Lyman would be an action for contribution; but, as we have seen that the action can be maintained, it is enough to say that they should not be relegated to another action, but may rest on their rights in this one.

5. Was Charles McCarthy a necessary party to the suit? The law is well settled that

only those persons are necessary parties to a foreclosure suit who have some beneficial interest in the mortgaged property or in the demand secured. It is true that McCarthy paid off $5,000 of the $15,000 mortgage, and some interest and expenses that had accrued; but subsequently he transferred all his interest in the property to others, and, at the time this action was commenced, that interest was, and still is, vested in the McCarthy Company. He had consequently no interest in or lien or claim upon the property or demand secured, and was therefore, in our opinion, not a necessary or proper party to the action.

The other points discussed by counsel do not require special notice. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 651

## IRISH v. PAULEY. (Sac. 160.)

(Supreme Court of California. March 31, 1897.)

CONTRACT—PERFORMANCE.

Under a contract to furnish logs to a mill, to be floated to the mill the next spring, if practicable, and, if not, then the spring following, where it is found that delivery the first spring was not practicable, a delivery the second fulfills the contract; and no damages are recoverable for the delay, or for the depreciation in value of the logs during the year.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Action by John B. Irish against Benjamin Pauley on a contract. Judgment for plaintiff, from which, and from an order denying a motion for new trial, defendant appeals. Affirmed.

F. D. Soward, for appellant. Frank R. Wehe and John B. Irish, for respondent.

SEARLS, C. Action upon a verbal contract to cut and deliver sawlogs at the sawmill of defendant, on the East Fork of the North Fork of the North Yuba river, county of Sierra. The cause was tried by the court without the intervention of a jury. Written findings were filed, upon which judgment was entered in favor of plaintiff for $560 and costs. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

We have found but little aid from the statement of facts by the counsel for the respective parties in their briefs. The statement of each is predicated upon the evidence in his own behalf, and seems to ignore that of his adversary. As there was a substantial conflict in the evidence upon nearly all the issues in the case, and as the court below found in favor of the plaintiff, counsel for respondent is justified in assuming the facts to be in line with the testimony of his own witnesses.

The first point made for reversal is that "the decision is against law, as the judgment is based upon contradictory findings." It is urged under this head that the third finding contradicts the sixth, and such others as find that plaintiff complied with all the conditions of his contract. To the better understanding of the finding assailed, and of some others to which similar objections are made, we give a synopsis of such of the findings as shadow forth an outline of the case. (1) In August, 1893, plaintiff and defendant entered into a verbal contract by which plaintiff agreed to cut and deliver at defendant's sawmill, on the East Fork of the North Fork of the North Yuba river, Sierra county, sawlogs containing from 100,000 to 150,000 feet of lumber; to be paid therefor, on delivery, $8 per 1,000 feet. (2) The logs were to be cut into special lengths, of 12, 14, 16, 18, and 20 feet, and at such place that they could be floated down the East Fork to defendant's mill. They were to be floated in the spring of the year by water from the melted snow; and, if practicable, were to be floated in the spring of 1894, but, if not practicable, then in the spring of 1895. (3) In the spring of 1894 the plaintiff and defendant measured and counted the logs in the forest where cut, and found there were 417 logs, containing 140,000 feet of lumber. Such measurement was not intended as a modification or change of the contract, under which they were to be delivered at the dam or boom of defendant. (4) In the spring of 1894 plaintiff made an effort to float and deliver the logs, but was unable to do so by reason of a snowslide which blocked the river, and which, after a reasonable effort, by blasting, etc., he was unable to remove. (5) In the spring of 1895 plaintiff delivered to the defendant, at his mill, 100,000 feet of lumber, in 300 logs, and there then became due him $800. (6) Plaintiff complied with all the terms of his contract, and defendant has paid nothing on account thereof except the sum of $140. (8) The logs were, under the contract, fashioned according to the specifications furnished by defendant, and would not have been salable in the general market. (9) Defendant accepted the 100,000 feet of lumber. There are five more findings of fact, to which we will refer as occasion requires. We fail to see any conflict whatever between the third and sixth findings. The third is to the effect that in 1894 defendant measured and counted the logs, and found there were 417 logs, aggregating 140,000 feet of lumber. The contract called for 100,000 feet to 150,000 feet of lumber, and when 100,000 feet was delivered the contract was satisfied. This being so, the fact that the logs, as measured and counted in the woods, consisted of 417 logs and measured 140,000 feet, constituted no conflict. Plaintiff could comply with his contract by delivering anywhere from 100,000 feet up to 150,000 feet of lumber. The measurement of the logs in the woods was doubtless more convenient than in the dam or boom where they were to be delivered, and, had plaintiff succeeded in floating them all to the mill, it would have saved labor, nothing more.

It is further objected that finding 14, which is to the effect that plaintiff delivered no logs in 1894, but did deliver 300 logs in 1895; that they were cut and prepared for delivery in 1894; and that by the delay in delivery they were injured to the extent of $1 per 1,000 feet, etc.,—is in conflict with finding 6 and a portion of finding 11, which are to the effect that such delay was no violation of the terms of plaintiff's contract. By the second finding it will be seen that the logs were to be floated in 1894, if practicable, and, if not, then in 1895; and the fourth finding shows that it was not practicable to so float them in 1894, and gives at length the reason therefor. We agree with the learned counsel for appellant that the injury to the logs by the delay is a false quantity, and immaterial, as it was not in violation of the contract, or by reason thereof that the injury occurred. The court deducted $1 per 1,000 from the amount of the judgment on account of such injury. The judgment being upon the special contract, and not upon quantum valebat, this deduction was not called for. But, as the error was in favor of appellant, he cannot be heard to complain.

The question of the loss sustained by defendant by reason of not having logs to saw in 1894 cuts no figure in the case. Had defendant's theory, that the logs were, under the contract, to be delivered in 1894, been sustained, the loss by reason of a violation of the contract might have become an important factor; but as plaintiff's theory, that they were to be delivered in 1894 or 1895, was upheld, and as he was found to have performed the contract fully on his part, there was no question of damages sustained by defendant, or profits lost by him, to be considered. The contention that only 100 logs were delivered to and accepted by defendant is in conflict with the findings and evidence.

There are some other points made, but they have no more merit than those already noticed. We have carefully examined the evidence. It is conflicting, to the last degree, but is quite sufficient to sustain the findings of the court. We recommend that the judgment and order be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

116 Cal. 382

## DANIELSON v. YOAKUM. (L. A. 198.)

(Supreme Court of California. March 31, 1897.)

CORPORATIONS — STOCKHOLDERS' LIABILITY — VOLUNTARY PAYMENT.

A stockholder being liable only for debts of the corporation incurred after he acquired his stock (Const. art. 12, § 3; Civ. Code, § 322), his payment of debts incurred prior thereto is voluntary, and cannot be recovered of one who sold him the stock.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Karen A. Danielson against George P. Yoakum. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry Bleecker and Cochran & Williams, for appellant. Allen & Flint, for respondent.

HAYNES, C. Action to recover damages alleged to have been sustained by the plaintiff by reason of false and fraudulent representations made by defendant, whereby she was induced to purchase from the defendant certain bank stock. A general demurrer to the complaint was sustained, without leave to amend, and judgment was thereupon entered for defendant, and plaintiff appeals therefrom.

Plaintiff purchased from defendant 36 shares of the capital stock of the City Bank of Los Angeles on November 3, 1892, and the complaint sufficiently alleges false and fraudulent representations made by defendant to induce her to purchase, to justify a recovery, if damages were sustained. The complaint, however, further alleges that plaintiff discovered the fraud on or about August 17, 1893, and brought an action to rescind said contract of purchase, and that a decree was rendered therein requiring the defendant to return the consideration paid by plaintiff for said stock, and that she, pursuant to said decree, delivered said stock to the plaintiff. The complaint then proceeds to allege "that at the time of the transfer of said stock the said City Bank was indebted to a large number of persons and corporations, and among them the following, in the amount set opposite their names" (enumerating more than 80 creditors, with the amount due to each); that on or about November 22, 1893, these claims were consolidated by assignment, and the assignees commenced an action against her to recover a ratable proportion of the said liabilities of said bank, and attached her property; and that on or about the 18th day of October, 1894, she paid on account of said claims the proportion thereof which said 36 shares bore to the entire subscribed capital stock, to wit, $984.10,—and claimed damages in that sum. All the liabilities against the bank which are set out in the complaint are distinctly alleged to have accrued before she purchased the stock, and she was therefore not liable thereon to the creditors of the bank. The stockholders in a corporation who are liable to its creditors are those who were stockholders at the time the indebtedness or liability was incurred by the corporation. Const. art. 12, § 3; Civ. Code, § 322; Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752. Respondent was liable for his proportion of those debts at the time he sold and transferred said stock to appellant, and was not released from his liability by the transfer. Civ. Code, § 322. As there existed no legal liability against appellant, her payment was voluntary, and does not constitute a cause of action against respondent for damages. It clearly appearing that the sum paid by appellant was solely upon debts incurred before appellant purchased the stock, the court did not err in sustaining the demurrer without leave to amend. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

116 Cal. 359

## WILLIAM HILL CO. v. LAWLER. (S. F. 178.)

(Supreme Court of California. March 26, 1897.)

DISTRIBUTION OF ESTATE — COLLATERAL ATTACK.

Code Civ. Proc. § 1666, declares that, on final distribution of an estate, the decree must name the persons and their shares, and shall be conclusive as to the rights of parties unless appealed from. Section 1678 provides that such distribution may be made though some of the heirs, etc., have conveyed their shares, and that such shares must be assigned to the person holding the same. *Held*, that a decree, after due notice, distributing to certain heirs a particular tract of the community estate, was, in the absence of an appeal, conclusive on one to whom the widow had conveyed an undivided half of said tract pending distribution.

In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the William Hill Company against John Lawler to quiet title. From a judgment quieting plaintiff's title to an undivided half of the land, and from an order denying a motion for new trial, plaintiff appeals. Reversed.

Lyman Green, T. J. Geary, and A. B. Ware, for appellant. J. C. Sims, for respondent.

HARRISON, J. Patrick Lawler died September 9, 1887, leaving, him surviving, a widow and certain children, and also leaving a last will and testament, which was admitted to probate by the superior court of Sonoma county October 25, 1887. In his will he appointed his widow, Bridget, and his son Patrick, executors thereof, and declared that his entire estate was community property, and recognized and confirmed the right of his surviving widow to one half thereof, and gave the remaining half to his two sons James and Patrick. December 21, 1887, his widow conveyed, by deed of gift, to her son John, the respondent herein, "all her undivided one-half interest in a tract" containing about 144 acres of land, a portion of the estate of her deceased husband. May 20, 1889, the executors presented to the superior court for settlement the final report and account of their administration of said estate, and at the same time a petition for the final distribution of the estate was presented to the court. The court appointed June 18th as a day for the hearing thereof, of which proper notice was given, and on said day made its order settling the account, and distributing the estate. In the decree of distribution the tract of land that had been conveyed by Bridget to the respondent was distributed to Patrick and James, and other portions of the estate were distributed in severalty to Bridget, while some portion of the estate was distributed in undivided interests to the three. The plaintiff herein, having succeeded to the interest of James and Patrick in the tract which was distributed to them as above stated, brought this action against the respondent to quiet its title thereto. The superior court rendered judgment quieting its title to the extent of an undivided half interest therein. From this judgment, and an order denying a new trial, the plaintiff has appealed, claiming that the court erred in refusing to quiet its title to the entire tract.

By filing the petition for the distribution of the estate, and giving the notice required by section 1665, Code Civ. Proc., the superior court acquired jurisdiction to distribute the estate "among the persons who by law were entitled thereto." The "distribution" of an estate includes the determination of the persons who by law are entitled thereto, and also the "proportions or parts" to which each of these persons is entitled; and the "parts" of the estate so distributed may be segregated or undivided portions of the estate. It is declared in section 1666 that "in the order or decree the court must name the persons and the proportions or parts to which each shall be entitled," and also "such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal." A proceeding for distribution is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, "subject only to be reversed, set aside, or modified on appeal." The decree is as binding upon him if he fail to appear and present his claim as if his claim after presentation had been disallowed by the court. In re Griffith's Estate, 84 Cal. 107, 23 Pac. 528, and 24 Pac. 381; Daly v. Pennie, 86 Cal. 552, 25 Pac. 67. The grantee of an heir or devisee, or any person who claims under an heir or devisee, is bound by the decree as fully as would be the heir or devisee himself if he had not made the conveyance. Section 1678, Code Civ. Proc., provides: "Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees." The provisions of this section extend to the distribution as well as to the partition which is provided in that chapter, and render the decree as conclusive upon those to whom the heirs have conveyed the estate as it "otherwise would have been upon such heirs, legatees or devisees"; and the decree is equally conclusive whether the estate is distributed to the persons in segregated parts or in undivided proportions.

What was decided in Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081, was that distribution to the heir of certain property which he had conveyed pending administration did not preclude his grantee from claiming the property as against him; that, by virtue of his conveyance, he was estopped from claiming the property under the distribution, as against his grantee. In that case it appeared that the grantee of the heir was not before the court when the distribution was made, and there was no issue upon her right to have the property distributed to her. In Re Vaughn's Estate, 92 Cal. 192, 28 Pac. 221, it was held that the grantee of the heirs was entitled to have the estate distributed to him, and the order of the superior court making a distribution to the heirs in opposition to his petition was reversed. This was a direct appeal from the order of distribution, and, as the superior court had manifestly disregarded the provisions of section 1678, its order was reversed. Whether the title of the grantee would have been affected by the distribution to the heirs if no appeal had been taken from the decree was not considered by the court, but there is nothing in the case which lends countenance to the proposition that the decree could be collaterally attacked. The averments in the petition that the heirs had conveyed the estate to the petitioner were not controverted, and there was no issue presented thereon for the determination of the court. If the heirs had taken issue upon these averments, the superior court would have been required to determine that issue, and its decision thereon would have been conclusive upon the petitioner as well as upon the heirs, "subject only to be reversed, set aside or modified on appeal." In re Burdick's Estate, 112 Cal. 387, 44 Pac. 734, it was determined by this court, after mature consideration, that the surviving widow takes her share of the community property by "succession" from the husband; and it consequently follows that a conveyance by her of her interest in any portion of the estate, pending administration and before distribution, has no greater effect than would a similar conveyance by any other heir.

The decree of the superior court made on the 18th of June, 1889, was a determination by that tribunal, in a matter wherein it had jurisdiction of the subject-matter and of all persons who might make any claim thereto, that Patrick and James Lawler were entitled to the property in question. As no appeal was taken from this decree, it became conclusive upon Bridget Lawler and upon her grantee, the respondent herein. The question of an estoppel by virtue of her grant does not arise in the present case, as the property distributed to her is not the same as that which she had conveyed to the respondent.

The court did not err in refusing to admit in evidence or to consider the agreement between Bridget, James, and Patrick, which was presented to the superior court at the time of distribution. This agreement was only evidence offered to that court for determining the distribution which it should make; and if error was committed by that court, either in receiving or considering this evidence, such error could have been reviewed upon an appeal from the decree of distribution, but cannot be made the basis of a collateral attack upon that decree. The judgment and order are reversed.

We concur: TEMPLE, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.; McFARLAND, J.

116 Cal. 378

## MILLER v. CARR. (L. A. 142.)

(Supreme Court of California. March 31, 1897.)

VACATION OF JUDGMENT — MISTAKE—SUFFICIENCY OF SHOWING.

Where a defendant, on being served with summons, noted the date thereon, and gave it to his attorney, and his pleading was served on the day it was due according to such date, but on the same date judgment was entered against him by default on the return of the sheriff, which showed the service to have been made a day earlier, such facts, when shown, with a sufficient affidavit of merits, require the court to vacate the judgment and default.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by John O. Miller against W. B.

Carr. Judgment for plaintiff by default. Defendant appeals from an order denying his motion to vacate the judgment and default. Reversed.

Edward J. McCutchen, for appellant. J. W. Mahon, for respondent.

HAYNES, C. This appeal is from a judgment by default, and from an order denying defendant's motion to vacate said judgment and default. The action was commenced in the superior court of Kern county June 20, 1895, and the summons was served upon the defendant at the city and county of San Francisco, by the sheriff thereof, on the 24th day of the same month, as shown by the return of said sheriff indorsed thereon. On July 25th, the thirty-first day after said service as shown by said return, defendant's default and judgment thereon were entered by the clerk. Defendant promptly moved to set aside the judgment and default upon the ground that they were taken against him through his mistake in the date upon which service of the summons was made upon him, and in support of said motion two affidavits, one made by the defendant and one by his attorney, were read, and in opposition thereto plaintiff read the said return of said sheriff. No other evidence was offered or heard. Defendant's affidavit shows that, immediately after the service of the summons upon him, he noted thereon the words "Served June 25, 1895"; that to the best of his knowledge and belief said summons was served upon the 25th, and not on the 24th; that if the service was made on the 24th he was then, and ever since has been, mistaken as to the date of service; that he informed his counsel that it was served on the 25th; that if he was mistaken in the date his demurrer was filed and served one day too late. Said affidavit also contained a sufficient affidavit of merits. The affidavit of his attorney, Mr. McCutchen, shows that the papers served upon defendant were handed to him a few days after the service, that he was then informed by defendant that the service was made on the 25th, and noticed defendant's memorandum thereof at that time; that defendant informed him of the facts of the case, and instructed him to move for a change of the place of trial, and noted in his journal that July 25, 1895, was the last day to plead; that he prepared a demurrer and the motion papers, and mailed them to Bakersfield, where, as appears by defendant's affidavit, they were served and filed on the 25th of July.

We think the court erred in not granting defendant's motion. It is true the clerk was required to act upon the sheriff's return, but upon the hearing of this motion the court, upon its clearly appearing that the sheriff was in error as to the date, could have ordered the return to be amended in that particular, and in such case the default and judgment would have been set aside. That, however, was not clearly shown, and the motion was, therefore, based upon the mistake of the defendant. It was not questioned that the defendant in good faith believed that the service was made on the 25th instead of the 24th, and that he therefore believed that his appearance was in time. It was such a mistake as is clearly within the provisions of section 473 of the Code of Civil Procedure, which permits the court to grant relief, and which the spirit of the Code requires to be granted. Relief in such cases is said to be within the discretion of the court; but "the exercise of the mere discretion of the court ought to tend, in a reasonable degree at least, to bring about a judgment on the very merits of the case, and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." Watson v. Railroad Co., 41 Cal. 17; Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41. "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." Code Civ. Proc. § 4. In Bailey v. Taaffe, 29 Cal. 424, cited by respondent to the effect that such orders "rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion," the court also said: "It is not a mental discretion to be exercised ex gratia, but a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates." The order refusing to set aside the judgment and default should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order refusing to set aside the judgment and default is reversed.

116 Cal. 375

## POLEDORI et al. v. NEWMAN et al. (S. F. 604.)

(Supreme Court of California. March 31, 1897.)

REFORMATION OF DEED—PLEADING—RELIEF—APPEAL—PRESUMPTION TO SUPPORT JUDGMENT.

1. In a suit to correct a defective certificate of acknowledgment to a deed, the court may, under its authority to grant "any relief consistent with the case made by the complaint, and embraced within the issue" (Code Civ. Proc. § 580), correct defects in the certificate other than that specified in the complaint, if evidence thereof is introduced without objection.

2. On appeal on the judgment roll alone, it

will be assumed in support of the judgment that all objections to evidence sustaining the findings were waived.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Poledori and others against Newman and others to correct a defective certificate of acknowledgment to a deed. From a judgment for plaintiffs, defendants appeal. Affirmed.

George D. Collins, for appellants. A. Comte, Jr., and Freeman & Bates, for respondents.

PER CURIAM. This action was brought, under the provisions of section 1202, Civ. Code, to correct a defective certificate of the acknowledgment of a deed of conveyance made by a married woman. Judgment was rendered in favor of the plaintiffs, and the present appeal is taken directly from the judgment, upon the judgment roll alone, without any bill of exceptions. The ground of the appeal is that in the findings and judgment the court went beyond the issues in the case, and corrected the certificate in particulars not alleged in the complaint. The complaint sets forth the conveyance and its proper acknowledgment to the notary, and alleges that the notary, in affixing his certificate, omitted to certify therein "that, upon examination without the hearing of her husband, he had made her acquainted with the contents of the said deed, but used for his acknowledgment a blank form appropriate to cases certifying the acknowledgment of a deed made by an unmarried woman." Issue was taken by the defendants upon the several averments in the complaint, and the court found that the deed was properly executed and acknowledged, but that the notary, in affixing his certificate, "omitted to certify therein that, upon examination without the hearing of her husband, the said notary had made her acquainted with the contents of the said deed, and that, thereupon, she acknowledged to him that she executed the same and that she did not wish to retract said execution." The particular point urged on this appeal is that, as the complaint did not aver that the grantor in the deed acknowledged to the notary "that she did not wish to retract her execution of the deed," the court was not authorized to correct the certificate in that respect. Section 580, Code Civ. Proc., authorizes a court, when an answer to the complaint has been filed, to grant to the plaintiff "any relief consistent with the case made by the complaint, and embraced within the issue." The "case" made by the complaint herein, as well as the issue between the parties, is the right of the plaintiffs to have the defective certificate of acknowledgment corrected, and the relief granted by the court was "consistent" therewith. The failure to allege all the particulars in which the defect consisted might have been a ground for refusing to admit evidence of defects other than those alleged, but did not prevent the parties from consenting to have such defects considered by the court. Upon a direct appeal from the judgment, upon the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence in support of the findings were waived. If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings. The judgment is affirmed.

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116 Cal. 386

## PEOPLE v. PAGE. (Cr. 189.)

(Supreme Court of California. April 1, 1897.)

EMBEZZLEMENT—INDICTMENT—EVIDENCE—TESTIFYING BEFORE GRAND JURY—FUGITIVE FROM JUSTICE.

1. An indictment of a guardian for embezzlement, substantially in the language of Pen. Code, § 506, declaring that "every trustee * * * intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, * * * is guilty of embezzlement," is sufficient; it being unnecessary to allege the date of his appointment as guardian, the court appointing him, etc.

2. A person who appears before a grand jury considering a charge against him need not be informed by any member thereof of his right to counsel before testifying.

3. Name of person indicted need not be indorsed on the indictment as witness, though he testified before the grand jury.

4. A conviction of a guardian of an insane person for embezzlement is not sustained by evidence merely that he drew the ward's money out of the bank, and that he did not make payment, as ordered by court, to the asylum where the ward was confined.

5. Recital in an order removing a guardian of an insane person, "It appearing to the satisfaction of the court that said P. [the guardian] has appropriated to his own use the funds of the said insane person, and that he has rendered no account thereof," is not evidence against him on indictment for embezzlement, being mere hearsay.

6. That defendant does not testify in his own behalf cannot be considered by an appellate court on the question of sufficiency of the evidence to justify conviction.

7. Arrest of one outside the state does not of itself show that he was a fugitive from justice.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William J. Wallace, Judge.

James D. Page was convicted of embezzlement, and appeals. Reversed.

J. N. E. Wilson and Alex. Campbell, Jr., for appellant. W. F. Fitzgerald, Atty. Gen., and C. N. Post, Dep. Atty. Gen., for the People.

BELCHER, C. The defendant was convicted of the crime of embezzlement, and has appealed from the order denying his motion for a new trial, and from the final judgment entered against him. The indictment was filed May 29, 1895, and, after stating the jurisdictional facts, it charged that on or about the 28th day of May, 1895, the defendant, "being then and there intrusted with and having in his control the sum of four thousand three hundred and sixty-two dollars, in lawful money of the United States, * * * as guardian, trustee, and agent of one Louis Lichtneger, an insane person, for the use and benefit of said Louis Lichtneger, then and there the property of and belonging to said Louis Lichtneger, did then and there, to wit, at said city and county of San Francisco, on or about said 28th day of May, 1895, willfully, unlawfully, feloniously, and fraudulently embezzle, convert, and appropriate the same to his own use, contrary," etc. When called upon to plead, defendant moved the court to set aside the indictment upon the grounds (1) that the said indictment was not found, indorsed, nor presented as prescribed in the Penal Code; (2) that the names of the witnesses examined before the grand jury, or whose depositions were read before the grand jury, were not inserted at the foot of the indictment, nor indorsed thereon; (3) that a person not a member of the grand jury, nor judge of the court, nor the district attorney was permitted to be present during the session of the grand jury, and when the charge embraced in the indictment was under consideration, contrary to the provisions of section 925 of the Penal Code. The motion was denied, and thereupon the defendant demurred to the indictment upon the ground that it did not state facts sufficient to constitute a public offense. The demurrer was overruled, and the defendant then pleaded "Not guilty."

1. The indictment was found by a properly impaneled grand jury, and, in our opinion, was sufficient in form. It was drawn substantially in the language of section 506 of the Penal Code, which declares that "every trustee * * * intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, * * * is guilty of embezzlement." The defendant was a trustee of his ward (Civ. Code, § 250), and, under the provisions of the section above quoted, the indictment was authorized and found. Indictments framed in the language of the statute defining the offense charged have been held sufficient so many times by this court that we deem it unnecessary to cite the cases. It is true that an indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Pen. Code, § 950. The indictment here was sufficient to meet the requirements of the statute, and it was not necessary, as claimed for appellant, to allege the date of his "appointment as guardian, and in what court appointed, as well as the issue of letters of guardianship to him, and the fact of his taking possession of certain moneys of his ward; the fact of his filing his account, and the settlement thereof; the fact that he was incapable of discharging his trust, or unsuitable therefor, or had wasted or mismanaged the estate, and that the court, upon due notice given, had removed him, and had demanded that he should surrender the estate of his ward to the person found to be lawfully entitled thereto."

2. "The grand jury is not bound to hear evidence for the defendant, but it is their duty to weigh all the evidence submitted to them, and, when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced." Pen. Code, § 920. It is shown that the defendant "appeared as a witness before the grand jury finding the aforesaid indictment, and testified before said body, he not then and there being informed of his legal rights as a defendant witness, and that his name as such witness does not appear among the names of witnesses upon said indictment." It is not shown, however, and there is nothing in the record to indicate, that he did not voluntarily appear before the grand jury and voluntarily give all the evidence elicited from him. In People v. King, 28 Cal. 273, it is said: "So far as the motion was based upon the ground that the defendant had testified against himself before the grand jury is concerned, it is only necessary to say that we know of no rule of law which made it illegal for him to testify, if he felt inclined to do so, nor do we know of any rule of law which makes the voluntary testimony of the defendant before the grand jury a ground for setting aside the indictment." And we may add that we know of no rule of law which made it the duty of the foreman or any member of the grand jury to inform the defendant of his right to consult counsel before testifying. Besides, the defendant was himself an attorney at law, and had served a term as district attorney of the city and county of San Francisco, and must be presumed to have known what his rights and privileges were as a witness. It is not claimed that any person not a member of the grand jury was present at the session when the charge embraced in the indictment was under consideration, except the defendant himself while he was being examined as a witness. It is true that the name of defendant, as a witness, was not inserted at the foot of the indictment, or indorsed thereon, but it was not necessary that it should be. In People v. Northey, 77 Cal. 618, 19 Pac. 865, and 20 Pac. 129, it was expressly decided that, if the defendant has testified before the grand jury, it is not necessary to indorse his name

upon the indictment as a witness, and the failure to do so is not ground of motion to set aside the indictment. It follows that the court did not err in refusing to set aside the indictment, or in overruling the demurrer.

3. The most serious question in the case is that relating to the sufficiency of the evidence to justify the verdict. The facts proved were as follows: On January 3, 1891, the defendant, who was then the district attorney of the city and county of San Francisco, was duly appointed guardian of the estate of Louis Lichtneger, an insane person, and, upon giving the bond required by the court, letters of guardianship were duly issued to him. On April 4, 1891, an order was made by the court that he file his account. This order was not complied with until May 4, 1894, when he filed an account showing that of the money received by him as guardian he paid in June, 1892, to the asylum at Agnews, $190, and had a balance due the estate of $3,776.92. When defendant was appointed guardian there was on deposit in the German Savings & Loan Society of San Francisco, to the credit of Lichtneger, the sum of $3,561.01. Of this sum and the interest that accumulated thereon, defendant, as guardian, drew out of the bank from time to time all but $51; the first draft, for $353, being made on April 24, 1891, and the last, for $49.27, being made on September 7, 1892. On June 12, 1894, Judge Levy, in whose department of the superior court the matter of the estate was pending, and who had made all the orders before mentioned, made an order that defendant pay $475 to the superintendent of the asylum at Agnews, that amount having been found due for the care of Lichtneger. The money not being paid as ordered, an attachment was issued on July 3, 1894, but returned unserved; and again an attachment was issued on August 15, 1894, which was also returned unserved, and nothing more was done in the matter during that year. Judge Levy testified: "I do not know what Mr. Page's reasons were for not paying the money as ordered." But immediately following, and in this connection, one Hufschmidt testified that he had been in the habit of visiting the asylum about once in every six weeks; that he met Lichtneger there, and "during the first part of the time that I have seen him there he was in the pay ward, but the latter part of the time he was in the pauper ward." In January, 1895, Judge Levy's term of office expired, and Judge Slack succeeded him. Nothing appears to have been done in the matter of the said estate until May 2, 1895, when an order was made requiring the defendant to appear on the next day and show cause why he should not file his account. A citation was issued, and returned unserved. On May 3d another order was made, fixing May 10th as the time the defendant should appear and show cause why he should not be removed from his office of guardian. A citation was again issued and returned showing "guardian could not be found." The court then caused a citation to be published, fixing May 20th as the time when the defendant should show cause why he should not be removed from his office of trust. After the publication of the citation the defendant called upon the judge at his chambers, and requested that the hearing of the matter might be postponed until May 27th, and the request was granted. On May 27th he again called, and requested a further continuance until the next day, which continuance was also granted. On May 28th defendant did not appear, and an order was then made removing him as guardian of the said estate. "No other order was made, and no person was appointed guardian in his place and stead, and no demand was made upon him for the moneys and goods in his possession and belonging to the said estate of Louis Lichtneger." The minute order of removal containing the recital, "and it appearing to the satisfaction of the court that said Page has appropriated to his own use the funds of the said insane person, and that he has rendered no account thereof," was next introduced in evidence, against the objection of defendant that it was immaterial, irrelevant, incompetent, and hearsay. In January, 1896, defendant was arrested in the city of New York, and he stated at the time to the officer arresting him "that he was anxious to return to stand his trial for the offense of which he was accused." The above is, in substance, all the evidence introduced by the prosecution, and at the conclusion of it the defendant, by his counsel, moved the court to instruct the jury to acquit "upon the ground that the facts proven by the prosecution were not sufficient to establish the guilt of the defendant of embezzlement; that there was nothing in the proof to show that Mr. Page had fraudulently misappropriated any of his ward's money or property; that no demand had ever been made upon him for the money or property of his ward; and that no person had ever been designated by any court, or by any person in authority, to whom the defendant, Mr. Page, could have delivered the money or property of his ward." The court overruled the motion, and thereupon the case was submitted without further testimony. It is very evident that the recital above quoted from the order removing defendant from the position of guardian did not constitute any evidence tending to support the charge of embezzlement. At most, it was mere hearsay, and Judge Slack, who made the order and was on the stand as a witness, was not asked, and did not attempt to state, upon what ground the recital was based. It must therefore be entirely disregarded. Leaving out this recital, it will be observed that there was no evidence showing that defendant ever spent, wasted, or appropriated to his own use, any of the money of his ward. It is true, he drew out from the savings and loan society most of the money which was on deposit there to the credit of Lichtneger; but this was

not a criminal act, and did not show a criminal intent to misappropriate the money. He may have intended to deposit the money in some other bank, or to invest it in safe securities. The cashier of the savings and loan society, who testified to the withdrawal, stated: "I do not know what Mr. Page did with the money which he withdrew. He may have deposited it in some other bank, or some safe-deposit box." So far as appears, the defendant at the time of the trial may have still had all the money ready to be paid over on demand to any one authorized to receive it. The fact that he did not pay to the insane asylum the $475, ordered to be paid by Judge Levy does not tend to show a misappropriation of that money. He may have believed that Lichtneger was in the "pauper ward," and that the asylum was not entitled to demand pay for keeping and caring for him.

It is urged for respondent that, while "the fact that a defendant does not take the witness stand on his own behalf cannot be taken against him by the jury, yet it is, in our judgment, a fact that should be taken into consideration by this court on the point of the sufficiency of the evidence to justify the verdict." We do not think so. A person accused of crime is presumed to be innocent until he is proved to be guilty, and facts and circumstances which cannot be considered by the trial court or the jury in determining as to the guilt or innocence of the accused cannot be resorted to in this court to support a verdict not otherwise authorized.

Again, it is urged that the defendant, when arrested, was a fugitive from justice, and that this is a circumstance which may be considered in determining as to his guilt. But it does not appear that he was a fugitive from justice. There is nothing in the record to show when or under what circumstances he left San Francisco and went to New York. He may, so far as the evidence shows, have gone on a business or pleasure trip, and have been intending soon to return. In People v. Royce, 106 Cal. 173, 37 Pac. 630, and 39 Pac. 524, the defendant was the treasurer of the Veterans' Home Association, a corporation, and was charged with the embezzlement of the balance of a draft received by him, amounting to about $2,050. He was convicted, and on appeal the judgment was reversed by this court, sitting in bank, upon the ground that the verdict was not justified by the evidence. The court said: "What became of this balance does not appear. Appellant may have had it ready to be produced whenever called for. * * * The by-laws also provide that all moneys in the hands of the treasurer should be turned over to his successor in office, but it does not appear that appellant ever had a successor in office. * * * There is no evidence that any demand was ever made upon appellant for said money by the association, or by any officer or agent thereof, or by any other person. * * * He may have had the money all that time, ready to respond to any demand of the association." If the verdict in that case was not justified by the evidence, it is quite clear that it was not in this. We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

(116 Cal. 384)

## PEOPLE v. WICKHAM. (Cr. 220.)

(Supreme Court of California. March 31, 1897.)

FORMER JEOPARDY—EMBEZZLEMENT—WHEN A FELONY.

1. A plea of former jeopardy is not supported by proof that a former conviction of defendant for the same offense was reversed, and the prosecution dismissed, on the ground that the information was not filed within the time prescribed by statute after defendant's commitment.

2. Under Pen. Code, § 514, providing that "every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled," the embezzlement of a horse is a felony without regard to its value; the stealing of a horse being grand larceny, by the terms of the statute.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Ed. Wickham was convicted of embezzlement of a horse, and appeals. Affirmed.

W. F. Aram, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant was convicted of the embezzlement of a horse of the value of $40, and appeals from the judgment.

It is claimed that the trial court committed error in refusing the admission of certain evidence offered upon the plea of "once in jeopardy." This evidence showed that defendant had been previously convicted of the offense for which he was then upon trial; that he had appealed to this court from such conviction, upon the ground that the information had not been filed within 30 days after he had been committed by the examining magistrate; that a motion to dismiss the prosecution upon that ground had been theretofore denied by the trial court; that the judgment was reversed, and the cause remanded by this court, with directions "to dismiss the prosecution unless upon a further hearing good cause was shown for the failure to file the information within the time prescribed by the statute"; that thereafter the prosecution was dismissed, in pursuance of the order of this court, no good cause to the contrary being shown; and that thereafter a new information was filed and this present prosecution based thereon. The facts above set forth are insufficient to establish the plea of once in jeopardy upon the second trial. When this case went back to the trial court (People v. Wickham, 113 Cal. 283, 48 Pac. 123), if that court, upon good cause shown, had denied the motion to dismiss the prosecution, and had proceeded to again try the defendant upon the same information, certainly no jeopardy in his favor would have existed to bar a second conviction; and the fact that the prosecution was dismissed rather than proceeded with does not alter the case. In all essentials People v. Schmidt, 64 Cal. 260, 30 Pac. 814, covers the present case; and, upon the legal principles there declared, defendant's contention in this respect is without merit.

2. It is claimed that the court erred in rendering judgment that defendant be imprisoned in the state prison, it appearing from the verdict of the jury that the value of the property embezzled was only $40. This contention involves the construction to be given section 514 of the Penal Code, which provides: "Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled." This section has been construed in People v. Leehey, 4 Pac. Coast Law J. 75, and also in People v. Salorse, 62 Cal. 139; and, upon the authority of those cases, we hold that the defendant has been convicted of a felony. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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(5 Cal. Unrep. 657)

## CLOUGH v. BORELLO et al. (Sac. 243.)

(Supreme Court of California. April 1, 1897.)

APPOINTMENT OF ADMINISTRATORS—FRIVOLOUS APPEAL.

An appeal by a public administrator from an order denying his petition for letters on decedent's estate, and granting those of guardians of decedent's children, is frivolous; it not being contended that the guardians were not entitled to administer if the children were legitimate, and his petition having alleged that they were decedent's children and "heirs at law," and there being no evidence in the record of illegitimacy.

Commissioners' decision. Department 1. Appeal from superior court, Merced county; E. W. Risley, Judge.

Petitions by A. G. Clough, Frank M. Borello, and N. P. Justy for letters of administration on the estate of Giovanni Galliano, deceased. From an order denying the petition of Clough, and granting those of the others, he appeals. Affirmed.

T. C. Law, for appellant. J. W. Knox and W. D. Crichton, for respondents.

HAYNES, C. In probate. A. G. Clough, public administrator in and for the county of Merced, petitioned the court for letters of administration upon the estate of Giovanni Galliano, deceased. Respondents Frank M. Borello, as the guardian of the person and estate of Charles C. Galliano, a minor son of the deceased, and N. P. Justy, as the guardian of the person and estate of James Frank Galliano, also a minor son of the deceased, each petitioned the court to be appointed as administrator of said estate, and also filed written opposition to the appointment of appellant. Abrana Galliano, as the surviving wife of said deceased, and mother of said children, also petitioned for letters of administration, but afterwards withdrew her petition, and requested the appointment of one or the other of the said guardians. The several petitions and contests were heard together, and resulted in the denial of appellant's petition, and the making of an order appointing both of the guardians of said minor children as administrators of said estate, and from that order the public administrator appeals.

The record contains a bill of exceptions which sets out the various petitions and oppositions above mentioned, the withdrawal and request of the widow, and the order appointing respondents as such administrators, but does not contain the testimony of any witness, or set out any of the evidence given upon the hearing. Appellant's brief, however, is largely devoted to the question of the legitimacy of said minor children, based, of course, upon the asserted nonmarriage of the deceased and the mother of said children, Abrana Galliano; but, as the record before us gives no hint of the asserted illegitimacy of these children, that question cannot be considered here. On the contrary, appellant's petition for appointment alleges that these are the children and "the heirs-at-law of said deceased," and it is not alleged that there are any other heirs.

The sole question, therefore, is whether the guardians of these minor heirs are entitled to administration in preference to the public administrator. Next to the surviving husband or wife, or some competent person whom he or she may request to have appointed, the children of the deceased are entitled to letters of administration (Code Civ. Proc. § 1365); and section 1368 (amended St. 1893, p. 52) provides as follows: "If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." See, also, Estate of Wooten, 56 Cal. 326, and In re McLaughlin's Estate, 103 Cal. 429, 37 Pac. 410.

It is not contended on the part of appellant that said guardians were not entitled to administration if said children were legitimate, and, as appellant alleged their legitimacy by alleging that they were the children and "heirs at law of the deceased," the appeal is frivolous, and we recommend that the order appealed from be affirmed, with $100 damages, and costs of appeal.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed, with damages in the sum of $100, and costs.

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5 Cal. Unrep. 654

## GNEKOW v. CONFER et al. (Sac. 234.)

(Supreme Court of California. March 31, 1897.)

MECHANICS' LIENS—PERSONAL LIABILITY OF OWNER.

Code Civ. Proc. § 1183, providing that a building contract shall be void if not filed with plans and specifications, and that in such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished "at the personal instance of the owner," and that the persons furnishing them shall have a lien for their value, does not create a contractual relation between the owner and subcontractor, whereby the owner can be held personally liable for such work and materials, but merely affords an opportunity for a lien by complying with the statute.

Commissioners' decision. Department 1. Appeal from superior court, Shasta county; J. S. Beard, Judge.

Action by E. L. Gnekow against Saul Confer, Jr., and W. E. Hanks (co-partners under the firm name of Confer & Hanks), and Masonic Building Association (a corporation). From a judgment in favor of the Masonic Building Association, plaintiff appeals. Affirmed.

Kile & Plummer, J. J. Paulsell, and Thomas B. Dozier, for appellant. Clay W. Taylor and J. Chadbourne, for respondents.

SEARLS, C. This action is brought to foreclose a mechanic's lien taken by plaintiff upon a building of the defendant the Masonic Building Association, to secure a balance of $756 due on account of material furnished and labor performed upon a building described as the "New Masonic Building," situate in Redding, county of Shasta, state of California. The other defendants, viz. Confer and Hanks, who were the original contractors for the construction of the building, made default. The defendant the Masonic Building Association had judgment, upon the ground that the lien of plaintiff was not filed within the time prescribed by the statute, viz. within 30 days after the completion of the building. Plaintiff appeals from the judgment, and the cause is presented on the judgment roll.

Appellant acquiesces in the judgment refusing to enforce his lien, but insists that upon the findings he was entitled to a personal judgment against the corporation defendant for $756, the amount of his claim. The findings show in substance as follows: (1) In the month of July, 1891, the corporation defendant entered into a contract with Saul Confer and W. E. Hanks, by which the latter agreed for $25,000 to construct the new Masonic building or temple in the city of Redding, and work was commenced before the contract was recorded in the office of the county recorder, and is therefore void as against plaintiff. (2) About September 15, 1891, plaintiff entered into an agreement with Confer & Hanks to furnish tin for the roof of said building, gas, and water pipes, water-closets, sinks, soil pipes, etc., and to perform the labor of placing all of the material in place for $1,956. Plaintiff completed his contract, and was paid $1,200 on account thereof by the owner of the building, the corporation defendant. The residue of the findings relate to matters going to the validity of plaintiff's lien, but in no wise affecting the personal liability of the corporation defendant to plaintiff.

We think appellant's claim that he is entitled to a personal judgment against the corporation defendant cannot be upheld. Plaintiff was a subcontractor, who furnished material and performed labor on the building for Confer & Hanks, who were the original contractors, and plaintiff occupied no contractual relation with the owner of the building, unless it was created under section 1183 of the Code of Civil Procedure, by a failure of the parties to record their building contract before work was commenced on the building. The effect of such failure is declared by section 1183, supra, to be that the contract shall be "wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." When the law, in the contingencies mentioned in section 1183, assumes that labor is performed and material furnished "at the personal instance of the owner," it is simply for the purposes of the liens which it is the object of the statute to afford to those who perform labor or furnish material for the construction of buildings, etc. To accomplish this object, the statute creates under the circumstances, by its own force and vigor, such a relation for a specific purpose, viz. to uphold a lien, as will effectuate that purpose. The statute does not, however, create or attempt to create a contractual relation between the owner and a subcontractor upon which a personal action will lie. This question was involved in McMenomy v. White (decided by this court Dec. 17, 1896) 47 Pac. 109, and it was said: "The owner, however, is not personally liable for labor done and materials furnished at the instance of the contractor, even though the contract be void, for the reason stated. the only remedy against the owner in such case being a foreclosure of the liens." Lumber

Co. v. Schmitt, 74 Cal. 625, 16 Pac. 516; Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419; Lumber Co. v. Gottschalk, 81 Cal. 647, 22 Pac. 860; Wood v. Transit Co., 107 Cal. 502, 40 Pac. 806. A subcontractor may have a personal action against the original contractor, but, as against the owner of the property, his relief is confined to a lien upon the property, and to a foreclosure and sale as provided by the statute. The case of Morris v. Wilson, 97 Cal. 644, 32 Pac. 801, relied upon by appellant, was one in which the original contractors had entered into a contract with the defendant for the construction of a building. The contract was held void for want of filing, as required by section 1183, and that plaintiffs were not entitled to a lien, but were entitled to a personal judgment against defendant, the owner of the building. The personal liability there was based upon the contractual relation between the parties, which does not exist here as between the plaintiff and the corporation. The judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(116 Cal. 370)

## CARTER v. LOS ANGELES NAT. BANK (WILLIAM DEERING & CO., Intervener. L. A. 179).

(Supreme Court of California. March 30, 1897.)

ACTION AGAINST GARNISHEE—COMPLAINT—NECESSITY OF ORDER TO GARNISHEE TO APPEAR—LIMITATIONS.

1. Plaintiff recovered judgment against his debtor after having garnished defendant, who, at the time of garnishment, held, as collateral, notes due to the debtor. Defendant thereafter collected on the notes more than enough to satisfy his debt. Plaintiff's execution was returned unsatisfied in part, and he sued to have the amount unpaid satisfied out of the surplus in defendant's hands. *Held*, that his complaint need not show an order requiring defendant to appear and answer, or an order authorizing action against the garnishee, under Code Civ. Proc. § 720, since section 544 makes the garnishee directly liable to the attaching creditor until the attachment is discharged or the creditor's judgment is satisfied.

2. A garnishee may plead the statute of limitations, if he is entitled to the plea as against the principal defendant, but the statute does not run in his favor as to the liability created by the garnishment itself.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by F. A. Carter against the Los Angeles National Bank. William Deering & Co. intervened. From a judgment for plaintiff, intervener appeals. Affirmed.

Carver & Preston, for appellant. H. A. Barclay, for respondent.

TEMPLE, J. Plaintiff brought suit against the Richardson-Kimball Company, garnished the defendant on attachment, and afterwards recovered judgment against the Richardson-Kimball Company. An execution was issued against the Richardson-Kimball Company, upon which plaintiff realized a portion of his debt, but left $777.35 still due and unpaid. At the time the notice of garnishment was served, the defendant had in its possession certain notes due the Richardson-Kimball Company, which it held as collateral. Subsequent to the attachment, but prior to the bringing of this suit, defendant had collected upon the securities which it so held enough to satisfy its demand against the Richardson-Kimball Company, and $1,356.22 over and above its demand. Defendant answered, admitting such facts, and stating that other parties were asserting claims to the money in its hands, and asking that they be brought in, and that the court determine to whom the money should be paid. Thereafter the appellant intervened. The court held that plaintiff was entitled to the money. The appeal is from the judgment, without a bill of exceptions.

The sole point made on this appeal is that the complaint fails to state a cause of action (1) because the action is based upon a garnishment, under section 544 of the Code of Civil Procedure, without procuring an order requiring defendant—the garnishee—to appear and answer, and without any order authorizing an action against the garnishee under section 720 of the Code of Civil Procedure; and (2) defendant's liability under the garnishment is barred by the statute of limitations.

The first point cannot be sustained. The proceeding supplementary to execution is in the nature of an action in which definite relief may be had. In most states express provision is made for a trial and a judgment which shall conclude the rights of all parties, as in proceedings upon a creditors' bill. Nothing of that kind is provided for under the proceedings on attachment in this state. On the contrary, section 544 provides that the garnishee shall be directly liable to the attaching creditor "for the amount of such credits, property or debts, until the attachment is discharged or any judgment recovered by him be satisfied." This question was decided in Roberts v. Landecker, 9 Cal. 262. In all material respects, the practice act was identical with the Code. In that case it was averred that the garnishee had property belonging to the debtor at the time of the garnishment, but had fraudulently disposed of the same. A demurrer to the complaint was interposed upon the same ground as here, and the court, after stating the theory of the statute, said: "There is nothing in the chapter concerning attachments that refers to these sections, and nothing in the proceedings supplementary to the execution that properly applies to the peculiar circumstances of this case. The liability of the defendant commenced when the writs were served, and the measure of his responsibility depends upon the amount of property belonging to Hertzinger, and then in his possession and under his control. The plaintiffs, under the state of the case made by the complaint, are not seeking to enforce their lien upon the property itself, as that cannot be reached, having been disposed of to others. They are not seeking a discovery of the property and the subjection of it to their debt under a sheriff's sale. * * * The proceedings supplementary to the execution have another object in view. They seek to subject the property itself to sale under execution, or the debt to collection. Under the provisions of the two hundred and forty-first section, the plaintiff must satisfy the judge, by affidavit or otherwise, that the person has property of the execution debtor, or is indebted to him. The plaintiffs in this case could not make affidavit at the time they issued their execution that the garnishee then had property in his hands belonging to the execution debtor, because before that time the property had been disposed of to others. Nor could they state that Landecker was then indebted to Hertzinger, for the reason that Landecker's liability, under section 127, was direct to the plaintiffs. The chapter relating to the writ of attachment provided no specific remedy, and the remedy by proceedings supplementary could not reach the peculiar state of the case." Considerable stress is put in this opinion upon the fact that the garnishee had disposed of the property, and was sued for the value thereof. I see no grounds for any distinction, and, if there were any, the case in hand would be on all fours with that. Here the defendant had not retained the personal property which he held at the time the attachment was served. It had been converted into cash by the process of collection. This case was not overruled in Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857, but was recognized, and the distinction pointed out between the proceedings provided by sections 717 et seq. and under section 544 were approved. The proceedings provided for in sections 717 et seq. do not imply any notice of garnishment whatever. It is a special proceeding, which can only be inaugurated after execution has been issued and returned unsatisfied in whole or in part. It may be commenced by affidavit or other proof showing that any person has property of the judgment debtor. No showing is required to the effect that a notice of garnishment has been served upon such person. In section 715 it is provided that, where it is sought to subject such property to the levy of the execution, the same proceedings may be had as those provided after the return of the execution. This expressly refers to sections 717 et seq. This section also fails to provide, as in section 544, for a direct liability to the plaintiff in the attachment suit. This distinction is also pointed out in Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857. This being so, it is plain that no equitable circumstances need be shown to justify the suit. If, in giving the right, the statute has not also provided a remedy, an action at law will lie upon the liability created by the statute. Roberts v. Landecker, supra.

As to the statute of limitations, if the garnishee is entitled to the plea as against the defendant in the attachment suit, he can plead it. The liability created by the garnishment is never barred. Of course, the garnishee can plead any defense he would have against his creditor, and also that the attaching creditor's debt has been satisfied, or that he failed to recover judgment, or that it has been reversed or has been barred. These last defenses might also have been made by the intervener. But the liability which arises from the attachment, as something entirely distinct from these, is not barred. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(116 Cal. 424)

## HIBERNIA SAVINGS & LOAN SOC. v. MATTHAI. (S. F. 528.)

(Supreme Court of California. April 7, 1897.)

RECORD ON APPEAL—SHOWING AS TO SERVICE OF SUMMONS — SUPPLYING DEFECT — SUBSTITUTING COPY—DEFAULT JUDGMENT—ENTRY BY COURT—PROOF OF SERVICE—AMENDMENT OF RECORD AFTER JUDGMENT.

1. Where the original summons, with proof of service, was lost from the files when the appeal was taken, but after the briefs were filed the court below ordered a copy substituted, and respondent, on suggesting a diminution of the record, filed a certified copy showing personal service on defendant, a contention in defendant's brief that the record did not show jurisdiction over him is untenable.

2. An order of court for the substitution of a copy of the summons and the indorsed proof of service, in place of the original, which had been lost from the files, is a determination that the copy is correct.

3. On failure of a defendant properly served to appear within the time allowed, the court may enter judgment against him without a prior formal entry of default by the clerk.

4. The court may enter judgment against a defendant who was properly served, but who did not appear in time, though the summons, with proof of service, had not been filed with the clerk.

5. Where the summons has been properly served, the record may be amended after judgment to show proof of service.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by the Hibernia Savings & Loan Society against Mary Elizabeth Matthai. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Fowler, for appellant. Tobin & Tobin, for respondent.

HARRISON, J. The appeal herein is from a judgment of foreclosure entered upon the default of the appellant. It is recited in the judgment that the defendants in the action were severally, personally, and duly served with the summons, together with a copy of the complaint; that the default of the appellant for not answering was duly entered; and that the cause came on regularly for trial by the court upon the complaint taken as confessed by her. The judgment roll, which is set out in the transcript as originally filed herein, did not contain a copy of the summons with proof of service upon the appellant; and it was contended by her in the briefs filed on her behalf that, by reason of the failure of the record to show that the court had acquired jurisdiction over her, the judgment must be reversed. At the time the appeal herein was taken, the original summons, with the proof of service thereof upon the appellant, had been lost from the files of the superior court; but afterwards that court, upon proof of the loss, authorized copies to be filed and used in place of the originals. Since the briefs herein were filed, the respondent, upon a suggestion of the diminution of the record, has filed herein a properly certified copy of the summons, with proof of service indorsed thereon, substituted as aforesaid, from which it appears that the appellant was personally served with the original summons issued herein, and a copy of the complaint, in the city and county of San Francisco, by the sheriff thereof, on the 28th of December, 1894. The points urged in support of the appeal have therefore been obviated, and it sufficiently appears from the record, as thus corrected, that the judgment against the appellant was properly entered.

The order of the superior court authorizing the copies to be filed was a determination by that tribunal that they were correct copies of the originals, and the papers thus substituted are entitled to the same weight as would be the originals. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580. Upon the service of the summons, and the failure of the defendant to appear in the action within the time allowed therefor, the court acquired jurisdiction by reason of her default to enter a judgment against her, and it was not necessary that a formal default should have been previously entered by the clerk. Drake v. Duvenick, 45 Cal. 455. The court had jurisdiction to enter the judgment even though at the time the summons with proof of service had not been filed with the clerk. Herman v. Santee, 103 Cal. 519, 37 Pac. 509. (The ruling to the contrary in Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, was overruled in this case.) The court acquired jurisdiction of the appellant by the service of its process, and did not lose it by neglecting to make the proof of such service a matter of record. Sichler v. Look, 93 Cal. 600, 29 Pac. 220. And a subsequent amendment of the record by supplying this proof of service is as effective to support the judgment as if it had been filed before its entry. Freem. Judgm. § 89b; Allison v. Thomas, 72 Cal. 562, 14 Pac. 309; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109; Herman v. Santee, 103 Cal. 519, 37 Pac. 509. The judgment is affirmed.

We concur: BEATTY, C. J.; VAN FLEET, J.

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116 Cal. 461

### PEDLAR v. STROUD et al. (Sac. 286.)

(Supreme Court of California. April 7, 1897.)

APPEAL—NOTICE—DISMISSAL.

1. On the death of a judgment plaintiff the authority of his attorney ceases, and the service of a notice of appeal thereafter on him is of no effect.

2. Though proceedings taken for an appeal are ineffective to give the supreme court jurisdiction, where the records of the trial court show an appeal, the supreme court will order its dismissal to remove such apparent appeal.

3. Where judgment defendants unsuccessfully attempt to perfect an appeal after plaintiff's death and before any substitution is made in the trial court, the supreme court will not refuse to dismiss the appeal because there has been no substitution in such court, and the motion does not purport to be made on behalf of any interested party.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by one Pedlar against one Stroud and others, in which defendants appealed from the judgment. Motion to dismiss the appeal. Granted.

L. L. Cory and Jas. A. Burns, for appellants. Frank H. Short, for respondent.

HARRISON, J. Judgment in this action in favor of the plaintiff and against the defendants was rendered July 31, 1895, and entered August 7, 1895. July 6, 1896, the defendants Stroud filed with the clerk of the superior court and served upon Frank H. Short, who had been the attorney of record of the plaintiff, a notice of appeal from said judgment, and also from an order denying a new trial. The plaintiff in the cause died September 3, 1895. No substitution or order of substitution of the administrator or other personal representatives of the plaintiff was made in the cause, nor was any application made to the superior court for such substitution. A motion is now made to dismiss the appeal upon the ground that by reason of the death of the plaintiff before the appeal was taken this court is without jurisdiction over the same. Upon the death of the plaintiff the authority of Short as his attorney ceased, and the service of the notice of appeal thereafter upon him was ineffective to constitute an appeal, or in any respect affect the judgment that had been rendered. Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Cal. 93; Sheldon v. Dalton, 57 Cal. 19. Although the proceedings taken by the defendants have been ineffective to give this court jurisdiction of the appeal, yet, as upon the face of the records of the case in the superior court an appeal has been taken, this court will order its dismissal for the purpose of removing such apparent appeal. Ditch Co. v. Bachtold, 109 Cal. 114, 41 Pac. 813. Neither is it a ground for denying the motion that there has been no substitution in this court of the personal representatives of the plaintiff, and that the motion does not purport to be made on behalf of any party interested in the judgment. An appeal of which this court has no jurisdiction will be dismissed of its own motion whenever its attention is drawn thereto. Bienenfeld v. Milling Co., 82 Cal. 425, 22 Pac. 1113. Lyons v. Roach, 72 Cal. 85, 13 Pac. 151, cited by appellant, does not hold a contrary doctrine. In that case the appeal had been perfected in the lifetime of the plaintiff, but he died before the transcript on appeal was filed in this court. A motion to dismiss the appeal for failure to file the transcript was served upon his attorneys of record before any substitution of his personal representatives had been made in the case, and was denied for the reason that by the death of the plaintiff the attorneys ceased to represent him in the cause, and this court had no jurisdiction over the personal representatives by which they would be bound by an order of dismissal. The court had jurisdiction of the appeal, but did not have jurisdiction of the motion, whereas in the present case the court has never acquired jurisdiction of the appeal. The motion is granted.

We concur: BEATTY, C. J.; VAN FLEET, J.

116 Cal. 365

### TIBBETS v. COHN et al. (S. F. 368.)

(Supreme Court of California. March 30, 1897.)

INSOLVENCY—ASSIGNEE AND RECEIVERS—ACTIONS.

St. 1891, p. 511, provides that the court shall in insolvency proceedings appoint the sheriff receiver to take charge of the estates of the insolvent, and to care for and dispose of the same until the appointment of an assignee, and that his powers shall in all respects be regulated by the general laws of the state applicable to receivers. Code Civ. Proc. § 568 (relating to receivers generally), provides that a receiver may sue and defend in his own name, take and keep possession of the property, receive rents, collect debts, compound for and compromise the same, make transfers, and do such acts respecting the property as the court may direct. *Held*, that a receiver appointed under the act of 1891 cannot sue for property transferred in contemplation of insolvency, but that the authority is vested solely in the assignee by the insolvency act (St. 1880, c. 87, § 21), which expressly authorizes him to recover from any person receiving a conveyance, gift, or payment from an insolvent contrary to the act.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by George A. Tibbets, receiver, against G. Cohn & Co. There was a judgment for plaintiff, and defendants appeal. Reversed.

Naphtaly, Freidenrich & Ackerman, for appellants. Garber, Boalt & Bishop, and J. H. Ahern, for respondent.

TEMPLE, J. This action was brought to recover the value of certain property alleged to have been transferred to defendants within one month before the commencement of proceedings in insolvency, in violation of the insolvency act. In the complaint it is averred that on the 19th day of May, 1892, one Charles W. Pick, being insolvent, filed his petition alleging his insolvency, and praying to be discharged from his liabilities; that such proceedings were had that plaintiff was, on August 24, 1892, appointed receiver of the estate of said insolvent pending the election of an assignee. Facts are then alleged tending to show that, within one month before the commencement of said proceedings, the defendants, who were creditors of the insolvent, received a transfer of all the available assets of the insolvent, in payment of defendants' demand against the insolvent, and that Pick and the defendants well knew of the insolvency of Pick, and intended by said transfer thereby to prevent the property from coming into the possession of the assignee, etc. Before answering, the defendants demurred to the complaint, on the ground that the same does not state facts sufficient to constitute a cause of action. One of the defendants, G. Cohn, then answered, and the case was tried before a jury, which rendered a verdict for the plaintiff, and the defendants appeal upon the judgment roll, without a bill of exceptions.

In 1891 section 63 of the insolvent act was repealed (St. 1891, p. 511), and section 6 amended so as to provide that the court shall make an order appointing the sheriff a receiver, to take charge and possession of all estate, etc., of the insolvent, and to keep and care for and dispose of the same until the appointment of an assignee, and that his powers shall in all respects be regulated by the general laws of the state applicable to receivers. Section 568, Code Civ. Proc., provides that a receiver have power, under control of the court, to bring and defend actions in his own name, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and to do such acts respecting the property as the court may direct.

The complaint discloses the fact that the plaintiff was not the sheriff of the county of Kern, in which the proceedings were pending, and the appellants therefore contend that the appointment was void. To this the plaintiff replies that the objection is not raised by a general demurrer. It is not that the complaint fails to state a cause of action, but that the plaintiff has not the legal capacity to sue. This objection must be taken by special demurrer or answer, and, if not so taken, is waived. Several cases are cited which seem to sustain this contention. Swamp Land Dist. v. Feck, 60 Cal. 403; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675. The view taken of this case, however, renders it unnecessary to definitely pass upon this question. If, conceding the validity of the appointment of plaintiff as receiver, the action is one that he could not maintain, the objection would not be to his capacity to sue as receiver, but that, being receiver, the complaint fails to show a cause of action in him. Our statute gives no further definition of the office of receiver, or statement of his powers and functions, than above recited. Section 6 of the insolvency act defines his duties to be to take into his possession the assets of the insolvent, and to care for them until the appointment of an assignee. The reference to the general laws of the state applicable to receivers must be to section 568, Code Civ. Proc., from which no further powers could be derived, save that he may sue and be sued in his own name, collect debts, and do such acts respecting the property as the court may direct. This language would not authorize him to bring suits not connected with his receivership, and necessary to enable him to perform its functions. The appointment of a receiver pendente lite does not change the title to property, and, in the absence of a statute to that effect, would not authorize the receiver to sue in his own name for property which has not come to his possession. His possession is only temporary, and for the purpose of preserving the property, that it may be subjected to the operation of the judgment which shall finally be entered. The purpose of the statute in the appointment is clearly stated in section 6. The actions which he can bring must be those which enable him to get and retain possession of the "estate, real and personal, of the debtor." He is not even to retain possession until the final judgment, but to deliver all to the assignee, who may be appointed at any time not less than 30 days after the adjudication. The powers of the assignee are defined in section 21 of the act. He is expressly authorized to recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of the act, the property thereby transferred or assigned, or, in case a redelivery of the property cannot be had, to recover the value thereof, with damages. The property which can be thus recovered constituted no part of the estate of the insolvent, and the receiver is not authorized or directed to take charge of it, or given a right of action for its recovery.

Even the creditors had no right of action against the defendants in respect to the property here involved. On the contrary, if the assignment had not been made in the insolvency proceeding, and until it is made, the defendants were rightfully in possession of the property, for aught that appears, as owners. The debtor had the right to make the preference, unless it was done in contemplation of insolvency, and for the purposes mentioned in section 55 of the act, and even then the validity of the transfer could only be called in question by the assignee. The right of action is created by the act, and the assignee expressly authorized to sue. This right of action certainly was not in the insolvent, and ordinarily receivers can assert no rights which the owner could not have asserted to property. The exceptions are cases especially provided for by statute, or the rules of equity, in which the receiver is authorized to sue in the interest of creditors. Many such cases are cited by the respondent, but all of those were under special statutory provisions. Most are cases where the receiver was appointed in proceedings supplementary to execution, to discover and subject to execution concealed assets. In those cases it was held that, by virtue of the statute, the title of the debtor was vested in the receiver. As a rule, however, the receiver cannot sue to recover property which has not come to his possession, or which, being in the possession of the defendant, ought to have been delivered to him. He cannot maintain trover for property of the insolvent converted before the adjudication, nor to recover property transferred by the debtor in fraud of creditors. Lansing v. Manton, 14 N. B. R. 127, Fed. Cas. No. 8,077; Sutherland v. Davis, 10 N. B. R. 424; In re Steadman, 8 N. B. R. 319, Fed. Cas. No. 13,330; Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495. His appointment is intended to have the effect of a preliminary injunction to preserve the property. High, Rec., § 5.

It does not appear that there was any order of the court directing or authorizing the suit. The case of Adams v. Woods, 15 Cal. 207, has no reference to anything involved here. No question was there raised whether the suit was rightfully brought, and the suit was not to recover property fraudulently transferred by the debtor. In Re Real Estate Associates, 58 Cal. 356, it was only decided that, pending an appeal from the order of adjudication, the functions of the receiver are not suspended. Any suits which he could have maintained if the appeal had not been taken he may still maintain. The case of Ex parte Hollis, 59 Cal. 405, is not authority for the respondent. It was held that a person having property which he claimed adversely to the insolvent could not be required to deliver it to a receiver, and punished for contempt if he refused. The court should direct an action to be brought by the receiver or assignee. Even if such an action could have been brought by the receiver, it would not cover this case. There the right of action was in the insolvent. Here it is not. Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147, goes no further than the case of In re Real Estate Associates, supra. No doubt, the receiver can maintain all actions necessary to preserve the property which constituted the estate of the insolvent. This falls far short of the exigencies of respondent in the present case. A right of action is created by the act, and the assignee expressly authorized to bring the suit. Can this action be instituted by a receiver whose functions are expressly limited to preserving the property until an assignee is appointed, which may be done in 30 days? I think not. First, because such action is not within the scope of the receiver's powers and duties; and, second, because the right is expressly conferred upon the assignee, and does not exist until his appointment.

Respondent's counsel seem a little forgetful as to the record. It contains no Exhibit B, showing what allegations were in the petition, but the complaint does show that there were no petitioning creditors. The record does not show that the receiver became also the assignee. If appointed after the suit was commenced, however, that would make no difference. The judgment is reversed, and the cause remanded.

We concur: McFARLAND, J.; HENSHAW, J.

116 Cal. 397

## PEOPLE v. TRUCKEE LUMBER CO.

(Sac. 209.)

(Supreme Court of California. April 3, 1897.)

Public Nuisance—Action to Enjoin—Sufficiency of Complaint.

1. In an action to enjoin a nuisance, the complaint alleged that defendant operated a mill on a river which was stocked with fish; that it placed deleterious refuse in such stream, which poisoned the waters, thereby killing the fish; that such acts were a public nuisance; and that defendant, unless restrained, would continue such wrongful acts. *Held*, that the complaint stated a cause of action under Civ. Code, §§ 3479, 3480, declaring an obstruction to the free use of property by a neighborhood a public nuisance.

2. The fact that a public nuisance is made punishable as a misdemeanor is not a bar to a suit to enjoin it.

3. The attorney general can maintain, on his own information, a bill to enjoin a public nuisance, without the intervention of a private relator.

Department 1. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by the people of the state of California, on the information of the attorney general, against the Truckee Lumber Company, for an injunction. From an order refusing to vacate a preliminary injunction, defendant appeals. Affirmed.

C. F. McGlashan and Thos. S. Ford, for appellant. W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, Dep. Atty. Gen., for the People.

VAN FLEET, J. The action is in the name of the people, on the information of the attorney general, to restrain the commission of an alleged nuisance, the complaint alleging, in substance, that defendant, a corporation, maintains and operates a sawmill and box factory on the bank of the Truckee river, at the town of Truckee, in this state, in which it cuts and manufactures lumber and boxes; that said river is a freshwater stream, having its source in the state of California and flowing into the state of Nevada, and is now, and for a long time prior hereto has been, stocked with fish; that defendant, in operating its mill and factory, has heretofore and does now place and allow to pass into the waters of said river large quantities of refuse matter, consisting of sawdust, shavings, slabs, edgings, waste, and other deleterious substances, the effect of which has been and is to pollute said stream and the waters thereof, and render the same unfit for use, and which substances are poisonous and deleterious to the fish in said stream, and are killing, destroying, and exterminating them, all of which is alleged to be in violation of the rights of the people, and a public nuisance; that defendant threatens to, and, unless restrained, will, continue to commit said wrongful acts, to plaintiff's irreparable injury. A preliminary injunction was granted ex parte on the filing of the complaint, which defendant subsequently moved to vacate. The motion was made upon the complaint alone, based upon the objection that the facts alleged made no case for relief. The motion being denied, this appeal ensued.

The sole question is whether the complaint states a cause of action, and this is to be determined precisely as if the pleading were subjected to a general demurrer.

The first point made against the complaint is that the facts alleged do not constitute a public nuisance, within the definition of our Code. But this objection would seem to overlook the most material feature of the complaint. It is alleged that the acts of defendant have the effect of polluting and poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is "an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons," is a public nuisance. Pen. Code, § 370; Civ. Code, §§ 3479, 3480. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (Ex parte Maier, 103 Cal. 476, 483, 37 Pac. 402), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union. The complaint shows that, by the repeated and continuing acts of defendant, this public property right is being, and will continue to be, greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. People v. Elk River Mill & Lumber Co., 107 Cal. 219, 40 Pac. 486. But defendant urges that the facts do not show the infringement of any public right; that the right, if any, shown to be interfered with, is solely that of fishery, or the privilege to take fish; that this is a public right only so far as it pertains to navigable waters, while, as to all other waters, it is exclusively in the riparian proprietor; that, as the Truckee river is not a navigable stream, the destruction of the fish therein is not an injury to the public for which the people can complain, there being no allegation that the riparian proprietors thereon have been injured. In the first place, the common right to take fish extends not alone to navigable waters, but exists as to all waters the lands underlying which are not in private ownership,—in other words, to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of this state or the United States not protected by reservation; and, since there is no averment that the lands along the Truckee river are held in private proprietorship, we think the presumption must be that the title remains in the government. But, in the next place, if this is not the presumption the case would not be different. The dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery. Cottrill v. Myrick, 12 Me. 222; State v. Franklin Falls Co., 49 N. H. 240; State v. Roberts, 59 N. H. 256, 484.

For the purposes of the right involved in this action, then, the Truckee river, so far as it flows within this state, is a part of the waters to which the jurisdiction of the state in the protection of its fish supply extends. This court will take judicial cognizance of the fact that the river has its source in Lake Tahoe, a large navigable body of water lying partly in this state, and that it flows thence into the state of Nevada, and empties into Pyramid lake, also navigable; and the court may also take notice of a fact so common and notorious that between these two bodies of water the river affords, and has from time immemorial, a natural and free highway for the passage of the fish inhabiting these lakes. Even, therefore, if, as contended by defendant, the lands through which the stream flows are to be presumed, in the absence of contrary averment, to be owned in private proprietorship, it can make no difference as to the right here asserted. While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. "This right in the owner of the land must be regarded as qualified to a certain extent by the universal principle that all property is held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it is subject to legislative control. It is a well-established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a similar right upon their lands upon the stream above and below." State v. Roberts, 59 N. H. 256. The mere fact, therefore, that the interference or obstruction complained of may in fact be in a stream where the right of fishery is exclusively in private riparian owners, does not make the acts here complained of any less an invasion of the public right, nor prevent the state from protecting its general interest in the property.

The fact that acts of the character alleged are by the Penal Code made a misdemeanor, and punishable as such, does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil. Nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information, without the intervention of a private relator. People v. Davidson, 30 Cal. 388; People v. Stratton, 25 Cal. 242; People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 Pac. 1152.

The other objections made do not call for particular notice. Order affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

116 Cal. 410

## VERCOUTERE v. GOLDEN STATE LAND CO. (S. F. 592.)

(Supreme Court of California. April 6, 1897.)

BUILDING AND LOAN ASSOCIATIONS—BY-LAWS—VALIDITY.

1. A corporation for the purpose of dealing in real estate and carrying on any kind of real-estate business, in which natural persons may engage, is not a land and building corporation authorized to be organized by Code, § 639, providing for corporations organized for improvements on real property.

2. A by-law of a corporation providing for surrender of stock and withdrawal by giving notice, and for payment of surrender value, is

illegal, under Civ. Code, § 309, forbidding the withdrawal by stockholders of any part of the capital stock except on dissolution.

3. Under Civ. Code, § 301, providing for the adoption of by-laws after organization of a corporation, a copy of by-laws prepared and signed by the stockholders before organization is invalid.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by one Vercoutere against the Golden State Land Company. Judgment for defendant on its counterclaim. Order for new trial denied, and plaintiff appeals. Affirmed.

John A. Wall and R. P. Clement, for appellant. Morrison & Foerster, for respondent.

HARRISON, J. The defendant is a corporation under the laws of this state, and its certificate of incorporation was issued by the secretary of state June 6, 1890. The purposes for which the corporation is formed are stated in its articles to be "to accumulate funds by the payment of each stockholder in periodical installments, and of investing the same for the mutual benefit and advantage of its stockholders, and for that purpose to deal in, improve, and buy and sell, real property; also, for the purpose of carrying on and transacting any and all kinds of real-estate business in which natural persons may lawfully engage." Prior to the issuance of the certificate by the secretary of state, a code of by-laws had been prepared and signed by many who afterwards became stockholders, including the plaintiff, and was afterwards signed by others as they became stockholders in the corporation. Article 16 of this code of by-laws is as follows: "Any stockholder desiring to surrender his stock and withdraw from the corporation may do so by giving sixty days' notice, as provided in article 13, section 2, and shall upon surrender of his stock be entitled to receive the amount due him, to be determined in the manner and paid in the time as provided in article 13, section 2, of the by-laws." Article 12 of this code of by-laws provided that each shareholder should pay into the treasury his subscription to the capital stock in installments of one dollar each month, until the full amount of his subscription should have been paid. The plaintiff was an original subscriber for 100 shares of stock, and paid the installments thereon from the time of his subscription up to and including February 10, 1892, amounting to $2,910, and at that time gave notice of his withdrawal, as provided by article 16 of the by-laws, and demanded the repayment of the amount so paid by him. Upon the refusal of the defendant to make such payment, the present action was brought to recover the same. The defendant, in addition to denying its liability to the plaintiff, set up a counterclaim against him for the installments that fell due upon his subscription subsequent to February 12, 1892. Judgment was rendered against the plaintiff upon his complaint, and in favor of the defendant upon its counterclaim. A motion for a new trial was made by the plaintiff, and denied. The present appeal is from this order. No appeal has been taken from the judgment.

The appellant's contention that the defendant was incorporated under title 16, pt. 4, div. 1, §§ 639–647, Civ. Code, cannot be maintained. Section 639, as it stood at the date of the defendant's incorporation, is as follows: "Corporations organized for the erection of buildings, and making other improvements on real property, may raise funds in shares not exceeding two hundred dollars each, payable in periodical installments. Such bodies are known as land and building corporations, and may be organized with or without a capital stock." A comparison of the articles of incorporation of the defendant with the provisions of this section shows that the purposes for which it was incorporated are entirely different from those authorized by this section. A corporation for the purposes set forth in the defendant's articles of incorporation can be made only under the provisions of title 1 of part 4 of the Civil Code, and the finding of the court that the defendant was incorporated under the provisions of this title was fully justified.

The further finding that article 16 of the by-laws aforesaid was illegal and void necessarily followed. Inasmuch as under the provisions of sections 301 and 354, Civ. Code, the corporation can adopt only such by-laws as are not inconsistent with the constitution or existing laws of this state, it follows that any regulation or rule that it may adopt under the form of a by-law which contravenes the provisions of an existing law is invalid, and has none of the elements of a by-law. Section 309 of the Civil Code forbids the withdrawal or payment to the stockholders of any part of the capital stock of a corporation, except upon its dissolution, or at the expiration of its term of existence; and section 560 of the Penal Code makes it a misdemeanor for any director to concur in any vote or act of the directors by which it is intended to withdraw, or in any manner, except as provided by law, pay to the stockholders or any of them any part of the capital stock of a corporation. "The inhibition runs against the directors because they are, under the law, the managers of the business of the corporation. What the directors cannot do, the stockholders cannot do or authorize to be done." Kohl v. Lilienthal, 81 Cal. 387, 22 Pac. 692.

The finding of the court that the defendant has had a code of by-laws ever since about the time of its incorporation is not objected to, but the plaintiff merely assigns as error the finding that "it was not adopted in the manner provided by law." Section 301, Civ. Code, provides for the adoption of a code of by-laws after the organization of the corporation, either at a meeting of the stockholders called for that purpose, or by the written assent of the holders of two-thirds of the stock. As the code of by-laws of this defendant was prepared and signed by a large number of the stockholders before the creation of the corporation, the finding of the court was justified by this fact. The signature of the plaintiff thereto, though made before the organization of the corporation, constituted an agreement on his part which the corporation which was thereafter formed in pursuance thereof could enforce. West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

Certain exceptions were taken to rulings of the court at the trial, but counsel have presented no argument in their support, and we find no error in the rulings. The order is affirmed.

We concur: BEATTY, C.J.; VAN FLEET, J.

116 Cal. 416

## KELLERMAN v. MAIER et al. (L. A. 204.)

(Supreme Court of California. April 6, 1897.)

SUBSCRIPTION TO CORPORATE STOCK—CONTRACTS BY DIRECTORS—SHAREHOLDERS.

1. In an action by creditors to enforce the liability of subscribers to corporate stock for an unpaid balance, findings that the defendants never subscribed to such stock, or agreed to pay any balance between the price paid for the stock and the par value, but that defendants purchased the stock respectively from the corporation for certain amounts, and paid therefor, justify a judgment for defendants.

2. Where directors are the only holders of corporate stock, payment by them for stock subscribed by transfer of land was not invalid.

3. Under Civ. Code, § 359, providing that no corporation shall issue stock except on payment therefor, certificates issued in violation of the section are void, and the parties receiving them do not become shareholders.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. M. Kellerman against Simon Maier and others. From an order refusing a new trial as to four of them, plaintiff appeals. Affirmed.

F. W. Burnett, for appellant. J. T. Houx, for respondents.

BELCHER, C. On January 15, 1895, the plaintiff recovered a judgment in the superior court of Los Angeles county against the Castica Oil Company, a corporation, for the sum of $2,632.50 and $9.50 costs of suit, on which an execution was issued, and returned unsatisfied; and 10 days later he commenced this action against the stockholders of the corporation to subject the amounts due upon their alleged unpaid subscriptions for stock to the payment of his judgment. The court below gave judgment in favor of all the defendants, and the plaintiff appeals from an order refusing to grant him a new trial as to four of them.

It appears from the record that the Castica Oil Company was organized as a corporation under the laws of this state by the respondents Maier, Phelps, Summerland, and Cook, and one Mason, since deceased. The articles of incorporation stated that the purposes for which it was formed were "to bore for, mine for, produce, manufacture, buy, sell, use, store, and refine petroleum and other oils, gas, brea, asphaltum, and kindred substances; and to manufacture, build, buy, sell, use, and lease oil and other mining plants," etc.; that the respondents and Mason should be the directors of the corporation for the first year; that the amount of the capital stock should be $100,000, divided into 100,000 shares of the par value of $1 each; and that each of the incorporators had subscribed for 10,000 shares of the stock. The articles were filed in the office of the county clerk on March 31st, and in the office of the secretary of state on April 2, 1891. On May 20, 1891, at a meeting of the directors held that day, the secretary reported that deeds to the corporation for 840 acres of oil land, which had been secured and paid for by the five incorporators, had been delivered, and thereupon a resolution was unanimously adopted as follows: "Whereas, all of the land deeded to the Castica Oil Company, being eight hundred and forty acres in all, was secured and paid for by the following named persons [stating their names]: Therefore, be it resolved, that for and in consideration of said land, and for the further consideration of twenty dollars, to be paid by each of the above-mentioned persons, being one hundred dollars in all, that the subscription of ten thousand shares of the capital stock of the Castica Oil Co., subscribed for by each of the above-mentioned persons, be considered fully paid, and that the said land and said one hundred dollars be accepted as full payment for the ten thousand shares of capital stock of the Castica Oil Co. subscribed for by each of the before-mentioned persons." Thereafter, on the same day, the deeds were received by the corporation, and the $20 in cash was paid by each of the incorporators, and a certificate for 10,000 shares of stock was issued to each of them as fully paid up stock. Four days later these certificates were surrendered and canceled, and in place thereof a new certificate for 8,248 shares of the stock was issued to each of said subscribers, as trustee. And on May 24, 1894, the last-named certificates were returned to the company and canceled, and no stock was afterwards issued in place thereof. The price first fixed by the board for the sale of stock was 50 cents per share, and on May 28, 1891, Maier and Cook each purchased and paid for 1,000 shares at that price. Afterwards, on October 6, 1891, a resolution was passed by the board authorizing the sale of stock at 25 cents per share, and directing the secretary to "issue additional stock to those persons who had subscribed and received their stock and paid for the same at fifty cents per share, in accordance with the reduced price." Pursuant to the direction contained in this resolution, the secretary issued to Maier and Cook additional certificates for 1,000 shares each, for which nothing was paid. In February, 1894, the price for the sale of the stock was again reduced by a resolution of the board, and with the consent of the stockholders, to seven cents per share; and at that price, on May 24, 1894, there were sold to Maier and Cook each 2,000 shares, to Phelps and Summerland each 1,000 shares, and to the plaintiff 3,000 shares, for which certificates were issued. In January, 1892, the plaintiff contracted with the corporation to sink a well on its land, and again, in June, 1894, made anotner contract; and it was under these contracts that the indebtedness for which he obtained his judgment arose. On the day plaintiff commenced this action he transferred his said 3,000 shares of stock in the company to one Kellogg, without any consideration whatever therefor.

It is alleged in the complaint, upon information and belief, that the defendants, of whom there were more than 30, were on and prior to January 2, 1895, subscribers to, and are still the owners and holders of, shares of stock of the corporation "to the amount hereinunder set forth opposite their names respectively,"—the number set opposite the names of Maier and Cook being 4,000 shares each, and the number set opposite the names of Phelps and Summerland being 1,000 shares each,—and that the four last-named defendants had each paid 32 cents per share upon one-half of their respective shares, and 7 cents per share upon one-half, and no more; and that said defendants agreed, at the time they became such subscribers, owners, and holders of said shares of stock, to pay the balance of the par value of said shares so remaining unpaid to said corporation, or for its use, when legally called upon to do so; but that no part of said balance has been paid, and that the said balance now remains due and unpaid. It is further alleged that the said corporation, by its officers, has neglected and refused, and still neglects and refuses, to make further assessments on said shares, or to collect the amount so remaining unpaid on said shares of stock from the defendants. And the prayer is: First, that the court will ascertain the amount due from each of said defendants as owners or holders of said stock of the defendant corporation; and, second, that the plaintiff have judgment against each of said defendants for the amount found due plaintiff on account of said judgment, and interest thereon, not to exceed the amount due from each of said defendants on their subscription of stock.

The court below found, among other things, as follows: (1) "That the defendants above named were not, nor were either or any of them, subscribers to any shares of the capital stock of the said Castica Oil Company on January 2, 1895, or at any time subsequent to the ——— day of May, 1891." (3) "That the above-named defendants did not, nor did either or any of them, agree at any time, or at all, to pay the balance or any part of the par value of said shares remaining unpaid, or at all, to said Castica Oil Company, or for its use, or at all, when legally called on to do so, or in any manner or form, at any time or at all, and there is not any sum of money remaining unpaid or payable from each or any of said defendants to said Castica Oil Company." (4) "That said Castica Oil Company did not, by its officers or otherwise, or at all, neglect or refuse, and does not refuse or neglect, to make any further or any assessments on said shares, or any shares, or at all, and did not neglect or refuse to collect any amount remaining unpaid or otherwise on said shares of stock, or any shares of stock, from any of the defendants above named, and said Castica Oil Company has assets subject to execution." (10) "That each of said defendants purchased from said corporation, and it sold to each of them respectively, the said shares owned and held by them respectively, for the amount each respectively paid said corporation for said shares, and that the amount that each defendant has paid to said corporation for his respective shares as aforesaid was the full market value and price of said shares at the time of said sale and purchase and ever since." These findings are not assailed or objected to in the specifications attached to the statement, or in the brief of appellant's counsel. They are sufficient in form and substance to justify and support the judgment, and must be upheld as correct statements of the facts shown by the evidence. This being so, it is immaterial whether other findings objected to are justified by the evidence or not. Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47.

It is argued for appellant that the payment by the original incorporators for the stock subscribed for by them, by the transfer of land, was a transaction void on its face, because they, as directors, sold to the corporation their own property at their own price. But at the time of the transaction the five directors were the only stockholders of the company, and they continued to be so up to October following. The corporation was organized to bore for oil, and the corporators obtained title to the land, supposing, doubtless, that it contained oil, which, by boring, could be brought to the surface in paying quantities, and utilized. Why could they not organize a corporation to effect the objects they had in view, and turn over to it the land to be operated on for such price as they might themselves agree upon? No one was injured, and no public policy violated thereby. We fail to see how the cases cited can be held applicable to the facts of this case, since at the time of the transaction here complained of the directors were the only stockholders, and the only beneficiaries of the trust. Besides, the shares of stock first subscribed for are evidently not the ones involved in this action. The complaint alleges that each of the respondents is the owner and holder of a certain number of shares, upon which he has paid a certain part of their par value, and no more. These numbers correspond exactly with the number of shares afterwards purchased and paid for by respondents, and the shares so owned and held must, therefore, be the ones on which plaintiff based his right to recover.

It is further argued that nothing was paid for the 2,000 shares of stock issued to two of the respondents under authority of the resolution of October 6, 1891, and that the holders are liable for the par value thereof; but it is admitted that as to the remainder of the stock issued the evidence shows that it was sold at the highest market price, and under the decisions of this court the purchasers are not liable for any unpaid balance. It appears that certain stockholders had purchased and paid for stock at 50 cents per share, and that by the resolution of October 6th the price was reduced to 25 cents per share, and additional shares were to be issued to those who had purchased at 50 cents, in order to equalize the prices, so that the stock already purchased should cost no more than that to be purchased at the reduced price. Section 359 of the Civil Code provides: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received." The certificates for the 2,000 shares of stock referred to appear to have been issued in violation of this provision; and, if they were so issued, they were void, and the parties receiving them did not thereby become shareholders, nor make themselves liable to creditors as for an unpaid subscription. Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648; Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954. If we are right in what has been said, then the other points discussed by counsel are immaterial, and do not require special notice. In our opinion, the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

116 Cal. 443

## SAN FRANCISCO PROTESTANT ORPHAN ASYLUM v. SUPERIOR COURT OF SANTA CLARA COUNTY et al. (S. F. 565.)

(Supreme Court of California. April 7, 1897.)

WILLS—PROBATE—CONTEST—PARTIES—PRACTICE.

1. Code Civ. Proc. § 1327, provides that the probate of a will may be contested at any time within one year after such probate. Section 1328 requires citation to be issued on the filing of the contest, without otherwise limiting the time for issuance. Section 1329 provides that the court must try the cause if citation has been served on "any of the persons named therein." Section 1713 makes applicable to probate proceedings the rules of procedure in civil actions, which provide (sections 406-408) that summons, alias or otherwise, must be issued within one year after the filing of the complaint. *Held*, that sections 406 to 408 did not apply, and where a valid petition of contest was filed, and thereupon a citation was issued to all necessary parties, all of whom were at once served, except one, as to whom the service was defective through mistake, the court acquired jurisdiction; and, the trial having been had in due season, jurisdiction was not lost, as by want of diligence in prosecution of the contest, by the fact that the defendant as to whom the service was defective was not duly served within a year from the filing of the petition; contestant's attention not having been called to the defect within that time.

2. The defendant as to whom service was defective being a necessary party, the court had power to order him to be brought in after expiration of the year, both under general equitable principles and practice, and under Code Civ. Proc. § 389, providing that "the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in"; the application of said section not being limited to absent persons not named as parties in the first instance. Temple, J., concurring, on the ground that the court's power to bring in said defendant was inherent, and not conferred by the statute.

Department 2. Certiorari by the San Francisco Protestant Orphan Asylum against the superior court of Santa Clara county, and John Reynolds and W. G. Lorigan, Judges. Writ dismissed.

J. C. McKinstry, for petitioner. M. C. Hassett and H. V. Morehouse, for respondents.

McFARLAND, J. Certiorari to review an order of the superior court directing a citation to issue to petitioner, the said San Francisco Protestant Orphan Asylum, in a pending proceeding for the revocation of the probate of a will. The facts necessary to be stated are these: Edward Barron died on the 24th day of November, 1893, leaving an estate worth nearly $2,000,000, and a will which was probated on January 5, 1894. On the 9th of April, 1894, within a year after the probate of the will, George Barron, a son of the deceased, filed in said superior court a petition to revoke the probate of said will upon various grounds. The next day a citation was issued to all the legatees and devisees named in the will, requiring them to appear on the 14th of May, 1894, to show cause why the said probate should not be revoked. By said will, about 15 persons were named as devisees. Several of the devisees, including the petitioner here, the said orphan asylum, were benevolent institutions. The citation was served within the year upon all of the parties named, except the said petitioner. There was an attempted service on the petitioner, but it was served on the matron of said petitioner, who, as it ultimately appeared, was not the proper person to be served. The said contestant, George Barron, supposed that petitioner had been properly served, and his attention was not called to the fact that the service was defective until more than a year after the probate of said will, to wit, in the year 1896. There was no intention on the part of said contestant not to serve properly the said petitioner herein. The petitioner did not appear in the case until April 23, 1896. In the meantime the other persons named in the citation appeared and filed their answers, and a trial of the contest was had, which resulted in a verdict of a jury that the testator was not of sound mind, and was unduly influenced by his wife. A motion for a new trial was made and granted, on account of supposed errors committed at the trial. Thereafter, on April 23, 1896, the petitioner herein appeared for the purpose only of making a motion to dismiss the will contest, so far as it concerned the petitioner, upon the ground that there had been no service of the citation upon petitioner within a year after the admission of the will to probate. This motion was by the court denied on the 18th day of said April, 1896; and thereafter, on the 25th day of the same month, the superior court ordered a citation to issue to the petitioner herein, requiring it to show cause on the 12th of June, 1896, why the probate of said will should not be revoked, and such citation was accordingly issued and served. This present proceeding was instituted here for the purpose of having said order last named set aside, as beyond the jurisdiction of the court to make, because not made within one year after the said probate of said will.

There is some contention on the part of the respondents, founded upon certain affidavits, that this proceeding should be dismissed because the petitioner is not a party aggrieved, for the reason that it has made arrangements with both parties to the contest that it shall receive its legacy of $5,000 in any event; but we do not think it is necessary to examine into this contention.

The Code provides that a contest of the probate of a will may be commenced by a petition in writing "at any time within one year after such probate." Code Civ. Proc. § 1327. The next section provides that a citation must be issued to certain named parties, but there is no time specifically mentioned within which such citation must be served. However, section 1713 provides that, "Except as otherwise provided in this title, the provisions in part 2 of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title"; and it is contended, upon principle and authority, that, by analogy, a citation must be issued and served within the time and the manner prescribed for the issuance and service of the summons in an ordinary civil action, and that, therefore, a citation cannot be issued to any party after the expiration of a year. It is contended that this rule has been established by this court in the case of Bacigalupo v. Superior Court, 108 Cal. 92, 40 Pac. 1055. But that decision is authority only in a case where, after the expiration of a year from the time of the probate of the will, there is neither a valid citation nor petition in existence. In that case a citation had been issued, but it had been quashed, and the petition for the revocation had itself been dismissed; and it was held that the case stood as though no citation had ever been issued to any one or served on any one, and, indeed, as if no petition had ever been filed. The court say: "The fact that one citation was taken out within the year is immaterial, for that citation was quashed and set aside and discharged, and thereafter the case stood exactly as though no citation had ever been issued." The court further say: "Thereafter, and more than one year subsequent to the filing of said petition, it was dismissed upon motion of this petitioner;" and that "after its dismissal it possessed no life." It was held in that case that the court could not, after the expiration of a year, revive the petition, and order another citation to issue "to all parties interested"; and the case goes upon the theory that, when a year had elapsed without any service of a citation upon any one, there could be no further proceeding in the matter. But in the case at bar a valid petition was filed, and a citation issued within the year to all the necessary and proper parties interested, and, within the year, the said citation had been served upon all the parties except only the petitioner in this present case; and upon this petitioner there had been a defective service, and the defect had not been called to the attention of the contestant until it was brought to his attention by the motion of the petitioner herein to dismiss the proceeding. The court therefore had jurisdiction over the proceeding. Code Civ. Proc. § 1329, provides as follows: "At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any of the persons named therein, the court must proceed to try the issues of fact joined, in the same manner as in an original contest of a will."

But the petitioner herein, the said San Francisco Protestant Orphan Asylum, being a legatee named in the will, was a necessary party to a complete determination of the controversy; and, not being before the court on account of said defective service, the court had the power, not only under general equitable principles and practice, but under the provisions of the Code, to order the said petitioner brought in as a party to that controversy. Section 389 of the Code is made applicable to the proceeding for the revocation of the probate of a will, and that section provides as follows: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." It is contended that this section applies only to a person who was not named in the first instance as a party. Such a construction, however, is too narrow, and is incorrect. The "parties before it," within the meaning of that section, are evidently the parties actually before the court, who had been "brought in" either by actual service of process or by a voluntary appearance. If the petitioner had not been named in the citation, there could have been no question as to the propriety of the action of the court below which is here attacked. But the mere naming of a person as a party in an action or proceeding, without any further attempt to bring him within "the presence" of the court, does not make him a party before it. This meaning of the phrase "brought in" was evidently attached to it by this court in Fanning v. Foley, 99 Cal. 336, 33 Pac. 1098. In that case, Gaven, who was the owner of the fee in the land involved, "was made a defendant, but was not served with summons"; and the court say: "The owner of the fee had never been brought in by appearance or service." The Code never intended to provide, and does not provide, that where the petition has been filed within the year, and within that time a citation has been issued and duly served upon all of numerous necessary parties except one, the contest shall utterly lapse, and the rights of all contestants be entirely obliterated, because, from mistake or inadvertence, there has been a failure to properly serve that one within the year. It seems to be admitted by counsel that a decree in favor of the contestant without the presence of petitioner would be fruitless as to all the devisees named in the will. That being so, the petitioner, although interested in only a small fraction of the immense estate, could, if its position be tenable, defeat a legal inquiry into the proper disposition of nearly the entire estate; and the result would be the same whether petitioner is acting solely in its own interest, or, as contended by respondent, is allowing itself to be used in the interest of others. A court should not reach such an unjust conclusion unless driven to it by the imperative language of the law; and there is no such imperative language. We think that the court below, under the circumstances hereinbefore detailed, acquired jurisdiction of the proceeding, and that petitioner, being a necessary party to a complete determination of the controversy, and not being before the court, could be brought in by a citation or any appropriate method.

A few authorities are cited by counsel for both parties from New York, but we do not see that any of them are particularly applicable to this case. It is true that in Re Phelan, 51 Hun, 208, 4 N.Y. Supp. 408, cited by respondent, the court, dealing with a proceeding for the revocation of the probate of a will, say that the court "has power, where all persons who are necessary parties have not been cited or notified, to issue a supplemental citation for the purpose of bringing in such parties"; and that something of the same kind appears in Re Laytin's Estate (Surr.) 37 N. Y. Supp. 1125, and in Re Will of Gouraud, 95 N. Y. 256; but it is difficult to discover to what extent the decisions in those cases rested on peculiar statutory provisions. The order sought to be reversed is affirmed, and the writ of certiorari is dismissed.

TEMPLE, J. I concur in the judgment. The Code provides no limitation whatever in regard to the proceedings for the contest of a will after probate, except that the contest must be inaugurated within one year. Like all other proceedings in court, it is subject always to the power and the duty of the court to dismiss the contest if not prosecuted with due diligence. The contest here in question was commenced within the year, and has been diligently prosecuted. A judgment was once entered which was vacated on motion for a new trial, and, when the case was about to be called for retrial, a motion to dismiss was made by the petitioner, on the ground that the citation had not been served upon it. It turns out that the citation was served upon an employé of the petitioner who was apparently in charge of its asylum, but who it is conceded was not the person upon whom the citation should have been served. The motion to dismiss was denied, and a day was fixed for the hearing, which would give the contestant an opportunity to cite the petitioner, and a new citation was ordered.

It is contended that the order is void solely because the citation would be issued more than one year after the contest was commenced. It is claimed that it is jurisdictional, and that it makes no difference whether the matter has been prosecuted diligently or not. It is not contended that there is any such express limitation in the statute, but it is worked out upon the theory that Code Civ. Proc. § 1713, enacts: "Except as otherwise provided in this title, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." "This title" contains the entire procedure in probate matters, and part 2 the procedure in civil cases. But what provision is there in part 2 in its nature applicable to this proceeding? Section 1327 provides that a contest shall be inaugurated by filing a petition; section 1328, that, upon the filing of the petition, a citation must be issued requiring certain parties to appear upon a day named to show cause, etc. I find only two sections in part 2 in which any allusion is made to a right to issue a summons after the lapse of a year. Section 406 provides that the clerk must indorse on the complaint the date of its filing, "and at any time within one year thereafter the plaintiff may have a summons issued." How could this be read into, or even stand with, section 1328, which, as was said in Bacigalupo v. Superior Court, 108 Cal. 92, 40 Pac. 1055, requires the citation to issue forthwith upon filing the petition? The two provisions cannot exist together as applying to the same thing. It would be absurd to say that a person filing a petition for a contest may have a citation issued at any time within one year thereafter. The other section in which the time is mentioned is section 408, which provides that an alias summons shall not issue after the expiration of one year. This is equally inapplicable. There is no alias citation like an alias summons. The citation notifies the parties to appear at a time mentioned to show cause. If the court has the power to set the hearing, the citation may, of course, issue.

No one would contend that the provisions in regard to summons would apply generally to the various citations authorized in probate proceedings. It may be issued to require the performance of an act, and sometimes disobedience to it may be enforced by arrest and imprisonment (Code Civ. Proc. §§ 1398, 1402, 1408, 1459, 1461, 1623, 1625); and when personal notice is required, and no other method is provided, it must be by citation. But I think the statute shows on its face that no provision in regard to summons applies to citations. Everything in regard to citations is provided for in title 11. Section 1707 states what it must contain; 1708 provides for its issuance; 1709, that it shall be served in the same manner as a summons. This would be unnecessary if the provisions as to the summons applied, and on that supposition no operation can be given this section. Unlike a summons, the length of the notice may be prescribed by the court; otherwise, it is five days. Section 1711. As a rule, its functions are very unlike those of a summons. It is simply a notice which may be molded to suit the occasion, and not a process which a party may sue out or not, and which, having sued out, he can serve when he pleases, provided it be done within three years.

In the Bacigalupo Case it is correctly said that the provision in regard to citation cannot be used for delay. Of course not, for it must be issued to notify the party interested of a day of hearing specially appointed by the court. It was therefore unnecessary to say anything about the time within which it can be issued. A summons, however, need not be issued at all unless the plaintiff wishes it, and then at any time within the year, and can be served at any time within three years thereafter. These can hardly be said to be provisions to prevent delay, and, as applied to the probate court, would be ridiculous. A proceeding in that court is expected to move continuously and quickly to an end. If applicable to proceedings in the probate court, their effect would be to authorize delay, not to prevent it. It is not expressly ruled in Bacigalupo v. Superior Court that the provisions above referred to in regard to the issuance of summons do apply to the proceeding for the contest of a will. It is said: "Giving section 1328 the widest latitude of construction possible, the power to issue a citation would, beyond all question, cease one year after the petition for revocation was filed." This is apparently a construction of section 1328, and evidently refers to the previous remark that the statute requires citations to be immediately issued; that is, where a statute requires an act to be done at once, it surely must be done within the year. The party contesting cannot file his petition, and then wait a year, before asking for a hearing and ordering citation. This is a declaration of a rule of due diligence, not an assertion of a plain statutory limitation. In this case no such state of things existed. A citation was issued at once, and the trial of the issues proceeded with due diligence. There has been no delay, and I am unable to discover by what means the court has lost jurisdiction. It is a proceeding in rem, and not inter partes. The court already had jurisdiction of the res, and could have proceeded with the trial of the contest without further notice, had the statute so provided. The contest could have been treated as an incident in the administration which was already pending. The office of the citation, then, was not like that of a summons, to give the court jurisdiction. It was an extra protection provided by the statute, and, if the court still had jurisdiction of the proceeding, its power to issue the citation cannot be doubted. It is not doubted that the service of the citation upon some of the parties gave jurisdiction as to them. Had the defect been discovered on the return day, it will not be disputed that the court might have continued the hearing to another day, to allow the completion of service. If this course had been kept up for a year, and service was still found incomplete, although all possible diligence had been used, I can see no rational ground for a claim that the court had thereby lost jurisdiction. It would require an express limitation to work such a result. Of course, all presumptions are against a construction which could have that effect.

I concur in the judgment for these reasons, which I understand accord with those expressed by Mr. Justice McFARLAND. I have not been able to persuade myself that Code Civ. Proc. § 389, has any application to this case.

I concur: HENSHAW, J.

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(116 Cal. 470)

## WHITE v. HARRIS et al. (L. A. 138.)

(Supreme Court of California. April 7, 1897.)

STREET IMPROVEMENT—RESOLUTION OF INTENTION —INSUFFICIENT NOTICE.

1. A city council passed a resolution of intention to construct a public sewer along specified portions of eight different streets. Thereupon the superintendent of streets posted notices of such resolution along the designated route, describing the work proposed as a public sewer, within the defined limits on each street, but making no mention of its extension to any of the other streets named in the resolution. *Held*, that the notice was not a sufficient compliance

with Act March 18, 1885, § 3 (amended St. 1889, p. 158), requiring such notice to describe briefly the improvement proposed.

2. The defect was not cured by the fact that the entire assessment was apportioned to feet frontage, since the cost per foot in one street might greatly exceed the cost per foot in another.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by S. White against Charles T. Harris and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

John T. Jones, for appellant. Wells & Lee, Allen & Flint, Mulford & Pollard, and Calvin Edgerton, for respondents.

BRITT, C. Action to enforce an assessment for the expense of constructing a sewer in the city of Los Angeles. A judgment sustaining a demurrer to the complaint was reversed on a former appeal. 103 Cal. 528, 37 Pac. 502. After that decision, trial was had in the court below, and resulted in favor of defendants. The decision of one of several questions now argued by counsel will suffice for the disposition of the case. A resolution of intention was passed by the city council on June 20, 1889, declaring the purpose of the council to order the construction of a public sewer along specified portions of eight different streets. Thereupon it was the duty of the superintendent of streets, under section 3 of the "Act to provide for work upon streets," etc.[1] (amended St. 1889, p. 158), to post along the line of the contemplated work, and publish in a newspaper, notices stating the fact and date of the passage of the resolution, briefly the work or improvement proposed, and referring to the resolution for further particulars. It is not disputed that substantial compliance with such provision was essential to the validity of the subsequent proceedings. In this instance notices were posted along the designated portion of each street on which the sewer was to be constructed describing the work proposed as a public sewer within the defined limits on that street, but making no mention of its extension to any of the other seven streets named in the resolution. Thus, the work proposed was stated in the notices posted along College street to be "a public sewer on College street, from a point ten feet west of the center line of Buena Vista street to a point twenty-seven feet east of the east line of Ramona avenue." This notice was posted along the described part of College street, and not elsewhere. A like course was pursued as to the notices along the line of the sewer on each of the other streets, respectively. The publication made in a newspaper was found by the court to have been "similar in substance to the said posted notice." Thereafter a contract was let to plaintiff's assignor for the construction of the sewer as an entirety; and the subsequent assessment apportioned the cost of the work as a whole upon all the frontage along the eight streets where the sewer was laid.

Appellant argues that each notice pointed to additional work by referring to the resolution of intention for further particulars The statute, however, requires that the notice itself shall state briefly the work proposed; and we cannot allow that it is a compliance with this requirement to designate in the notice only a relatively small transverse section of an extended line or network of sewers. The case of Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585, relied on by appellant, does not meet the objection. The notice there identified the locality of the proposed work, and such identification was declared to be among the evident objects to be effected by the same. In that particular the notices in the present case were misleading. No one being apprised merely that a sewer was contemplated within certain limits on a single street would have any intimation that its locality extended over seven other streets also.

It is contended, further, that no owner of property to be assessed could be damnified by the omission; this, for the reason that, the assessment being apportioned according to feet frontage, any extension of the sewer beyond a single street is accompanied by a corresponding extension of assessable frontage. But the conclusion appears unwarranted when we reflect that the laying of the sewer on one street may involve only excavation in sand, while in other streets it might require the filling of a morass or blasting of rock, to the material enhancement of the general cost. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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116 Cal. 458

## KRELING v. KRELING. (S. F. 603.)

(Supreme Court of California. April 7, 1897.)

SUPERSEDEAS BOND—JUSTIFICATION OF SURETIES.

1. A judgment providing that defendant pay a certain indebtedness on two notes, and, in default, that certain real estate be sold, and that, if the proceeds are insufficient, a judgment for the balance be docketed against defendant, is not within Code Civ. Proc. § 942, requiring a bond for double the amount of the judgment on a stay of execution where the judgment directs the payment of money.

2. A decision of the clerk of the superior court on the justification of sureties on appeal cannot be reviewed.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

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[1] Act March 18, 1885.

Action by one Kreling, administratrix, against one Kreling. Defendant appeals from the judgment. Motion for writ of supersedeas. Granted.

J. D. Sullivan and Herbert Choynski (Thos. A. McGowan and F. H. Smithson, of counsel), for appellant. H. H. Lowenthal, for respondent.

HARRISON, J. A judgment was rendered in favor of the plaintiff, that the defendant, within 10 days after its entry, pay, satisfy, and discharge certain indebtedness existing in favor of the Anglo-California Bank, Limited, upon two promissory notes, amounting to $5,000, held by it, and within said date procure a release of the plaintiff's intestate from liability on said notes; that in default thereof a certain parcel of real estate described in said judgment be sold by a commissioner who was appointed therefor, and that out of the proceeds thereof the amount of said notes be paid to said bank, and, if said proceeds were insufficient, judgment for the balance be docketed against the defendant, and execution issue therefor. From this judgment the defendant appealed, and gave an undertaking in the sum of $300 for the costs of appeal, and a further undertaking, in the sum of $2,500 (that amount having been fixed by the judge of the court which rendered the judgment), to the effect that the appellant would not, pending the appeal, commit, or suffer to be committed, any waste upon the real property directed to be sold. The plaintiff excepted to the sufficiency of the sureties on this undertaking; and upon their justification before the county clerk, upon notice therefor, that officer approved the undertaking and the sureties thereon. The present motion is for a writ of supersedeas, staying the execution of the judgment and all proceedings thereon pending the appeal, and is resisted by the plaintiff upon the ground that the appellant did not give an undertaking in double the amount of the judgment.

The provisions of section 942, Code Civ. Proc., requiring an undertaking in double the amount of the judgment for a stay of its execution, "if the appeal be from a judgment or order directing the payment of money," is inapplicable to the present case. That section is applicable to a judgment which directs payment by the defendant of a specific amount of money, and which can be directly enforced by a writ of execution, but has no application to a judgment which may be satisfied in either of two or more modes, or which cannot be enforced against the defendant until after the plaintiff has exhausted another remedy, and where he is personally liable for only a deficiency of the proceeds of certain property which is primarily chargeable therefor. Painter v. Painter, 98 Cal. 625, 33 Pac. 483; Boob v. Hall, 105 Cal. 413, 38 Pac. 977. If the judgment direct the sale of real property, and the defendant is liable only in case of deficiency of the proceeds of such sale, the provisions of section 945 control, and by that section it is only when the judgment is for the sale of "mortgaged" premises that the undertaking must provide for the payment of a deficiency.

We cannot review the decision of the clerk upon the justification of the sureties before him. The statute has designated that officer as a tribunal for hearing and determining that question, and has provided no mode by which his conclusion may be reviewed. Boyer v. Superior Court of San Francisco, 110 Cal. 401, 42 Pac. 892. It is a general rule that where a fact to be determined rests upon conflicting testimony, or the weight of evidence, or the credibility of witnesses, the decision of the tribunal to whom it has been intrusted will be accepted as correct. The motion for the writ is granted.

We concur: BEATTY, C. J.; GAROUTTE, J.

(116 Cal. 463)

## GRAHAM v. FARMERS' & MERCHANTS' BANK OF LOS ANGELES. (L. A. 215.)

(Supreme Court of California. April 7, 1897.)

GUARANTY — SCOPE OF CONTRACT — DRAFT FOR PRICE OF GOODS—ADVANCES ON GOODS NOT COVERED BY GUARANTY—EVIDENCE.

1. A guaranty of payment of a draft for the price of three car loads of fruit, which expressly states that the fruit has been loaded in cars having designated numbers, given to a bank to procure advances for the accommodation of the shipper, does not justify the bank in advancing money to him on shipments in other cars, where the bills of lading and bills of exchange presented with the guaranty showed on their face that they were drawn to cover shipments made in other cars.

2. In an action against a bank for a deposit sequestered by it to reimburse itself for advances on unpaid drafts guarantied by the depositor, a letter written by the guarantor, and presented to the bank with the guaranty, is admissible as part of the transaction to show that the guaranty was not intended to cover the advances actually made.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Robert Graham against the Farmers' & Merchants' Bank of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed.

Graves, O'Melveny & Saankland, for appellant. Edward A. Meserve, for respondent.

TEMPLE, J. Plaintiff sues to recover $312, which he had on general deposit with the defendant, but which defendant refused to pay upon his order. The defense is that the defendant had paid three drafts guarantied by plaintiff, amounting to $450, which drafts had not been paid by the drawee or drawer although demand had been made, and that thereupon the bank sequestered the deposit. The guaranty given by plaintiff was as follows: "Sacramento, Cal., July 25, 1895. H. J. Fleishman, Cashier F. & M.

Bank, Los Angeles, Cal.—Dear Sir: This is your authority to honor the draft of E. N. Altland & Company on P. Ruhlman & Company, New York, to cover shipments of three car loads of oranges loaded into fruit growers' express cars 12,312, 12,332, and 12,324. Said draft not to exceed $150 for each car, or a total of $450 for the three cars. I shall hold myself responsible for the payment of this draft by P. Ruhlman & Company on presentation. Yours, truly, Robt. Graham." This was presented to the bank July 29th, with three drafts as follows: "$150.00. Los Angeles, Cal., July 27, 1895. On demand, pay to the order of Farmers' & Merchants' Bank one hundred and fifty—100 dollars, % A. R. L. 5,626, value received, and charge to account of E. N. Altland. No. 65. To P. Ruhlman & Co., New York City, N. Y." "$150.00. Los Angeles, Cal., July 27, 1895. On demand, pay to the order of Farmers' & Merchants' Bank one hundred and fifty — 100 dollars, % A. R. L. 4,072, value received, and charge to account of E. N. Altland. No. 64. To P. Ruhlman & Co., New York City, N. Y." "$150.00. Los Angeles, Cal., July 29, 1895. On demand, pay to the order of Farmers' & Merchants' Bank one hundred and fifty — 100 dollars, % F. G. E. 12,007, value received, and charge to account of E. N. Altland. No. 67. To P. Ruhlman & Co., New York City, N. Y." Accompanying each was a bill of lading for a car load of oranges packed in the three cars respectively mentioned in the bills of exchange. No notice whatever was given to Graham of the acceptance of the guaranty, the advance on the drafts, or of their nonpayment. The officers of the bank knew nothing of any correspondence or of the relations between Graham and Altland except as above. Evidently the bank was not charged with any duty with reference to the fruit which had been loaded into the cars named. They were, however, charged with knowledge of certain facts, to wit, that plaintiff supposed that the fruit already loaded in the cars named would be shipped to P. Ruhlman & Co., in consideration for which P. Ruhlman & Co. would pay the drafts. The fact that the numbers of the cars in which the oranges were loaded were given was itself a significant fact. The officers of the bank may well have asked why these particular cars were mentioned, if it was immaterial in what cars the fruit was shipped. It turns out that these cars were about one week on the road, and could have been diverted by telegraph so as to reach New York in a day or two,—ten days or so earlier than those shipped in the other cars could reach New York. According to the testimony of Graham, this was quite material to P. Ruhlman & Co. Upon presenting the letter containing the guaranty, Altland also presented three bills of exchange, each one of which informed the bank, or its officers, that it was not drawn against the shipment in the three cars specially mentioned, but against shipments made in other cars. Perhaps a car load of oranges indicates a certain quantity of fruit. Upon that there was no issue. But if Graham was willing to guaranty that certain car loads would be purchased by P. Ruhlman & Co., and that they would net at least $150 per car load, that does not prove that he would be willing to make the same guaranty as to other car loads; and the judgment of witnesses and the court cannot be substituted for that of Graham himself. They cannot change his contract. If the shipment was merely the consideration which moved Graham to give the guaranty, as appellant suggests, the bank should have concluded that Graham had some hold upon those cars, and for that reason should not have advanced the money upon entirely different shipments. The fact that the bank took bills of lading itself shows that it did not regard the recital as merely stating a fact which was of no concern to it. I do not see how the telegram to Altland can help appellant. If it really was authority to change the guaranty so as to apply to other shipments, no doubt Graham would be liable, even though the bank officers did not know of it. But it was, in fact, no such thing. As sent by Graham, it was a refusal to guaranty payment for any other shipment. As only actual authority from Graham could help the bank, it cannot profit by any mistake made in its transmission.

The court did not err in permitting the letter from Graham to be read. The telegram expressly refers to it as explanatory, and I think it was admissible as showing the surrounding circumstances, and that the shipment of the car loads specially mentioned was deemed material by Graham in making the guaranty, and that he at the time intended that the guaranty should apply only to them. Graham had no interest whatever in the shipments made. His guaranty was wholly a friendly act, designed to assist Altland. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

116 Cal. 403

## RUTAN v. WOLTERS et al. (S. F. 567.)

(Supreme Court of California. April 3, 1897.)

TROVER AND CONVERSION—SUFFICIENCY OF COMPLAINT—JUDGMENT—CONSTRUCTION—APPEAL—HARMLESS ERROR.

1. A complaint alleged that plaintiff was "heretofore" the owner and entitled to the possession of certain personal property, and that defendants, "within two years last past," took possession of it, and converted it to their own use. *Held*, that the complaint was sufficient, after verdict, though it did not state the precise time plaintiff was the owner, or when defendants converted the property.

2. In conversion against L., and against "L. as sheriff of," etc., a judgment against "L., sheriff of," etc., was against L. individually.

3. In conversion against a certain person, in-

dividually and as assignee in insolvency, he cannot complain that the judgment is against him in his representative capacity, where the jury found that he converted the property to his own use.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Rutan against one Wolters and others for the conversion of personal property. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Dorn & Dorn and Dunne & McPike, for appellants. R. H. Countryman, for respondent.

HARRISON, J. 1. The complaint herein sufficiently states a cause of action. It alleges that the plaintiff was "heretofore" the owner and entitled to the immediate possession of certain personal property, and that the defendants, "within two years last past," took possession and control of the property without the consent of the plaintiff, and converted the same to their own use and benefit, to the damage of plaintiff in the sum of $1,619. The complaint does not allege the precise time at which the plaintiff was the owner, or at which the defendants took or converted the property, and was open to a demurrer for ambiguity in this respect. No such demurrer was filed, but the cause was tried before a jury upon the answer of the defendants denying the allegations of the complaint, and a verdict thereon was rendered in favor of the plaintiff. It is as consistent with the averments in the complaint to hold that the "heretofore" therein named included the time at which it is alleged that the defendants converted the property, as that it was prior thereto; and as, after judgment, every intendment is to be made in support thereof, it must be assumed that the proofs at the trial were sufficient to justify the verdict.

2. Two of the defendants named in the caption to the complaint are "Leopold Cassell, as assignee in insolvency of the St. Helena Wine Company, an insolvent debtor," and "C. S. Laumeister, as sheriff of the city and county of San Francisco." These persons are also named individually in the caption as defendants in the action, and the conversion of the property is alleged to have been by "the said defendants." The answers were filed in their behalf both as individuals and in the capacity in which they were sued. The judgment rendered is that the plaintiff "do have and recover from C. S. Laumeister, sheriff of the city and county of San Francisco, state of California, and L. Cassell, as assignee in insolvency of the St. Helena Wine Company, an insolvent debtor, two of the defendants, the sum of $1,389." It is contended by the appellants that Cassell could not commit a tort in his capacity as assignee of an insolvent debtor, and that the judgment against him, in his representative capacity, for the conversion of the property, was erroneous. The judgment, however, is not against the estate of the insolvent, but is against Cassell "as assignee"; and, as the verdict implies that the jury found that he converted the property to his own use, it is not for him to complain that the judgment is against him in his representative capacity. Whether he shall be reimbursed from the estate of the insolvent, in case he satisfies the judgment out of his own property, will be determined by the court which appointed him the assignee. The judgment against Laumeister is against him as an individual, notwithstanding the addition of the words, "sheriff of the city and county of San Francisco." The judgment is affirmed.

We concur: BEATTY, C. J.; VAN FLEET, J.

116 Cal. 467

## COUNTY BANK OF SAN LUIS OBISPO v. GREENBERG et al. (L. A. No. 121.)

(Supreme Court of California. April 7, 1897.)

NOTE—CONSTRUCTION—PLEADING.

1. In an action on a note payable in one year, with the clause, "This note is given to secure overdraft," the complaint is insufficient if it does not allege the existence of an overdraft when the note was due.

2. Where a note provides that it is given to secure an overdraft and is payable in one year, and the overdraft, at the time it is given, is less than the face of the note, the overdraft secured is the amount due at the time the note is payable, not exceeding the face of the note.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the County Bank of San Luis Obispo against Meyer Greenberg and others. Judgment for plaintiff, and defendant B. Schwartz appeals. Reversed.

Graves & Graves and Louis Lamy, for appellant. Wilcoxon & Bouldin, for respondent.

HAYNES, C. This action is upon a promissory note made by Meyer Greenberg, L. J. Greenberg, and B. Schwartz, dated March 5, 1894, at one year, to order of the plaintiff, for the sum of $5,000, with interest at 10 per cent. until paid; and at the end thereof, above the signature of the makers, it was added: "This note is given to secure overdraft of Greenberg Bros." The complaint is in the usual form, sets out a copy of the note, and alleges that no part of it has been paid. A general demurrer to the complaint was overruled, the defendants answered, and upon trial before a jury the plaintiff had verdict, and judgment was entered thereon against the defendant Schwartz, the other defendants having been discharged in insolvency pending the suit. This appeal is from the judgment, upon the judgment roll and a bill of exceptions.

The demurrer to the complaint should

have been sustained. The instrument sued upon is not an absolute and unconditional promise to pay a certain sum of money at the time specified, but is a collateral agreement to pay the overdraft of Greenberg Bros., on March 5, 1895, not exceeding the sum of $5,000 and accrued interest. The action is properly brought upon the instrument, but as the liability of the defendants depended upon a fact not appearing upon its face, namely, the existence of an overdraft at the time the action is brought, such fact must be alleged. In Tooker v. Arnoux, 76 N. Y. 397, the action was upon the following order drawn upon the defendant in favor of the plaintiff: "Please pay William T. Tooker the sum of $556 out of the money to be realized from the sale of the houses on the north side of 46th street, city of New York, and known as Nos. 305, 307, and 309 East 46th street. James Watson." This order was accepted by defendant, and, before suit, $100 was paid thereon. There was no allegation that the houses, or any of them, had been sold. Defendant's counsel, at the beginning of the trial, moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied. Plaintiff offered evidence of the sale of the houses, to which defendant objected on the ground that it was not averred in the complaint. Verdict for plaintiff. Upon appeal the court said: "We think the complaint was clearly bad. The sale of the houses mentioned in the order, and the receipt of money from such sale, were conditions precedent to the defendant's liability on his acceptance, and those facts should have been averred. In the absence of such averments, no indebtedness appeared." So in the case before us there was no indebtedness upon the note unless there was an indebtedness of Greenberg Bros. upon their account with the bank, and no such indebtedness was averred. A judgment by default would not have been supported by the undenied averments of the complaint. It was not even averred that anything was "due" upon the instrument set out in the complaint, the averment being "that no part of the principal sum, or the interest thereon, has ever been paid,"—an averment which might be strictly true, though the overdraft had been fully paid.

The conclusion we have reached necessitates a reversal of the judgment, but, as the plaintiff may desire to amend its complaint, one question made by defendant will doubtless arise on a new trial, and should be briefly noticed. Defendant contends that at the time the instrument in question was executed the overdraft of Greenberg Bros. amounted to $3,700; that afterwards, and before this action was brought, they deposited in the bank at various times sums amounting to over $37,000; and that said subsequent deposits should have been applied, so far as necessary, to the payment of said overdraft. The intention of the parties, to be ascertained from the terms of the instrument read in the light of the surrounding circumstances, must determine that question. No specific overdraft as to amount is mentioned. The amount then due was much less than $5,000, the amount named in the obligation. If it had been intended that the definite amount then due should only be secured, that sum would doubtless have been named, or, if it had been intended that the first deposits made by the Greenberg Brothers should apply to the satisfaction of the overdraft then existing, there could have been no good reason why the larger sum should bear interest. We think the evident intention was that the overdraft might be increased, and that the obligation in question was intended to secure whatever overdraft might exist on March 5, 1895, not exceeding the amount of the obligation and accrued interest thereon; in other words, that it was intended to strengthen and enlarge the credit of Greenberg Bros., and contemplated continued transactions between them and the bank. The judgment appealed from should be reversed, with directions to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, with directions to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend.

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116 Cal. 435

## SAWTELLE v. MUNCY et ux. (L. A. 196.)

(Supreme Court of California. April 7, 1897.)

DEFAULT—WAIVER—HARMLESS ERROR.

1. A default for want of an answer was waived where the defaulting defendant subsequently joined her co-defendant in a demurrer and an answer, without objection by plaintiff till the close of the latter's testimony.

2. On foreclosure of a mortgage executed by husband and wife to secure the former's note, plaintiff's failure to establish his demand against the husband renders harmless a refusal to enter judgment against the wife for want of an answer.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by C. A. Sawtelle against R. E. Muncy and wife to foreclose a mortgage. From a judgment for defendants, plaintiff appeals. Affirmed.

W. S. Wright, for appellant. Collier & Evans, for respondents.

SEARLS, C. Action to foreclose a mortgage executed by R. E. Muncy and Sadie E.

Muncy, his wife, to secure the payment of a promissory note for $1,295, made by R. E. Muncy, September 7, 1888, and payable on or before two years after date, with interest at 10 per cent. per annum. Defense: Want of consideration, menace, and fraud. Defendants had judgment. Plaintiff appeals from the judgment, and supports his appeal by a bill of exceptions. The cause was tried by the court, without a jury.

The findings show that the note in suit was made without valuable consideration; that the note and mortgage were procured by false representations on the part of plaintiff, and by menace, consisting of threats of a criminal prosecution against defendant R. E. Muncy, and of consequent injury to his character, and that the mortgage was executed by defendants, and each of them, under the influence of such menace, and would not otherwise have been made or executed. Appellant contends that the findings are not supported by the evidence, and specifies various particulars in which the evidence fails to support the several findings. For the sake of brevity, we shall consider the objections together. The evidence may be epitomized as follows: Plaintiff introduced the note and mortgage, and rested. Defendant R. E. Muncy testified that he contracted to purchase the mortgaged premises in May, 1887, from one Moses Bollinger, and introduced the contract; consideration, $652.51. When the last payment was made, defendant had the deed made to his wife, Sadie E. Muncy. After defendant had contracted, land rose in price, and he made a contract with one Townsend to sell him the same land at, say, $200 per acre. $200 or $300 was paid as a bonus, and the residue of, say, $1,500, was to be paid at a specified time, or the bonus to be forfeited. Townsend was in default for a year or so, and went into insolvency. About the date of the note and mortgage, plaintiff came to this defendant, and represented to him that he had received a note from Townsend for, say, $1,250, secured by an assignment of the Muncy contract for the sale of the land; that, in conveying the land to his wife, R. E. Muncy was guilty of a crime, and unless he fixed it up at once, and "no fooling," he would institute criminal proceedings against him. Defendant's wife was in a delicate situation. He had recently come to the state, and engaged in business, and, fearing the effect of a prosecution, was induced to give the note and mortgage. Defendant's wife corroborated the evidence as to threats by plaintiff of a criminal prosecution, etc. In rebuttal, the deposition of plaintiff, who resides in Oregon, was read in evidence, stating, in substance, that one N. G. Yoakum had contracted to purchase the land covered by the mortgage, and had contracted to sell it to defendant R. E. Muncy; that there was a balance of $1,295 due to Yoakum from Muncy; that Yoakum assigned his contract of purchase and his contract of sale to plaintiff; and that the sum due from defendant constituted the consideration for the note in suit. In reply to this, defendant R. E. Muncy testified that he never at any time had any dealings whatever with Yoakum,—barely knew him; Yoakum never had any interest in the land that he knew of; that he never contracted with Yoakum in reference to this or any other land or thing; that, shortly after he bought the land of Bollinger, Yoakum disappeared, leaving his family, and has never been heard from since. The parties to the suit were the only witnesses.

From the foregoing synopsis of the evidence it is quite apparent that there was evidence to support the findings, and that if the court below believed the defendants, as it evidently did, it could not well have found otherwise. According to their testimony, there was no consideration whatever for the note, and hence it matters not whether the menace was sufficient to defeat the instrument. It seems strange, if plaintiff testified truthfully, that he did not fortify his position by some of the agreements of which he speaks, or by extrinsic evidence in support of his statement. It is sufficient, however, for us to say that the court was amply justified in its findings.

Appellant further contends that the court erred in refusing judgment against defendant Sadie E. Muncy after default. The record shows that the defendant Sadie E. Muncy was served with summons on the 1st day of November, 1892, and that her default for want of an answer was entered by the clerk November 22, 1892. December 7, 1892, both of the defendants demurred to the complaint, which demurrer was overruled December 23d. January 20, 1893, defendants answered; and, after leave from the court so to do, they, on the 7th day of March, 1894, filed an amendment to their answer. No objection seems to have been taken to the appearance of the wife defendant up to the close of plaintiff's testimony, when judgment was asked against her, and the court took the motion under advisement, and reserved its ruling.

1. We think the default was waived. In Hestres v. Clements, 21 Cal. 425, default was entered against a defendant, who afterwards served and filed a demurrer, and acceptance of service of the demurrer was held a waiver of the default. Upon like principles, failing to raise objections to the various pleadings filed by the defaulting defendant, and going to trial upon the merits, should be regarded as a waiver of the default.

2. If it be conceded that the default was not waived, we are at a loss to see how plaintiff was injured. The defendant Sadie E. Muncy was not a party to the note in suit, and the only relief sought against her was the foreclosure of her interest in the land in satisfaction of plaintiff's demand. Mani-

festly, the establishment of that demand against her co-defendant was a predicate to such foreclosure, and, as plaintiff failed in establishing his demand against her co-defendant, he had no claim to satisfy out of the property of Sadie E. Muncy. The facts as found support the conclusions of law, and we recommend that the judgment be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(116 Cal. 440)

## PEOPLE v. GEIGER. (Cr. 201.)

(Supreme Court of California. April 7, 1897.)

INSANE PERSONS — DISCHARGE FROM ASYLUM — CRIME—INSANITY AS A DEFENSE—SPECIAL TRIAL OF ISSUE—BURGLARY—INDICTMENT.

1. Shortly after the escape of a patient from the insane asylum, the resident physician, who had intended to discharge him in a few days, and who believed that the patient was then restored to reason, caused his discharge to be recorded as "recovered." *Held* a valid exercise of the physician's authority, under St. 1875–76, p. 135, to discharge such patients as, "in his opinion," have recovered.

2. The fact that the accused had been in the insane asylum, and that his discharge as recovered was not entered till after his escape from the asylum, is insufficient to warrant submitting to trial the question of his present insanity, under Pen. Code, § 1368, authorizing such submission "if a doubt arises as to the sanity of the defendant."

3. Where the designation of the local vicinage of the building burglarized is not necessary for its identification, the variance between an allegation that the building is at S., in a specified county, and proof that it is over a mile from S., is immaterial.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Ernest Geiger was convicted of burglary, and from the judgment and order denying a new trial he appeals. Affirmed.

Geo. E. Colwell, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.

BRITT, C. Defendant was charged with the crime of burglary, perpetrated on October 9, 1895. When the case was called for trial he moved the court to stay all proceedings against him, and assigned as ground for such motion that he had been regularly committed as an insane person to an asylum for such persons, had not been legally discharged therefrom, and was then insane. The proof was that on November 9, 1892, he was duly committed by a judge of the superior court to the state asylum for the insane at Napa. He escaped therefrom on December 24, 1894, and never returned. No attempt was made to retake him. The resident physician, being of opinion that he was restored to reason, had, before his escape, intended to order his discharge if his condition did not change in a few days; and, believing him to be then so restored, said resident physician caused an appropriate record to be made of his discharge as "recovered" very shortly after the escape. On this showing, the court rightly denied the motion. The statute concerning the management of the asylum provides that the resident physician shall be the executive officer of the institution, and shall discharge such patients as, "in his opinion, have permanently recovered their reason." St. 1875–76, p. 135. And the fact that defendant had escaped when his recovery was thus determined by competent authority is no ground for impeaching such determination. The statute did not make his corporeal presence a condition of the valid exercise of the power to discharge him. See Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677.

Defendant next moved the court to submit to trial the question of his present insanity, under the provision for such submission in section 1368, Pen. Code, "If a doubt arise as to the sanity of the defendant." The motion was not supported by any evidence in addition to that produced on the motion for a stay, and it was denied. We see no error. Prima facie, defendant had been restored to reason, and it cannot be said that the showing was such as must necessarily have constrained a doubt in the mind of the judge as to defendant's sanity. Webber v. Com., 119 Pa. St. 223, 13 Atl. 427, where this question is examined at length.

The trial of the information proceeded, and defendant was found guilty. It is urged that the evidence showed conclusively that he was insane when the burglary was committed. There was certainly evidence that he acted at times like a lunatic, and that, in the opinion of some who knew him well, he was crazy. On the other hand, there was testimony that he made false statements of the means by which he procured the property stolen at the time of the burglary, and several of his neighbors and intimate acquaintances testified their belief that he was sane. The record also informs us that "other witnesses in corroboration were examined." How strong such corroboration may have been, we cannot know. It must be said that the evidence regarding his sanity was conflicting. The trial judge considered it sufficient to justify the verdict, and its insufficiency cannot be assumed here.

There was a request for an instruction directing the jury to acquit on the ground of variance between allegation and proof, in this: The information charged a burglary in entering, etc., a building at St. Helena, in the county of Napa, while the proof was that the building is situated a mile and a half from St. Helena. It does not appear that a designation of the local vicinage of the building was at all important for its identification, and, unless necessary for that purpose, it was surplusage to allege or prove its situation, further than that it was in the county of Napa. People v. Handley, 100 Cal. 370, 34 Pac. 853; 2 Bish.

Cr. Proc. § 135. The judgment and order denying a new trial should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(116 Cal. 427)

## GRANT v. MURPHY et al. (S. F. 466.)

(Supreme Court of California. April 7, 1897.)

Partition—Interlocutory Decree.

Where it appears, on partition of property which cannot be equitably divided by metes and bounds, but must be sold, that a contest is pending in probate court between certain of the parties over the interest of a deceased co-tenant, the court may make an interlocutory decree, definitely fixing the proportion to which each party is entitled, so far as undisputed, and also the quantity belonging to the estate of the deceased co-tenant, leaving the rights of the contesting claimants, as between themselves, to be determined by the probate court.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Suit for partition by Adam Grant against Daniel T. Murphy and others. From the interlocutory decree, defendants Mary Helen Dominguez and others appeal. Affirmed.

Metcalf & Metcalf and A. A. Moore (George D. Metcalf and Myrick & Deering, of counsel), for appellants. Lloyd & Wood, for respondent.

McFARLAND, J. This is an appeal from an interlocutory decree in a suit for partition. The point made by the appellants is that the decree does not determine the interest of all the various parties in the premises, and that for this reason it is invalid, and should be reversed. The facts found by the court and admitted by the parties, which are necessary to be noticed, are these: The premises consist of a city lot in San Francisco, upon which there is a large business building; and it is found by the court, and admitted, that it cannot be divided, but must be sold. On the 3d day of June, 1885, the owners of the premises were Adam Grant and Daniel T. Murphy, each owning an undivided half as tenant in common with the other. On that day the said Daniel T. Murphy died, leaving a will; and afterwards his half of the property was distributed by the proper probate court as follows: One-half thereof, or six twenty-fourths of the whole property, to his widow, Anna L. Murphy, and one twenty-fourth to each of his six children, Eugene K. L. Murphy, Daniel T. Murphy, Samuel J. Murphy, Mary Helen Murphy (now Mary Helen Dominguez), Frances Josephine Murphy, and Mary Margaret Isabella Murphy. There was also another daughter, Anna Wolseley (formerly Anna Murphy), to whom nothing was given by the will of said deceased. Daniel T. Murphy and Samuel J. Murphy each afterwards conveyed his one twenty-fourth to the plaintiff herein, so that at the time of the decree the plaintiff was the owner of fourteen twenty-fourths of the premises. Afterwards the widow, Anna L. Murphy, died, leaving a will, by which it is claimed by some of the parties that she devised her six twenty-fourths to her three daughters, the aforesaid Mary Helen Dominguez, Frances Josephine, and Mary Margaret Isabella. This will was admitted to probate in the superior court of Alameda county, but it was afterwards contested by the brothers and said Anna Wolseley, and the probate thereof was set aside by the court. But upon appeal the judgment of the said superior court was reversed in this court, and judgment ordered admitting the said will to probate. After the remittitur went down, however, another appeal was taken, which is still pending. The said three daughters of Anna L. Murphy, deceased, who claim under her will as aforesaid, set up in their answers that each of them, in addition to the ownership of one twenty-fourth part of the premises, is also entitled to an undivided one-third of the one-fourth of said lands held by their said mother. The defendant Victor H. Metcalf, who is the administrator of the estate of said Anna L. Murphy, deceased, set up in his answer that the estate was the owner of the undivided one-fourth of said premises. The said Anna Wolseley, Daniel T. Murphy, and Samuel J. Murphy filed answers, in which they denied the validity of the said will of their mother, Anna L. Murphy, and set up that each is entitled to an undivided one-seventh of the undivided one-fourth of said premises, which belonged to their mother at the time of her death. The said Eugene K. L. Murphy also died, leaving a will, and there is a contest between his heirs and certain trustees named in his will as to his one twenty-fourth of the premises; but, as there is no appeal taken by the trustees or heirs, or any other person, from that part of the decree which disposes of his one twenty-fourth, that part of the decree need not be here considered. The court found, and the interlocutory decree adjudges, that the plaintiff is the owner of fourteen twenty-fourths of the premises; that Mary Helen Dominguez is the owner of one twenty-fourth; that Frances Josephine Murphy is the owner of one twenty-fourth; that Mary Margaret Isabella Murphy is the owner of one twenty-fourth; and that the successors in interest of Eugene K. L. Murphy, deceased, are the owners of one twenty-fourth; and there is no objection made by any one to those parts of the findings and decree above stated. However, as to the remaining one-fourth, or six twenty-fourths, which belonged to Anna L. Murphy at the time of her death, the court finds that it belongs to those who are entitled to the real estate of which said Anna L. Murphy died seised, but does not determine who of the several parties are so entitled, and in what proportion they are entitled. The decree determines that said one-fourth is in the estate of said Anna L. Murphy, deceased, but leaves it to the probate court, where the administration of said estate is pending, to determine how it should be distributed. From this decree Mary Helen Dominguez, Frances Josephine Murphy, Mary Margaret Isabella Murphy, and Victor H. Metcalf, administrator, appeal; and the point made by them for reversal is that the decree does not definitely ascertain and determine who of the various parties are entitled to the interest of the said Anna L. Murphy, deceased, and in what proportion they are so entitled. This is the only question presented in the case.

Under these circumstances it would seem just to allow the sale to be made, leaving that part of the proceeds which goes to the successors in interest of Anna L. Murphy, deceased, to await the determination of the said contest in the probate court; but, under former decisions of this court, and the provisions of the Code upon the subject, the question involved is not free from difficulty. If the court below had retained the case for a reasonable time, to allow the probate court to determine the contest before it,—a course pursued by courts of equity in early times, when they held that they could not try title in an action for partition,—some embarrassment which now arises might perhaps have been avoided. But we have to take the case as we find it, and the question now is, must the decree be reversed for the said reasons urged by appellants? It seems to be settled by the authorities that, as a general rule, all parties to an action for partition are actors; that each party, whether plaintiff or defendant, has the same rights, other things being equal, as any other party; that each party may set up in his pleading the nature and extent of his interest in the premises involved, and have the same ascertained and adjudicated; that the adjudication must appear in the interlocutory decree; that these principles apply ordinarily to a case where the premises cannot be divided, and must be sold, as well as to a case where there can be a strict partition; and that a decree which does not adjudicate the interests of the respective parties is invalid. Morenhout v. Higuera, 32 Cal. 290; De Uprey v. De Uprey, 27 Cal. 336; Bollo v. Navarro, 33 Cal. 459; Lorenz v. Jacobs, 53 Cal. 24; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Stevens v. McCormick, 90 Va. 735, 19 S. E. 742; Freem. Coten. § 516. It is to be observed, however, that in the cases above cited the subject was being dealt with generally, and not in view of any such particular phase of the question as is presented by the case at bar. In some of the cases there had been no ascertainment or adjudication at all by the trial court of the interests of any of the parties to the action. In the case at bar a sale of the premises was confessedly necessary. The interests of all the parties in the proceeds of the sale were definitely settled by the decree, except only the interests, as between themselves, of certain parties who were contesting claimants of the interest of a deceased co-tenant; the quantity of interest which belonged to said co-tenant at the time of her death, and which became part of her estate, was also definitely determined; and a contest between said claimants involving their conflicting rights to said deceased co-tenant's interest had been inaugurated, and was pending and undetermined, in the probate court, which had full jurisdiction of that subject. These facts, or facts similar to them, did not exist in any of the cases to which our attention has been called; and they cannot, therefore, be held as determining definitely how the law should be applied to a peculiar condition not contemplated when the decisions were made. For instance, Lorenz v. Jacobs, 53 Cal. 24, and De Uprey v. De Uprey, 27 Cal. 330, are the only cases decided by this court which involved a decree for the sale of the land instead of a partition by metes and bounds. In the Lorenz Case, the trial court had decreed a sale of the water ditch involved, without having ascertained or determined the interest of any one party to the action; and the De Uprey Case involves questions of pleading, practice, parties, variance, etc., which are quite different from the question presented in the case at bar. Therefore, general expressions used in the opinions in those two cases are to be taken as pertinent to the facts then before the court and the questions there involved, and not as applicable to and determinative of a question not then in contemplation. We think, therefore, that the question now before us is, so far as former decisions go, an open one; and, as the conclusion of the court below is apparently a just one, the decree should not be reversed unless it is violative of some statutory provision.

The provisions of the Code of Civil Procedure upon the subject of partition are not extremely clear and definite, and some of them are almost irreconcilably inconsistent and contradictory. They certainly do not define with precision the proper procedure to be taken if the action should come to the point reached in the case at bar, namely, where a co-tenant had died, and, although the quantity of interest going to his estate had been definitely ascertained, there was a contest between claimants of his estate pending in the proper probate court, which could not be ousted of the jurisdiction of such contest. Of course, in such a case, neither a plaintiff nor a defendant other than the said contestants can have any control over the proceedings in the probate court, and new complications might arise from deaths of other parties. Must they wait until proceedings which they cannot hasten have terminated in the probate court, and which might remain there unsettled for many years, or may they proceed to a division, leaving the contestants to a particular interest to settle their claims among themselves in the proper court? We think that the latter course is a proper and just one, and within the general scope of the law and the jurisdiction of the court, at least where there is to be a sale of the entire premises and a deposit of the proceeds in court. We need not inquire whether the rule could be properly applied to a case of strict partition of the premises by metes and bounds. Appellants rely a good deal upon section 759, Code Civ. Proc., and respondents upon section 774; and it is very difficult to construe the two sections so that both can stand,—which, of course, ought to be done, if possible. Section 759 provides that: "When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; * * * except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves." But section 774 provides that: "When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued, as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court;" and provision is made for further evidence, pleadings, etc. No very satisfactory construction of these two apparently conflicting sections is given by counsel for either side. We do not, however, consider it necessary in the case at bar to absolutely determine what these sections, taken together, mean; for they evidently cannot be applied to the particular condition of this case. They clearly apply only to issues over which the court in which the partition suit is pending has jurisdiction. "The court" mentioned in either section is the court into which the parties had been brought by the action for partition, and both sections are based upon the assumption that the matters therein mentioned are matters over which that court had jurisdiction. But where the estate of a deceased co-tenant is unsettled, and the administration thereof is pending in the proper probate court, and there is also pending there a contest between heirs and devisees as to who are the rightful owners of the interest of such deceased co-tenant, there is no jurisdiction in the court in which the partition suit is pending to hear and determine the issues between the hostile claimants of the interest of the deceased co-tenant; such jurisdiction is in the probate court. And where, as in the case at bar, the court has determined all matters over which it has jurisdiction, and has definitely ascertained all the interests of all the co-tenants, except only the issues between contesting claimants in the probate court of the interest of a deceased co-tenant, over which issues it has no jurisdiction, and the premises must be sold in order to effect a just division, there a decree of sale leaving the rights of said contesting claimants to be determined in the court having jurisdiction thereof is proper, is warranted by the general law of partition, and is not violative of any provision of the Code. Section 786, which provides that the referees who make the sale may take a purchaser's receipt for his share of the proceeds, is not determinative of the question. There are other instances provided for by the Code in which it could not be applied. The decree is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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5 Cal. Unrep. 659

## PONET v. WILLS et al. (L. A. 114.)

(Supreme Court of California. April 9, 1897.)

APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

The findings of the trial court as to the location of a division line will not be disturbed where the evidence is conflicting.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Victor Ponet against William Le Moyne Wills and Charlotte Wills, in which there were findings and judgment for plaintiff. From an order denying their motion for new trial, defendants appeal. Affirmed.

Geo. H. Smith and Smith & Winder, for appellants. J. Brousseau, for respondent.

HAYNES, C. Action to quiet title. Findings and judgment were for the plaintiff, and defendants appeal from an order denying their motion for a new trial, upon the ground that the findings are not justified by the evidence.

Plaintiff and defendants own contiguous lots in the city of Los Angeles, fronting on Buena Vista street, formerly known as Eternity street. Said street runs nearly north and south. Bellevue avenue, formerly known as Short street, crosses Buena Vista street at a point north of the premises in dispute, and plaintiff's lot lies on the north side of defendants' lot. Plaintiff alleges that defendants entered upon his lot in 1893, and erected a fence thereon parallel to his south side line, and 11.2 feet north thereof, and claim to own said land so fenced off from plaintiff's lot, or that they have some adverse interest therein. The sole question is as to the true location of the line between said lots. That the evidence in this case is conflicting is apparent from the briefs of counsel of the respective parties, as well as from the evidence contained in the record. An extended discussion of the evidence is, therefore, unnecessary. The lot now owned by plaintiff was conveyed by the city of Los Angeles to Carlos Cruz, July 11, 1868, by the following description: "All that certain piece or lot of land situated, lying, and being in the city and county of Los Angeles, bounded and described as follows, to wit: Facing on Eternity street in said city sixty (60) feet and back in depth one hundred and sixty-five (165) feet; bounded north by Henry Bohring and south by city lands, as appears by a map made 8th July, 1868, by L. Seebold, deputy county surveyor." This conveyance was made upon the petition of Carlos Cruz, accompanied by said map, a copy of which is attached to the findings and to the complaint. This map shows that the south line of the Bohring lot, which is also the north line of the Cruz lot, is 241 feet south of the south line of Short street (now Bellevue avenue), and also shows a house upon the Cruz lot, the north side of which coincides with the north line of the lot. The answer alleges, and the court finds, "that defendant Charlotte L. Wills is the owner of lot 4, block E, of the Fort Hill tract, according to the survey of L. Seebold, made in July and August, 1868, and adopted as the official map No. 3 by the mayor and council of Los Angeles, November 17, 1868." Said lot was conveyed by the city to Jacob Hommel, December 29, 1884, the deed referring to said map made by Seebold last above mentioned. Appellants contend that these two maps were made by the same surveyor, from the same survey, and therefore the conveyances under which the parties respectively claim do not conflict; that respondent attempts to establish his case by measuring from the south line of Bellevue avenue as it is now established, assuming that it is the same as the south line of Short street as it existed at the time of Seebold's survey; appellants further contending that the lines of Short street have been changed by the city council so that the south line of Bellevue avenue is now 20.2 feet further south than the south line of Short street as shown by Ord's survey of 1849. This change is exhibited by a map made by A. Solano in 1894, put in evidence by appellants, purporting to show the lines of Short street by Ord's survey, also the lines of the same street according to a resolution of the council made in 1875, and the present lines of Bellevue avenue, which coincide with the lines fixed in 1875 so far as its intersection with the west line of Buena Vista street is concerned, though there is a material divergence as the lines of the street are extended westerly. It is apparent that from July, 1875, at least, the northeast corner of an adobe house situated at the southwest corner of Bellevue avenue and Buena Vista street marked the south line of Short street at its intersection with the west line of Buena Vista street; and if we assume that on July 8, 1868,—at the time Seebold made the survey and map of the lot conveyed by the city to Carlos Cruz,—the south line of Short street intersected the west line of Buena Vista street at the same point, the court below rightly found in favor of the plaintiff.

Upon this point the plaintiff called several witnesses, who gave testimony tending to show that there had been no change in the south line of Short street at its intersection with Buena Vista street since said survey and map were made. But the map made by Seebold for Carlos Cruz presents stronger evidence, if not of the true location of the south line of Short street as it existed in 1868, at least of the point which he took as the initial point of his survey, and which he assumed to be the south line of Short street; and, if said initial point can be determined, it must control, whether he was mistaken as to the location of the line of the street or not, as it will identify the precise boundaries of the land conveyed to Cruz. Upon said map Seebold marked a house, the north side of which coincides with the north line of the Cruz lot now owned by the plaintiff, and which is identical with the north line of the lot as marked in green lines upon defendants' Exhibit A, which, if correctly located, shows defendants' encroachment of 11.2 feet. The house so marked by Seebold was, according to his survey, 241 feet from the point which he took as the south line of Short street. Mr. Botello testified that he had a faint recollection of that house; that it was built of wood, and was located about 28 or 30 feet from the house in which his mother now lives. Applying the scale to Solano's map, we find the distance from the adobe house marked "Isabel Acuna" to plaintiff's north line, as designated by the green lines, to be 30 feet, and that line is 241 feet from the northeast corner of the adobe house which marks the south line of Bellevue avenue at its intersection with the north line of Buena Vista street. Mrs. Donaciana Reihm, who lives on the Bohring lot, testified that there was a house on the northeast corner of the Cruz lot, very near to the house in which she is now living; that it adjoined her lot, and was right on the line; and the house Cruz lived in in the seventies was there at the corner; that house has been torn down. That Cruz lived in the house at the northeast corner of his lot was also testified to by Emil Dubordieu, though there was testimony to the effect that Cruz lived in another house, near the south side of the lot. Mr. Botello also testified that he lived on the Bohring lot 11 or 12 years, in a house which was a foot and a half or two feet on the Cruz lot. This house was not the adobe house in which his mother now lives. The witness called it a cottage. Solano's map shows a building abutting on the south line of the Bohring lot, but it is not designated by any name. Whether it is the cottage to which the witness refers, the record does not show, unless by inference. If that be the house mentioned by Mr. Botello, the blue lines on Solano's map, which purport to be made according to Seebold's survey, instead of cutting off "a foot and a half or two feet" of said house, cut off about 18 feet. It is not probable that Seebold would show on the map he made for Carlos Cruz a house on the Cruz lot abutting the north line, when in fact the line cut off 18 feet of a house on the Bohring lot, without noting that fact also. There is also evidence tending to show that a house was built on what was supposed to be the Cruz lot, near the south line; that it was burned about 1880, but that the excavation made for it is still visible, the greater part of which is between the fence built by the defendant and the north line of plaintiff's lot as shown by the findings of the court. We think the evidence we have referred to is quite sufficient to sustain the findings, and the fact that it shows that Seebold must have taken the south line of Short street to be marked by the adobe house which now marks the south line of Bellevue avenue does not affect the case, even though the true south line of Short street was at that time 20 feet further north. No other questions are discussed by counsel. We think that the order denying defendants' motion for a new trial should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

116 Cal. 492

## LAMBERSON et al. v. JEFFERDS, County Auditor. (Sac. 231.)

(Supreme Court of California. April 8, 1897.)

APPEAL BY COUNTY—BOND.

Code Civ. Proc. § 1058, declaring that in a civil action no appeal bond can be required of the state or any officer thereof who is a party in his official capacity, "or of any county," etc., without mentioning county officers, applies to an appeal by a county auditor where the county is the real party in interest.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Charles G. Lamberson and others against E. W. Jefferds, auditor of Tulare county. From a judgment for plaintiffs, defendant appealed, and plaintiffs move to dismiss the appeal. Motion denied.

F. B. Howard, Dist. Atty., and T. C. Clark, Dep. Dist. Atty., for appellant. Power & Alford and Lamberson & Middlecoff, for respondents.

TEMPLE, J. Respondent asks that the appeal herein be dismissed on the ground that no undertaking on appeal was given, nor was there an order of court dispensing with the undertaking, as authorized by section 946 of the Code of Civil Procedure. Appellant claims that his case comes within the provisions of section 1058 of the Code of Civil Procedure, which reads as follows: "Any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity, or in behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this Code, the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies and benefits as if the bond, undertaking or security were given and approved, as required by this Code." It will be observed that the section makes special mention of the state and state officers, but, while it mentions counties, it omits the mention of county officers; hence it is argued with considerable force that the design was to exclude them. And as it is provided in section 940 that no appeal is effectual unless an undertaking be given, every exception must be express, and none can be implied. The county is, however, the real party in interest. It was held in Scheerer v. Edgar, 67 Cal. 377, 7 Pac. 760, that in such matters the auditor does not act in his individual right, but in that of the city and county. For that reason it was held that section 946 was applicable, and the court might, by order, dispense with the undertaking. If that be so, the county is the real party in interest, and the case is evidently within the reason of the rule laid down as to counties. But it is said the respondent can only get judgment for costs against the individual. That is also the case where a state officer is a party. Sections 1038 and 1039 only authorize costs to be paid from the state or county treasury when the state or county—as the case may be—is a party. It has been held that the auditor is not protected by an order of the board of supervisors allowing a claim which cannot be a charge against the county. Linden v. Case, 46 Cal. 171; Connor v. Morris, 23 Cal. 447; Carroll v. Siebenthaler, 37 Cal. 193. If he refuses to issue a warrant for an illegal claim, he is acting for the county, and is protecting it against the unlawful acts of the board of supervisors. If the auditor of a county or the comptroller of state refuse to issue a warrant, improperly, and when there is no just cause to doubt the validity of the claim, he would have no just claim against the state or the county for reimbursement, and may justly be cast in costs. Dispensing with the undertaking does not necessarily imply that a personal judgment for costs or damages may not be rendered. The main question—whether the county being the real party in interest brings this case within the purview of the statute or not—is determined, in my opinion, by the case of People v. Supervisors of Marin Co., 10 Cal. 344. It was provided in an act concerning appeals in certain cases (St. 1856, p. 26) that a city or county or town may appeal from a judgment against it, and have a stay of proceedings, without filing a bond. In the case mentioned the appeal was by the board of supervisors from a judgment against it awarding a writ of mandamus. That act made no express mention of the officers of such city, county, or town, and yet the supreme court held the statute applicable to the board of supervisors. I think this establishes a rule of construction directly applicable to this case, and I see no good reason for changing it. The motion is denied.

We concur: HARRISON, J.; HENSHAW, J.; VAN FLEET, J.; McFARLAND, J.

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116 Cal. 454

GILLIAM v. BROWN et al. (L. A. 212.)

(Supreme Court of California. April 7, 1897.)

CONSTRUCTION OF CONTRACT — WARRANTY — INSTRUCTION—SUBMISSION TO JURY OF QUESTION OF LAW.

1. In a contract to construct a ditch, which was guarantied to carry all the water of a creek for two years after its completion, the guaranty is in the nature of a warranty, and does not require the contractor to wait for two years after completion of the ditch before being entitled to payment therefor.

2. The question of whether the levy of an assessment by a company on its members for the purpose of paying for a ditch for which the company had contracted constituted an acceptance from the contractor of the ditch as then constructed is one of law, and its submission to a jury for determination is erroneous.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by T. J. Gilliam against Andrew Brown and others on a contract. Judgment for plaintiff, and defendants appeal. Reversed.

B. Brundege, for appellants. E. Rousseau, for respondent.

TEMPLE, J. This is an action upon a contract whereby plaintiff agreed to construct a ditch. The defendants are associated farmers of Kern county. The complaint charges them as partners in a certain ditch under the firm name of the Whitney Creek Ditch Company. Plaintiff avers that he and defendants entered into an agreement in writing, whereby he agreed to construct the ditch, for which defendants contracted to pay $1,000; that he constructed the ditch, and defendants accepted it as complete, but have not paid. The defendants, besides their denials of plaintiff's allegations, aver that plaintiff contracted to make an open cut along a described line from Whitney creek, at a depth below the creek, and of capacity sufficient to carry all the water that Whitney creek contains at all times, into the south fork of Kern river, to complete the work within two years, and to maintain such cut in such condition that it will divert and carry all the waters of the creek for two years after the completion thereof, and they charge that he has failed to perform this contract. The only evidence of a written contract at the trial consisted of a written proposal for bids, signed by certain persons as trustees, representing themselves to be trustees of the Whitney Creek Ditch Company, and plaintiff's acceptance thereof. The proposal for bids was as follows: "Notice to Bidders. Whitney Creek Ditch Co. According to the decision of the members of the above company, bids will be received by the trustees of above company for a contract to make a cut where the tunnel now is. The cut to be made so as to convey all the water that Whitney creek contains at all times. The successful bidder to guaranty and see that all the water of said creek runs through the cut for two years from completion of the work. The successful bidder to give bonds for double the amount of his bid. Work to commence not later than June 1, 1892. Bids will be opened on November 10, 1891, in presence of the bidders, by the full board of trustees. The trustees reserve the right to reject any and all bids. By order of the company. South Fork, September 14, 1891. [Signed] Wm. Scodie, Frank Fugitt, C. J. E. Taylor, Trustees." In his bid, plaintiff agree to fulfill the requirements of the trustees set out in the notice inviting the same. By the terms of this contract, as shown by the proposal for bids, plaintiff was entitled to his money when a cut was made sufficient in capacity and grade to carry all the waters of Whitney creek at all times. The guaranty that all the water shall run through the cut for two years was in the nature of a warranty. For that the company took the responsibility of the plaintiff. He was not required to wait for the two years, and then show that the ditch had carried all the water at all times, to enable him to recover. This view shows that many matters over which there was much controversy at the trial were immaterial. Upon every material point there was a conflict of evidence, and, whether the verdict was in accordance with the preponderance of testimony or not, we cannot say that it was unsupported by testimony.

Plaintiff contended that he had fully performed his contract, and was on that ground entitled to his pay. He also contended that the defendants had accepted the ditch as completed. This was not, as contended by counsel for defendants, a claim that the contract had been varied, but that the defendants had accepted the work, and thereby agreed that it had been done in all respects as required, or, if it had not been fully performed, that further performance was waived. It was competent for the parties to accept the work done, and to bind themselves to pay for it, although the contract had not been fully performed. If this is an alteration of the contract, it was at once an executed agreement. I do not therefore deem the refusal to give the instruction asked by defendants upon the subject of the verbal alterations of written contracts injurious, even if the instructions were not substantially given elsewhere by the court.

The instruction in regard to the levy of an assessment is of doubtful import, but seems to tell the jury that it is for them to determine whether the levy of an assessment of $1,000 was an alteration of the contract to the extent that it constituted an acceptance of the work. This was doubly erroneous. The so-called "levy" of an assessment could not of itself constitute an acceptance of the work, and, if it did, it would do so as a matter of law, and its effect would be for the court to declare. I do not find in the record any evidence whatever of an acceptance of the work. An agreement to pay the workmen, while denying that the contract has been performed, and claiming that nothing is due plaintiff, would not constitute such acceptance. For this reason, also, the instruction was erroneous. Quite likely the verdict was based upon this proposition.

For these reasons, the judgment is reversed, and the cause remanded.

We concur: McFARLAND, J.; HENSHAW, J.

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116 Cal. 487

## McLAUGHLIN v. CLAUSSEN. (L. A. 172.)

(Supreme Court of California. April 8, 1897.)

DISMISSAL FOR WANT OF PROSECUTION—DISCRETION OF COURT.

It is not an abuse of discretion for a court to dismiss an action for want of prosecution where it was dropped from the calendar nearly three years before by a verbal agreement between the attorneys, not authorized by the defendant, to await the determination of another action; there being no agreement filed as provided by Code Civ. Proc. § 283.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by James McLaughlin against Henry Claussen on a note. From a judgment dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

P. W. Dooner, for appellant. Schutze & Luckel, for respondent.

BELCHER, C. This is an action upon a promissory note for $400 executed by the defendant to the plaintiff on December 27, 1887, and payable four months after date, with interest. The complaint was filed October 27, 1888. The answer admitted the making of the note, and that plaintiff was the owner and holder thereof, and that no part of the same had been paid. It then set up facts which it was claimed constituted a defense to the action. The plaintiff demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense, and the demurrer was sustained. The defendant declined to amend his answer, and thereupon judgment was entered in favor of the plaintiff. From that judgment the defendant appealed to this court, where it was held that the facts set up in the answer were sufficient, if true, to constitute a defense to the action. The judgment was accordingly reversed, and the court below was directed to overrule the demurrer. McLaughlin v. Clausen, 85 Cal. 322, 24 Pac. 636. The remittitur was filed in the court below on September 19, 1890. Thereafter, as shown by the minutes of the court, the case was on April 6, 1891, "set for trial April 28, 1891." On the last-named day the "trial of cause passed by consent." On July 6, 1891, the case went "over." On October 5, 1891, the case went "over." On January 5, 1892, the case went "off calendar." Nothing more appears to have been done in the case until October 15, 1895, when plaintiff caused a writ of attachment to be issued and levied on the property of defendant. On October 23, 1895, defendant served and filed notice that he would move the court to dismiss the action upon the ground that "plaintiff has failed and neglected to prosecute this action, and has willfully kept this action pending for an unreasonable length of time without making any effort whatever to bring it to trial." The motion was heard on November 4, 1895, and granted; and, three days later, judgment dismissing the action was duly filed and entered of record. From that judgment the plaintiff appeals.

At the hearing of the motion the judgment roll, the minutes of the court, and the remittitur in the former appeal, and also the remittitur in the case of Witmer Bros. Co. v. Weid, 108 Cal. 569, 41 Pac. 491, which was filed in the court below on September 28, 1895, were produced and called to the attention of the court, and affidavits on behalf of the respective parties were introduced and read. That the court had power to dismiss the action for want of prosecution is settled law. Grigsby v. Napa Co., 36 Cal. 585; Simmons v. Keller, 50 Cal. 38; Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57. And the only question is, did it abuse its discretion in so doing? It will be observed that there is nothing in the record, except the affidavit read for plaintiff, showing that any order of the court postponing the case, after that of April 28, 1891, was made with the knowledge or consent of the defendant or his attorney. The names of the attorneys were placed on the calendar when it was made up by the clerk before the case was called, but, so far as appears, the orders may have been made in the absence of the attorneys for both sides. The affidavit read for the plaintiff was made by his attorney, Mr. Dooner, and it stated that "the orders of April 28, 1891, July 6, 1891, October 5, 1891, and January 5, 1892, were made and entered by the consent of the parties in open court; this affiant representing the plaintiff, and John Robarts, now deceased, representing the defendant, therein." It further stated, in substance, that the cause of the last continuance was as follows: That affiant had instructions to commence the suit of Witmer Bros. Co. v. Weid as soon as practicable, under the difficulties of procuring the necessary evidence therein; that this suit would be based upon the promissory notes of Weid, made to McLaughlin and assigned to the Witmer Bros. Co., of the same date and under the same contract of subsidy as the Claussen notes; that a question as to the sufficient delivery of the Weid notes would be likely to arise under the refusal of said Weid to regularly deliver his said subsidy notes, while no such facts existed in the case of the delivery of the notes of Claussen; "that affiant and the said Robarts were both of the opinion, and so expressed such opinion, each to the other, that the determination of the issues in the case of Witmer Bros. Co. v. Weid, aforesaid, would, in all reasonable probability, determine the rights of the parties in the present case"; that in the month of January, 1892, affiant informed Robarts "that he had such instructions, and that in the event that final judgment should go against the plaintiff in the case of Witmer Bros. Co. v. Weid, aforesaid, he would advise the dismissal of the above-entitled cause, but that otherwise it should be regularly set for trial and tried; that said cause was thereupon, and in pursuance of said understanding, taken off the calendar by consent of the parties plaintiff and defendant as aforesaid"; that thereafter, in April, 1893, the action of Witmer Bros. Co. v. Weid was commenced, and on March 3, 1894, judgment therein was rendered in favor of the plaintiff and against the defendant, which said judgment was thereafter affirmed upon appeal; and that in July, 1894, Robarts died. A counter affidavit, made by defendant, was read, in which it was stated, in substance, that, when the supreme court rendered its decision in this case, affiant was told by his attorneys that that decision had settled the whole case, and that it would never again be tried; that he never authorized Mr. Robarts to continue the case or keep it pending, as stated in the affidavit of Mr. Dooner, or at all; on the contrary, his instructions to his attorneys had all along been to push the case to a final determination, and they well knew that he wanted the case pushed to a trial, if any trial was to be had in it; that "there never was a written stipulation to continue and keep in abeyance this action between the said Dooner and the said Robarts, and, if said Robarts did make such a stipulation by parol, he did it without any authority from me, and against my positive instructions in the case." Under this showing, we cannot say that the court abused its discretion in making the order. Section 283 of the Code of Civil Procedure provides: "An attorney and counselor shall have authority: (1) To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise." It is not pretended that there was any agreement filed with the clerk, or entered upon the minutes of the court in regard to the continuance of this case pending the decision in the proposed Witmer Bros. Co. case; and, if any verbal stipulation as to the matter was made, it was executory, and not binding upon either party. Borkheim v. Insurance Co., 38 Cal. 623. Verbal stipulations with reference to proceedings in pending actions cannot be regarded, except so far as they are admitted by the parties against whom they are sought to be enforced, or have been wholly or in part executed. Reese v. Mahoney, 21 Cal. 306; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. And, if a party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute. Johnson v. Sweeney, 95 Cal. 304, 30 Pac. 540. The rule invoked by appellant, that "he who seeks equity must do equity," is universally recognized in courts of justice, but we fail to see how it can have any application to this case. It certainly was not incumbent upon the defendant to pay the note sued on before he could move the court to dismiss the action. The judgment, in our opinion, should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

McFARLAND and HENSHAW, JJ. For the reasons given in the foregoing opinion the judgment is affirmed.

TEMPLE, J. I do not think section 283 of the Code of Civil Procedure has any application to the facts of this case, but I concur in the judgment, because I think plaintiff failed to excuse his delay.

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116 Cal. 495

## ADAMS v. CRAWFORD et al. (L. A. 216.)

(Supreme Court of California. April 9, 1897.)

RIGHT TO JURY TRIAL—QUIETING TITLE—LOCATION OF MINING CLAIMS—EVIDENCE—SUFFICIENCY—TRIAL BY THE COURT—FINDINGS—APPEAL—REVIEW.

1. It is not error to refuse a jury trial where the party demanding it did not comply with the rule of court requiring such party to deposit the jury fees with the clerk.

2. In an action in which the issue was whether defendants' location of two mining claims was valid, their evidence was that monuments were erected at the center of each end of the two claims, and also at each of the four corners of each claim; that notices of location were posted on the initial monument of each of the claims, and were duly recorded. The notices, which were in evidence, appeared to be sufficient. Plaintiff and his witnesses admitted that they found the initial monument on each claim near the point where plaintiff had first discovered ore, but that they "saw" no other monuments, though they looked for them. *Held*, that findings for defendants would not be disturbed.

3. In an action to quiet title to mining claims, the complaint was in the usual form in actions to quiet title, under Code Civ. Proc. § 738, except that it did not call on defendants to set out their interest, title, or claim. It alleged that defendants were in possession, and that title and ownership were in plaintiff. *Held*, that defendants could prove a valid location by them prior to plaintiff's location, under a general denial, and without setting out in their answer the facts showing their ownership, or alleging title by location.

4. A question not raised below nor presented on the record cannot be considered on appeal upon the suggestion of counsel in his brief.

5. The court need not make findings as to merely probative facts.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by H. R. Adams against J. S. Crawford and others. From a judgment in favor of defendants, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Geo. B. Cole, for appellant. Wilfred M. Peck, Wm. J. Hunsaker, J. S. Callen, L. Gill, and John M. Lucas, for respondents.

HAYNES, C. This action is prosecuted by the plaintiff to quiet title to a certain mining claim, called the "Adams Mine." The cause was tried by the court without a jury, and written findings were filed in favor of the defendants. This appeal is from the judgment, and from an order denying the plaintiff's motion for a new trial.

Appellant's first contention is that the court erred in denying plaintiff a trial by jury. The record shows that on the day of the trial no jury was in attendance, nor had any been demanded or ordered for the trial of said cause; that after the cause was called for trial, and the parties respectively announced that they were ready, the plaintiff for the first time demanded that said cause be tried by jury. The complaint was not verified, and the defendants' answer denied each and every allegation of the complaint. Rule 28 of the superior court of Riverside county, in which said action was tried, is as follows: "A party demanding a jury trial shall deposit the jury fees with the clerk within five days after making such demand. Should a trial of an action by a jury continue for more than one day, the party demanding the jury shall deposit with the clerk at or before the opening of the court, on each day, the jury fees for each day so occupied in the trial." The plaintiff did not then make, nor had he at any time made or offered to make such deposit. We think the court did not err in denying plaintiff's demand for a jury trial, because the rule of the court above quoted was reasonable, and had not been complied with. Therefore we need not inquire whether this particular action was in its nature equitable or not.

Appellant also contends that the evidence is insufficient to justify the findings. This controversy is over a mining claim situated in the Chuckawalla range of mountains, about 40 miles northeast from Salton, in Riverside county. The plaintiff and one Bailey discovered the lode on the 12th of April, 1894, but left without making any location. Plaintiff returned to San Bernardino, but went back on the 8th day of May to locate the claim, and made a location thereon on the 9th day of May, 1894. Prior to the plaintiff's location, namely, on the 28th of April, 1894, the defendants found and located said claim. At the time the plaintiff and Bailey first discovered the lode in question, they dug down to the depth of 18 or 20 inches, and took out some specimens of ore, which the plaintiff took with him to San Bernardino to have tested. A sufficient test was made upon the ground to ascertain that the ore contained gold. Bailey then said he did not want the claim. It appears that Bailey subsequently informed some of the defendants of the discovery made, and gave some directions that might aid them in finding it. They succeeded in finding it, and made their locations at the time above stated; one locating the claim from the discovery northward, and others locating a claim from the same point southward. The court found as follows: "First. That plaintiff was not at the time of the commencement of this action, is not now, and never has been, the owner of the real property described in plaintiff's complaint, or of any part thereof. Second. That the defendants answering herein are the owners of said real property, and of every part thereof." As a conclusion of law the court decided that the plaintiff take nothing by his action. The discovery of the ore by Adams on April 12th vested in him no right or title to the property. The discovery is but one step in acquiring title to a mining claim. It must be followed by a location, which consists of the marking of the claim by monuments so that its boundaries can be readily traced, the posting of a notice thereon, and, where the state or district law requires it, the recording of such notice. It is therefore clear that, if the defendants' location is valid, the plaintiff acquired no right by his subsequent location, made some two weeks after the location made by defendants. The testimony on the part of the defendants shows that monuments were erected at the center of each end of the two claims, and also at each of the four corners of each of said claims; that notices of location were posted on the initial monument of each of these claims; that the notices were duly recorded. And these notices, which were put in evidence by the defendants, appear to be sufficient in every respect. As against this, the plaintiff and his witnesses, in rebuttal, admitted that they found the initial monument on each claim near the point where the plaintiff had first discovered ore, but that they "saw" no other monuments, though they looked for them. The most that can be said of this rebuttal testimony is that it tended to raise a conflict with the affirmative testimony given on the part of defendants, and in such case we cannot disturb the findings of the trial court.

The claim running northerly from the point of discovery was made by Felix Lohrer. Counsel for appellant says in his brief, "There was no evidence that Felix Lohrer was a citizen of the United States, or had ever made application to become one." This location notice recites that he is a citizen of the United States, over the age of 21 years. There is no specification of the invalidity of his location upon the ground that he was not a citizen, nor was any objection made to the introduction of the notice on that ground. This question was not raised in the court below, nor is it presented upon the record, and it cannot now be considered upon the suggestion of counsel in his brief.

Appellant also contends that the court failed to find upon several issues. The specifications in that regard are all of probative facts, such as that the court failed to find whether the plaintiff made a valid location, whether the allegations of certain paragraphs of the complaint were true, and other matters of like character. The court found, as ultimate facts, that the plaintiff is not, and was not at any time, the owner of the property described in the complaint, and that the defendants are the owners of said property. These are the ultimate facts in the case, and include the finding of all probative facts necessary to sustain the finding of the ultimate facts.

Several errors are alleged to have been committed by the court in its rulings upon the admission and rejection of evidence. Most of these rulings are upon immaterial matters, which could not control or affect the material facts in the case, and therefore need not be noticed. Some others, however, should receive brief attention.

Defendant Crawford was asked by his counsel: "State when you first discovered this claim." Answer: "On April 27, 1894." A general objection was made at this point to what the witness did with reference to any discovery of the mine in question; among other things, upon the ground that no such issue was made by the pleadings in the case. The objection was overruled, and the plaintiff excepted. This objection was made to a number of other questions put to the defendants or their witnesses, and like rulings were made. The complaint was in the usual form in actions to quiet title under section 738 of the Code of Civil Procedure, with the exception that it did not call upon the defendants to set out their interest, title, or claim. The complaint not being verified, the defendants denied generally all its allegations. The objection above noticed seems to be based upon the ground that the defendants did not set out in their answer the facts showing their ownership of the mining ground in dispute, or allege title by location. In support of his contention, counsel quotes Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771, where the court said, "And unquestionably it is the duty of the defendant to set out his interest, whatever it may be, when called upon, under this section of the Code"; and counsel again quote, "As already suggested, it is well settled that in an action of this character the defendant must set up whatever right of possession he may claim." The facts of that case were peculiar. The plaintiff had judgment in his action to quiet title against defendant, and afterwards moved for an order directing the sheriff to place him in possession of the property. The defendant opposed the motion upon the ground that after the rendition of the decree in plaintiff's action he obtained judgment on the merits against the plaintiff in an action of ejectment to recover possession of the same land, and also set out the acquisition by himself of an outstanding title, created since the action was tried and determined. The court ordered the writ of possession to issue, and from that order the appeal was taken. It is in view of these facts that the language of the court last above quoted was used; the meaning being that, where the defendant asserted different rights or sources of title, he should litigate all of them, to the end that all controversies affecting the property, as between the parties, should be determined. In the case at bar the complaint alleged that the defendants were in possession, and alleged title and ownership in the plaintiff. The defendants being in possession, it is not material to the plaintiff as to whether they were rightfully in possession or not, unless he were the owner and entitled to possession; and, as his right to possession was based solely upon his alleged ownership, the only question material to be determined was as to the validity of his claim of ownership. Such claim might be determined by showing that he never performed any of the acts necessary to the location of the mining claim, or by showing, if such acts were performed, that a prior location existed which precluded the possibility of a valid location having been made by the plaintiff. Such proof could properly be made under a general denial of the plaintiff's title and right of possession. Pennie v. Hildreth, 81 Cal. 127, 131, 22 Pac. 398.

Appellant also alleges that the court erred in overruling his objections to the admission in evidence of the location notices of defendants. These objections were on the ground that they were "incompetent, irrelevant, and immaterial." But the specifications do not show in what respect they were incompetent, irrelevant, or immaterial, nor does he point out in his brief any ground upon which such objection could be sustained. These notices of location appear to be sufficient in every particular. Upon a careful examination of the entire record, we find no error which would justify a reversal of the judgment, and advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; BELCHER, C.

McFARLAND and HENSHAW, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

TEMPLE, J. I concur. I wish to say, however, that I do not think it is usual, in actions of this character, in the complaint to call upon the defendant to set out his interest, title, or claim. When such matter is contained in a complaint, it is simply surplusage. The defendant is not called upon to set up his title, unless that be necessary under ordinary rules of pleading to enable him to introduce the evidence necessary to his defense. I think, in all cases in which the defendant is in possession, actions of this character are actions at law, and the legislature cannot convert it into an equitable action by styling it an action to quiet title.

116 Cal. 473

## REED v. CROSS. (L. A. 53.)

(Supreme Court of California. April 7, 1897.)

JUDGMENT—EFFECT AS ADJUDICATION.

1. Where a defendant pleaded as a counterclaim one-half of the amount of a payment made by him on a note which he alleged was given for the joint benefit of himself and plaintiff, and issue joined on such allegation was determined in his favor, and judgment rendered for his counterclaim, such judgment constitutes an adjudication, as between the parties, that each is liable for one-half the note, and estops the plaintiff from denying his liability in an action to recover on account of a subsequent payment made by defendant thereon.

2. A judgment for defendant in an action to recover money is a bar to a counterclaim for the recovery of the same money in a subsequent action between the parties, though not based entirely on the same grounds, where the evidence to sustain the counterclaim would have authorized a recovery in the former action.

Commissioner's decision. Department 2. Appeal from superior court, San Luis Obispo county; J. W. McKinley, Judge.

Action by F. C. Reed against John Cross. From the judgment both parties appeal. Reversed on plaintiff's appeal; affirmed on defendant's appeal.

W. H. Spencer, William J. Variel, and William H. Davis, for plaintiff. Hughes & Garrison and Anderson & Anderson, for defendant.

SEARLS, C. In this case a judgment was entered in the court below, by which it was adjudged (1) that plaintiff was not entitled to take anything upon the cause of action set forth in his complaint; (2) that defendant, John Cross, do have and recover nothing of and from F. C. Reed upon the said defendant's cross complaint; (3) that defendant recover his costs, amounting to the sum of $19.-95. Plaintiff appeals from so much of the judgment as denies his right of recovery against the defendant and awards costs against him. His appeal is supported by a bill of exceptions. The defendant also prosecutes a separate appeal (No. 70) from so much of the same judgment as denies his right of recovery upon his cross complaint, and his appeal comes up on the same judgment roll, in a separate record, without any bill of exceptions.

As the facts, except as to the bill of exceptions, are precisely alike in the two cases, it will facilitate progress and avoid useless repetition of facts by considering this case and No. 70 together. We accordingly pursue that course. The action was brought to recover $1,903.60, together with interest thereon from July 25, 1891, for one-half of the money alleged to have been paid out by plaintiff for the benefit of defendant, in a joint enterprise in which plaintiff and defendant were engaged, in which some 80 acres of land were purchased in San Luis Obispo county, in 1887, for the sum of $23,700. Defendant answered denying most of the allegations of the complaint, set up fraud in the transaction on the part of plaintiff, and pleaded the statute of limitations (section 339 and the first paragraph of section 342, Code Civ. Proc.) in bar of the cause of action. Defendant also pleaded the bar of a judgment for the same cause of action in a former action in which the defendant herein was plaintiff and the plaintiff herein was defendant, instituted in the county of San Luis Obispo, in which action the plaintiff here had judgment for $677 and costs against the defendant here. Defendant also filed a cross complaint in the action to recover back from the plaintiff $8,000, paid by him on account of the investment mentioned in the complaint on the ground of fraud practiced by said plaintiff in the transaction, setting out in apt terms the facts constituting the alleged fraud. Plaintiff answered the cross complaint of defendant, denying most of its allegations. He also sets up in bar of the cause of action set out in defendant's cross complaint an action brought by said defendant against him in the county of San Luis Obispo to recover the same sum of $8,000 here sought to be recovered by defendant; that plaintiff here, who was defendant there, interposed a counterclaim against the plaintiff there and defendant here; and that upon the issues made a trial was had and judgment rendered against the plaintiff in that suit, and in favor of the defendant therein on his counterclaim for $677 and costs, which judgment was thereafter, on appeal of said plaintiff, John Cross, to this court, duly affirmed. See No. 14,522, decided in 1892 (29 Pac. 244), affirming judgment and order, and not officially reported. The cause was tried by the court without the intervention of a jury. It seems necessary to set forth the findings in full. They are as follows:

"Findings.

"This cause came on for hearing before the court sitting without a jury, the same having been waived by the parties; Messrs. Variel & Davis appearing for plaintiff, and Anderson & Anderson and Hughes & Garrison appearing for defendant; and the court, having heard the evidence and argument of counsel, and the cause being submitted, now finds as follows:

"(1) That in April, 1887, plaintiff and defendant entered into an agreement whereby they were to purchase from one W. L. Beebee eighty acres of land situate in San Luis Obispo county, California, at and for the sum of $24,000, each to pay the one-half of such purchase price and to acquire an un divided one-half interest in said land. That in pursuance of such agreement, plaintiff and defendant, on May 3, 1887, purchased of said Beebee said land, each acquiring an undivided one-half interest therein, for the sum of $23,700, defendant then paying of said purchase price $8,000, and plaintiff then paying of said purchase price $7,700; and by agreement between plaintiff and defendant said Beebee conveyed said land to plaintiff only; and plaintiff borrowed of the Bank of San Luis Obispo $8,000, executing to said bank his note therefor, and a mortgage upon said land to secure its payment; and with said $8,000 so borrowed plaintiff paid to said Beebee the remainder of said sum of $23,700, the purchase price of said land. That thereafter, and on May 3, 1894, plaintiff conveyed to defendant an undivided one-half interest in and to said land subject to said mortgage. That thereafter plaintiff and defendant paid to said bank a part of said mortgage, and on July 25, 1891, there remained unpaid of the said mortgage debt the sum of $3,807.21, plaintiff having up to that time paid upon said debt $300 more than defendant had paid thereon. That on July 25, 1891, plaintiff paid to said bank the remainder of said mortgage debt, to wit, the sum of $3,807.21, no part of which has ever been repaid to him.

"(2) That for some years prior to the times in the complaint referred to the plaintiff and defendant had sustained towards each other confidential and friendly relations, and had frequently engaged in joint ventures and speculations. That during the months of April and May, 1887, the plaintiff invited and requested defendant to enter into a joint speculation with him, and offered to invest money for defendant in joint purchases with plaintiff. That defendant consented to unite with plaintiff in the purchase of a certain tract of sixty acres of land in the corporate limits of San Luis Obispo for the sum of $18,000, and authorized plaintiff to draw on him for the amount necessary to pay for the interest of defendant so purchased jointly with the plaintiff. And on the 14th day of April, 1887, the plaintiff wrote and notified defendant that he had purchased said tract of land, and had drawn on defendant for $10,000 to pay for defendant's interest in such investment. That the defendant paid said draft upon presentation, relying entirely upon statements made by plaintiff that said land so to be purchased jointly with defendant was said sixty-acre tract within the corporate limits of San Luis Obispo for a total price of $18,000, as then represented, and that said sum of $10,000 should fully pay for such interest of defendant therein. That thereafter, on the 27th day of April, 1887, defendant went to the city of San Luis Obispo, and there met plaintiff, who showed him the land which plaintiff represented that he had purchased for $24,000, and had paid thereon the sum of $16,000, $10,000 of which was paid with the money of defendant. That defendant was dissatisfied with said purchase, and claimed to plaintiff that the purchase was not one such as had been represented when the draft of $10,000 was paid, and demanded that plaintiff pay back to him the money which he had obtained by draft on him as aforesaid.

"(3) That plaintiff then represented to defendant that he had no money, but did not promise to take the entire interest, or any interest, in this transaction, or any interest off his hands, or to pay him back any amount which had been drawn by him. That plaintiff thereupon gave defendant his note for $2,000, which has been paid, but defendant did not hold the title to an undivided one-half interest thereafter conveyed to him by plaintiff as security for $8,000, but held the same in fee as his own property. That plaintiff then fraudulently claimed that the money had already been paid on said purchase at an agreed price of $24,000, and thereby induced defendant to leave the transaction in the condition in which it then was, and the defendant believed such representations, and believed that $16,000 in cash had already been paid on such purchase, and believed that the purchase price was $24,000, as then fraudulently alleged by plaintiff; and defendant, believing plaintiff's representations that the plaintiff had already paid over defendant's money, and could not then pay it back to defendant, but did not rely on plaintiff's promise to take the entire transaction off his hands, and defendant did not then at once attempt to recover the balance of said $8,000. That the purchase price paid for said land was $23,700, and that plaintiff, although pretending to be defendant's friend, and pretending to make a partnership or joint purchase for himself and defendant, but not for the purpose of cheating and defrauding defendant, retained said sum of $300 for his own individual use and benefit, and concealed from defendant the fact that the purchase price of said land had been reduced to $23,700; and plaintiff continually left defendant under the belief that the plaintiff had paid for said land $24,000, $16,000 of which had been paid in cash,—$8,000 by plaintiff and $8,000 by defendant,—whereas, in fact and in truth, the plaintiff had paid on his part but $7,700. That at the time of defendant's visit to San Luis Obispo on or about the 27th day of April, 1887, the money which had been obtained from defendant by the draft as aforesaid was then still in plaintiff's hands unexpended, and that the defendant's consent to let plaintiff have the money, after defendant had expressed his dissatisfaction with the investment, and repudiated the transaction as far as he was able, was obtained by the false and fraudulent representation that the money had already been paid on the purchase. That thereafter, to wit, on the ——

day of ———, 189–, the defendant filed suit in the superior court of San Luis Obispo county to recover said $8,000 from plaintiff on the ground of plaintiff's promise to take the entire interest in said transaction off defendant's hands, and repay him the amount of $8,000. That plaintiff denied said promise, and this defendant, having no preponderance of evidence, failed to recover the said $8,000, or any part thereof. That said action was tried in the superior court of San Luis Obispo county on the 16th and 19th days of March, 1891, and at said trial defendant learned for the first time that at the time of his visit to San Luis Obispo the money advanced by him was still in plaintiff's hands, and at the time of said trial the defendant first learned that the purchase price of said land was $300 less than his confidential friend and would-be partner had represented. That the defendant repudiated the transaction in toto, and offered to reconvey to plaintiff all interest he might have in said land upon the payment by him of the amount he had advanced. That defendant's interest therein was foreclosed, and the equity of redemption was worth much less than the mortgage debt thereon. That on the ——— day of March, 1891, said land was sold, and at said sale bought in by the mortgagee, and a deficiency judgment docketed against the plaintiff herein on his promise to pay said mortgage debt. That said land was never redeemed by any one from said sale, and defendant's interest therein was at all times after he learned of the fraudulent acts and representations of the plaintiff, in the answer set forth, totally and absolutely worthless. That upon the discovery of the fraudulent representations and acts of plaintiff in this transaction, how plaintiff had falsely represented to him that the money had already been paid on said purchase when the defendant first repudiated the transaction, and demanded that his money be repaid, and how plaintiff had falsely represented and concealed the true cost of the land from defendant, but not with the aim of cheating and defrauding defendant, to the extent of the difference between the price represented and the true price paid, the defendant withdrew from all connection with said purchase, repudiated his ownership of any part of said land, or of any interest therein, refused to be interested with plaintiff in this or any other transaction, and rescinded any and all agreements for partnership or joint ventures, and in particular rescinded and repudiated any agreement which might be thought or construed to involve this defendant in any liability for the payment of any part of the mortgage debt referred to in the complaint.

"(4) That at the time of the meeting of plaintiff and defendant in the city of San Luis Obispo, as aforesaid, plaintiff and defendant visited and examined said land together, and, after some talk between them with reference to the purchase of said land. plaintiff and defendant agreed that they would buy said land together, that each should own an undivided one-half thereof, and that each should contribute equally with the other in paying the purchase money and all the interest thereon. That plaintiff and defendant further agreed that they would pay for said land to William L. Beebee, the owner thereof, $24,000, and pay the same as follows: The plaintiff to pay the sum of $8,000, the defendant to pay the sum of $8,000, and that plaintiff, Reed, would, for the use of both plaintiff and defendant, borrow from the Bank of San Luis Obispo, upon a mortgage upon said land, the remaining $8,000, so as to pay said Beebee in cash all of said purchase price of $24,000. That on May 3, 1887, plaintiff and defendant purchased from said Beebee the said land, each acquiring an undivided one-half interest therein, at and for the sum of $23,700, of which purchase price plaintiff paid $7,700, defendant paid $8,000, and the remaining $8,000 was paid to said Beebee by borrowing upon a mortgage upon said land $8,000 from said Bank of San Luis Obispo. That for convenience of said parties, when said purchase was made, said Beebee conveyed said land to plaintiff only, and that thereupon plaintiff executed to said bank the note and mortgage mentioned and referred to in the complaint herein, and that thereafter, and on May 3, 1887, plaintiff executed his deed to defendant, thereby conveying to defendant an undivided one-half interest in said land. That there was no other or further arrangement or agreements between plaintiff and defendant with reference to the purchase of said land.

"(5) That in said action above referred to issue was joined and the trial had upon the answer to the third amended complaint and a supplemental complaint thereto. That in said answer a counterclaim was set up. That said action was tried by the judge of the superior court of San Luis Obispo county without a jury. That said court found and decided in said action that none of the allegations of fraud in said complaint were true; that the allegations of defendant's counterclaim were true; that plaintiff there (defendant here) recover nothing by his said action, and that the defendant there (plaintiff here) recover of and from plaintiff there (defendant here) the sum of $677, together with his costs. That judgment for said amount and costs, amounting to $16.75, was entered accordingly against plaintiff there (defendant here). That thereafter said John Cross appealed to the supreme court of the state of California from said judgment, and that said supreme court thereafter affirmed said decision of said superior court of San Luis Obispo county. That when plaintiff and defendant first met in the city of San Luis Obispo, as hereinbefore stated, he told defendant that the purchase price of said land was $24,000, and not $23,700, the actual purchase price of said land. That the $300 difference between the intended purchase price and the actual purchase price was not fraudulently appropriated and kept by plaintiff, nor was it ever used by plaintiff for his own use and benefit, but was used for the benefit of the partnership venture, to wit, used in the payment of interest upon said note and mortgage. That on March 13, 1889, he paid as interest upon said note and mortgage the sum of $1,528.12,—the $300 above referred to, the partnership money, and the sum of $1,228.12 of his own private funds.

"(6) That plaintiff's cause of action is not barred by the first paragraph of section 339 of the Code of Civil Procedure of the state of California.

"(7) That plaintiff's cause of action is not barred by the first paragraph of section 342 of the Code of Civil Procedure of the state of California.

"(8) That on the 21st day of March, 1891, at the city of San Luis Obispo, state of California, in an action there pending in the superior court of the county of San Luis Obispo, state of California, betwee John Cross, plaintiff, and F. C. Reed, defendant, for the recovery of the same $8,000 sought to be recovered by defendant in his cross complaint herein, judgment was duly given and made by which the plaintiff in this suit recovered from the defendant herein the sum of $677 and costs; but that said action was not for the same cause of action as set forth in the complaint herein.

"Wherefore, as a conclusion of law, the court finds that plaintiff is not entitled to take anything upon the cause of action set forth in his complaint herein, and that defendant is not entitled to take anything upon the cause of action set forth in his cross complaint herein, and that defendant is entitled to recover his costs herein."

The appellant correctly says that "the principal question, and perhaps the only question, raised on this appeal is whether the judgment in the case of Cross v. Reed is a bar or estoppel against the defense made by the defendant." The court did find that the former action was not a bar to plaintiff's cause of action herein. In the case at bar the defense is that the contract made between plaintiff Reed and defendant Cross for the purchase of the Beebee land, under which said land was purchased, was fraudulently procured by Reed. The findings of the court in this case sustain the defense of fraud, and hence the judgment against plaintiff. The point is this: Was the defendant here estopped from making the defense of fraud by the judgment in a former action between the same parties? Turning to the bill of exceptions, where the judgment roll of Cross v. Reed, which was in evidence in this case, is set out, and we find that the former action was brought by Cross to recover from Reed $8,000 paid on the contract for the purchase of the Beebee land, upon the ground of fraud on the part of said Reed. It averred that the alleged contract price of the land was $24,000, while in fact it was $23,700; that defendant had converted the $300 to his own use; had, without the knowledge or consent of plaintiff, given a mortgage on the land for $8,000, etc. The complaint admits the conveyance to plaintiff of a deed for the undivided one-half of the land, and tenders a reconveyance thereof to defendant. Defendant answered, denying all the allegations of fraud, and by way of counterclaim set up that he had paid on account of the mortgage the sum of $1,528.12, for one-half of which, less $300, viz. $614.06, he asks judgment. In a supplemental complaint plaintiff alleged that the mortgage had been foreclosed, and an order of sale of the land had been decreed. That cause was tried March 19, 1891. The findings are, in substance, that the parties agreed to purchase the land for $24,000, each to pay $8,000, and to borrow on note and mortgage $8,000 to make up the purchase price; that defendant afterwards procured the land for $300 less than the supposed price, took a deed to himself, executed a note and mortgage for $8,000, and conveyed one-half to plaintiff subject to the mortgage, and afterwards paid the $300 on account of interest. The court finds that all the allegations of the counterclaim are true, and that none of the allegations of fraud are true. Thereupon judgment was entered against plaintiff upon his demand, and in favor of defendant on his counterclaim for $677 and costs. Since that action was tried, the mortgaged property has been sold, leaving a deficiency of $3,807.21, which was paid by the plaintiff Reed, and this action is brought to recover one-half thereof, viz. $1,903.60.

"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision." Freem. Judgm., § 249, and cases there cited; Gray v. Dougherty, 25 Cal. 272; Caperton v. Schmidt, 26 Cal. 493; Garwood v. Garwood, 29 Cal. 521; Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731. The case of Wiese v. Society, 82 Cal. 645, 23 Pac. 212, is in most respects similar to the case at bar. In that case plaintiff had sued in justice court to recover sick benefits. Defendant set up as a defense a by-law under which benefits were limited to six months, and showing the payment thereof for said period. Judgment was given for plaintiff upon the ground that the by-law was invalid for want of power in defendant to impose such a limitation. By lapse of time and plaintiff's continued sickness, new installments were claimed to be due, and another action was brought to recover them, and it was held that the former judgment was conclusive in the action for subsequent installments, and estopped the defendant from a defense upholding the by-law. Applying the principle of Wiese v. Society to this case, and we find that in the former action the right of plaintiff to recover by way of contribution from defendant for what he had then paid out on the note secured by mortgage, was a sharply defined issue in the case. Plaintiff attacked the giving the note and mortgage by the defendant there (the plaintiff here) as being without authority, and fraudulent. The findings were in favor of the plaintiff here, and judgment went accordingly. The judgment estops the defendant here from again interposing the same defense a second time, and, plaintiff having shown in this case that he had subsequently paid a further sum on the same obligation, he was entitled to judgment therefor. We recommend that the portion of the judgment appealed from by plaintiff be reversed.

2. The appeal of defendant Cross from that portion of the judgment denying his recovery of $8,000 claimed in his cross complaint comes up on the judgment roll, without any bill of exceptions. (This appeal is No. 70.) The only point made for reversal is that the court below erred in holding upon the findings that the judgment of the court in San Luis Obispo was a bar to the recovery by defendant Cross in this case. Taken together, the findings in this case show that the sum of $8,000 sought to be recovered by plaintiff in his cross complaint here is the same $8,000 which, as plaintiff, said Cross sought to recover in the San Luis Obispo case; that in the San Luis Obispo case issue was joined on the pleadings, and tried by the court; "that said court found and decided in said action that none of the allegations of fraud in said complaint were true," etc., and rendered judgment against the plaintiff Cross. This finding shows that the question of fraud on the part of Reed was litigated and determined in the former action. It is true that the findings in this case show that Reed fraudulently represented to Cross that $16,000 of the purchase price of the land had been paid prior to his (Cross') visit to San Luis Obispo, April 27, 1887, while in fact such sum had not then been paid, and was still in Reed's hands, and that he (Cross) did not learn this fact until during the trial of that case in March, 1891. No reason is shown why this additional evidence of fraud was not introduced in evidence at the trial at which it was discovered. If the pleadings were not broad enough to include it, they could have been amended; or, if too late for that, it might have afforded cause for a new trial upon the ground of newly-discovered evidence. We know from the appeal by plaintiff in the case just what the judgment roll in the former case contained, but we may not avail ourselves of that knowledge on this appeal, for the reason that, as before stated, the appeal here does not include in the record that judgment roll. We think, however, it may properly be inferred from the findings in this case that the evidence necessary to sustain a judgment in favor of Cross here would have authorized a judgment in his favor in the former action. This being so, the former judgment was a bar to the cause of action set up by Cross here. It is true that the court found that the former action to recover the $8,000 was on the ground of plaintiff's promise to take the entire interest in said transaction off defendant's hands, and repay him the amount of $8,000. But it is equally true that the question of fraud was also made an issue in said action, and, as we have seen, was decided in favor of the defendant there and plaintiff here. In the present case the court finds against the contract on the part of plaintiff to take the property off of defendant's hands. As the decision is against defendant upon the ground of the bar of the former action, and as the court below had the judgment roll in the former action before it, we must presume it was sufficient to support the findings. We recommend that so much of the judgment as is appealed from by the defendant here be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, so much of the judgment as is appealed from by the plaintiff, F. C. Reed, is reversed, and so much of the judgment as is appealed from by defendant, Cross, is affirmed.

116 Cal. 503

## PEOPLE v. SEHORN. (Crim. 202.)

(Supreme Court of California. April 10, 1897.)

HOMICIDE—PRELIMINARY EXAMINATION—DOCKET ENTRIES—DE FACTO JUSTICE—COMMITMENT—SPECIAL VENIRE—ELISORS—EVIDENCE—CROSS EXAMINATION—SCOPE OF OBJECTIONS.

1. A justice of the peace before whom a complaint for felony is made may call in another justice of the same county to hold the preliminary examination, under Code Civ. Proc. § 105, authorizing a justice of the peace to hold the court of another justice of the same county.

2. An order by a justice of the peace requesting another justice to act for him need not state the reason therefor, no statute requiring it to do so.

3. Code Civ. Proc. § 105, requiring a justice acting for another to make in the docket "proper entry of the proceedings * * * subscribed by him," requires only such entries as the original justice would have been required to make; and hence, since no statute requires any particular proceedings on preliminary examination to be entered, failure of an attending justice holding a preliminary examination to subscribe his name to the docket affects no substantial right of defendant.

4. The requirement that the order holding defendant to answer on preliminary examination must be indorsed on the depositions is sufficiently complied with by an indorsement thereof on the complaint.

5. The fact that defendant was committed on preliminary examination on the order holding him to answer, without a formal commitment running to the sheriff, as required by Pen. Code, §§ 876, 877, is material only while

he is in custody thereunder, and is not ground for reversal of a conviction.

6. A justice of the peace, the boundaries of whose township were so changed after his appointment as to make him a nonresident thereof, but who has not been ousted and continues to act, is a justice de facto, and his right to hold a preliminary examination cannot be questioned on appeal from conviction.

7. It is in the discretion of the court to summon jurors by special venire after exhausting a drawn venire, but without exhausting the regular list.

8. An elisor may be appointed where the disqualification of the sheriff is admitted, and it is shown that the coroner is disqualified, under Pen. Code, § 1074, subd. 4, because having been a member of the coroner's jury.

9. On a trial for murder the people may prove that the deceased was not armed at the time of the homicide, where there is evidence that defendant believed that he was.

10. On a trial for murder it is not prejudicial error to permit testimony as to the unfriendly relations between defendant and deceased, where the witness stated fully the facts on which his testimony was based, and other testimony to the same effect was afterwards introduced without objection.

11. Where a witness for the people on a trial for murder testified to a conversation with defendant, and that defendant asked him to go up the street with him, questions on cross-examination as to what occurred at deceased's store when witness and defendant arrived there are properly excluded, as not relating to the matter testified to in chief.

12. A physician, who has testified for defendant on a trial for murder that he found certain injuries on defendant's person, may be asked on cross-examination if they were such as to require medical treatment.

13. On a trial for murder, objection to a threatening article published by defendant, as "not competent or material," does not raise the question whether the article on its face refers to deceased.

In bank. Appeal from superior court, Glenn county; Frank Moody, Judge.

W. A. Sehorn was convicted of manslaughter, and appeals. Affirmed.

**H. M. Albery, Charles L. Donohue, and K. E. Kelley, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.**

McFARLAND, J. The defendant was charged by the information with murder, and was convicted of manslaughter; and he appeals from the judgment, and from an order denying his motion for a new trial.

A great part of appellant's brief is devoted to technical points touching the regularity and validity of the proceedings before the committing magistrate on the preliminary examination upon which the information is founded; and it is contended that, on account of alleged defects in said preliminary proceedings, defendant's motion to set aside the information should have been granted. The general rule as to such points is that after a defendant has been tried upon an information, and convicted, the conviction will not be set aside for mere irregularity in the preliminary examination, which does not affect any of the substantial rights of the defendant. As was said by this court in People v. Rodrigo, 69 Cal. 602, 11 Pac. 481: "To justify the quashing of the information, it must at least appear that the defendant was deprived of some substantial right." The facts in the case at bar touching these points, so far as they are material, are as follows: On October 7th complaint was duly made before Frank McNorton, justice of the peace of the First judicial township in Glenn county, charging the appellant with the murder of one John E. Putman; whereupon the said justice issued his warrant, and indorsed thereon that said appellant "is hereby committed to the sheriff of the county of Glenn, without bail, until he can be tried or examined on said charge." The preliminary examination was then set by said justice for October 15, 1895, and on the 14th day of October it was agreed that the examination should commence on that day, instead of the day following. Thereupon the said Justice McNorton called in Justice George Jansen, of the Second judicial township of said county, to hold the examination, who proceeded to do so. Upon the close of the examination, on October 16th, the said justice entered an order in the justice's docket, as follows: "I adjudge defendant, W. A. Sehorn, guilty of the crime of murder, and commit him to the custody of the superior court for trial." At the same time, on said October 16th, the said Justice Jansen indorsed on the complaint the following order: "It appearing to me that the offense of murder has been committed, and that there is sufficient cause to believe the within-named W. A. Sehorn, defendant, guilty thereof, I order that he be held to answer the same, and committed to the sheriff of the county of Glenn. [Signed] George Jansen, Justice of the Peace." No order was indorsed upon any deposition other than the complaint; and it does not appear that the said Justice Jansen subscribed his name to the docket, except as the same appears in a document which the said Jansen sent to the clerk of the superior court, called a "Statement of the Case." Neither does it appear that a commitment in the form prescribed by sections 876 and 877 of the Penal Code was made out and delivered to the sheriff. Neither does it appear that Justice McNorton, in his order requesting Justice Jansen to act for him, set forth any reason why said request was made.

It is contended by appellant that one justice of the peace has no power to call in another for the purpose of making a preliminary examination; but that point has been determined against appellant's contention in People v. Sansome, 98 Cal. 240, 33 Pac. 202.

It is contended also that the order requesting another justice so to act should set forth the reason why the request was made, but there is no statutory provision to that effect

It is also contended that the preliminary examination is void, because the justice requested to act as aforesaid did not subscribe the docket, as provided in section 105 of the Code of Civil Procedure; but that provision is only to the effect that the "proper entry of the proceedings before the attending magistrate subscribed by him shall be made in the docket of the justice for whom he so holds the court," and refers only to those proceedings which are necessary to be entered in the docket, and which should have been so entered by the original justice if he had been himself acting; and our attention has not been called to any material proceeding which must be so entered and subscribed in the case of a preliminary examination. If it can be held to apply to a preliminary examination, it is merely directory, and affects no substantial rights of the defendant in such proceeding. The contention that the order holding the appellant to answer is invalid, because it was not indorsed upon the depositions other than the complaint, is not tenable. It has been held that it is sufficient if such an order be indorsed upon the complaint. People v. Young, 64 Cal. 212, 30 Pac. 628; People v. Wilson, 93 Cal. 377, 28 Pac. 1061; People v. Dolan, 96 Cal. 315, 31 Pac. 107.

There is nothing in the contention that the case should be reversed because there was no formal commitment running to the sheriff, as required by sections 876 and 877. The defendant was originally committed to the custody of the sheriff by the order indorsed upon the warrant of arrest, and afterwards by the order indorsed upon the complaint committing the appellant to the sheriff of the county of Glenn. This was a substantial compliance with the law; but, under any view, the question whether the sheriff was properly holding the appellant under the commitment would have been material only during the time when the sheriff was so holding him. As was said in Ex parte Baker, 88 Cal. 84, 25 Pac. 966: "The phrase 'legally committed,' as used in the foregoing sections, refers to the examination of the case, and the holding of the defendant to answer, as prescribed by title 3, c. 7, of the Penal Code."

It is contended that Jansen, who was called in to conduct the preliminary examination, was not a justice of the peace, and could not legally commit the defendant. The facts upon which this contention is made are these: After Jansen had been appointed justice of the peace of the Second judicial township, the board of supervisors of the county undertook to change the boundaries of that township in such a manner as to make him a nonresident thereof. It is somewhat doubtful upon the record whether any valid order was ever made changing the boundaries of said township, but assuming that it was legally made, and that thereafter the said Jansen was not a resident of the township as thus changed, still he continued to act as such justice, and to do business as the justice of said township. No other person was appointed to fill said office, and he continued to perform the duties of said office up to and during the said preliminary examination. He never was ousted from said office by quo warranto, or any other similar proceeding. He was therefore a de facto justice of the peace of said township, and his right to exercise the functions of his office cannot be questioned in this or any other collateral proceeding. Throop, Pub. Off. §§ 625, 631, and cases there cited; People v. Roberts, 6 Cal. 214; Case v. State, 69 Ind. 46; Woodside v. Wagg, 71 Me. 207; Sheehan's Case, 122 Mass. 445; People v. Hecht, 105 Cal. 621, 38 Pac. 941; Hull v. Superior Court, 63 Cal. 177.

These views dispose of all the technical points made by appellant as to the irregularity and invalidity of the commitment of the appellant upon the preliminary examination necessary to be noticed. A great many other points are made by appellant, none of which are, in our opinion, maintainable. We will refer to those which seem to call for special notice.

After a drawn venire of 30 jurors had been exhausted, the court made orders for additional jurors to be summoned from the body of the county, under the provisions of section 226 of the Code of Civil Procedure; and appellant contends that this was an abuse of discretion and error. This contention is not sound. There may, no doubt, be cases where, as was said in Levy v. Wilson, 69 Cal. 111, 10 Pac. 272, the drawing of the entire jury from the box would be "more consistent with the correct administration of justice"; but it has frequently been held with respect to both grand and trial jurors that, after the venire drawn from the regular jurors has been exhausted, the court may order additional jurors to be summoned from the county at large, and that such proceeding is valid, at least unless there has been a gross abuse of discretion, which does not appear in the case at bar. People v. Davis, 47 Cal. 95; People v. Devine, 46 Cal. 47; Levy v. Wilson, supra; People v. Vincent, 95 Cal. 427, 30 Pac. 581; People v. Leonard, 106 Cal. 318, 39 Pac. 617; People v. Durrant (Cal.) 48 Pac. 75.

There was no error committed by appointing an elisor. It was admitted that the sheriff was disqualified, and it was shown that the then coroner had been a member of the coroner's jury, which disqualified him, under subdivision 4 of section 1074 of the Penal Code. People v. Young, 108 Cal. 13, 41 Pac. 281.

There was evidence introduced by defendant that he believed the deceased to be armed at the time of the homicide; and therefore it was not error for the court to allow testimony to the point that, as a matter of fact, the deceased was not armed. People v. Powell, 87 Cal. 362, 25 Pac. 481.

There was no prejudicial error committed in allowing the witness Hulet to testify to the unfriendly relations between appellant and the deceased. We need not inquire whether or not the testimony was of that class in which a witness, owing to special opportunity for observation, but not as an expert, may testify as to the manner in which another person acted, and as to his demonstrations of affection or dislike, etc., which class is recognized by the authorities (see Bish. New Cr. Proc. § 1178; Whart. Cr. Ev. 460); for in this case the witness stated very fully the facts upon which his testimony was based, and, moreover, the same kind of testimony was afterwards introduced without objection. Duffy v. Duffy, 104 Cal. 605, 38 Pac. 443.

We do not think that the case should be reversed on account of the admission in evidence of what is called the "Bulldozer Article," written by appellant, and published in his newspaper. It was admitted that, at the time of the publication of that article, the deceased was a member of the board of town trustees, and was the chairman of that board. The article is about the said board, and particularly about the "Chief" of the board; and we cannot say, as a matter of law, that the article could not be fairly construed as containing a threat against the deceased. The point made here for the first time by appellant, that the article does not, on its face, refer to the deceased, can hardly now be considered, as the only objection at the trial was that it was "not competent or material" (People v. Foo, 112 Cal. 21–24, 44 Pac. 453, and cases there cited); but, in the first place, the article on its face might well be taken as referring to the deceased, and, in the second place, it appears from the record that evidence was introduced "to identify the parties referred to in the article heretofore referred to as the 'Bulldozer.' "

There was no error committed in sustaining objections to certain questions asked by appellant on cross-examination of Adams and Furnish, witnesses for the people. Their testimony in chief was, in substance, that on the day of the homicide they met the appellant "on the street in front or near Mr. Freeman's hardware store," and had a conversation with him about certain matters, and that he asked them to walk up the street with him. On cross-examination it appeared that they walked up the street with him to the place of business of the deceased, Putman. The witness Adams was then asked by appellant (and the cross-examination of Furnish as to the point was substantially the same) the following questions: "Did you see Mr. Putman there?" "Did you witness any difficulty there, Mr. Adams?" "Did you hear any conversation between Mr. Putman and Mr. Sehorn there?" These questions were objected to, as not proper cross-examination; and the objections were properly sustained on that ground. The questions did not refer to any matter testified to by said witnesses in their testimony in chief. Moreover, Adams and Furnish were called by appellant as his own witnesses, and testified fully as to the said matters which he sought to ask them about on cross-examination; so that he was not prejudiced by said rulings of the court, even if they could be held erroneous.

The testimony given by the witness Furnish touching the intoxication of the defendant (given in answer to a question which was modified by the court) was nothing more than a statement that, judging from his appearance, he had been drinking, and was therefore properly admitted. 1 Bish. New Cr. Proc. § 1178; People v. Monteith, 73 Cal. 8, 14 Pac. 373; People v. Sanford, 43 Cal. 32, 33; Clary v. Clary, 2 Ired. 78.

Appellant's witness Dr. Tooley, having testified in chief that he found a contusion, an enlargement, and a discoloration on appellant's person, was asked on cross-examination if they were such as to require medical treatment; and it was not error to allow the question over the objection of appellant. It was clearly proper cross-examination. Moreover, the testimony of the witness in response to the question was of no appreciable importance.

We do not deem it necessary to notice at large the positions taken by appellant, that the witness Henning was improperly allowed to testify to a statement made by appellant shortly after the homicide; that the venue was not proven; that the jury were not in charge of the proper person; that there was improper conduct on the part of the jury; that certain jurors were incompetent to serve; that the evidence was not sufficient to justify the verdict; and that a new trial should be granted on account of newly-discovered evidence. It is sufficient to say that no one of these positions is tenable. The record presents no good reason for the granting of a new trial, or the reversal of the judgment. The judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.; GAROUTTE, J.

116 Cal. 515

## CLARK et al. v. YOCUM et al. (L. A. 201.)

(Supreme Court of California. April 20, 1897.)

APPEAL—HARMLESS ERROR—BREACH OF CONTRACT —SUFFICIENCY OF COMPLAINT.

1. Error in overruling a demurrer to a complaint which improperly joined two causes of action was harmless where the court limited the evidence to one of the causes.

2. Under Civ. Code, § 3306, providing that the detriment for breach of an agreement to convey an estate in real property shall be the price paid and expenses incurred, etc., adding thereto, "in case of bad faith, the difference between the price agreed to be paid and the value of the estate * * * at the time of the breach," etc., a complaint averring a contract by defendants to convey land and certain water rights for a lump sum, which plaintiffs paid, and a refusal, without reason therefor, to convey the water rights, the value of which, at the time of the

refusal, was alleged, states a cause of action without alleging the amount paid for such rights, since the measure of damages would at least be the value at the time of the breach.

Department 1. Appeal from superior court, Los Angeles county; J. M. McKinley, Judge.

Action by Mary E. Clark and another against Hannah T. Yocum and another. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

W. E. Arthur and A. R. Metcalf, for appellants. L. G. Kellogg and W. S. Wright, for respondents.

GAROUTTE, J. This is an action to recover damages for the failure to convey certain water and water rights, and also to recover damages claimed on account of the defendants entering upon the premises of the plaintiffs, and shutting certain water off from plaintiffs' lands. Plaintiffs bought a certain tract of land, and also certain water rights and privileges, from defendants, and paid therefor the lump sum of $4,400. Defendants conveyed the land to plaintiffs, but refused to convey the water rights, and judgment for damages in the sum of $2,000 was awarded against them for such breach of the contract. From that judgment, and also from an order denying a new trial, this appeal is prosecuted. Defendants set forth three grounds upon which they rely for a reversal of the judgment and a new trial: (1) That the court erred in overruling defendants' demurrer to the complaint; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) that the evidence was insufficient to justify any judgment for the plaintiffs.

If it be conceded that the court committed an error in overruling the demurrer to the complaint, which demurrer raised the question as to the misjoinder of causes of action, still the error resulted in no injury, for at the trial by an express order the court limited the evidence to the single question of the breach of the contract in not making a conveyance of the water rights, and the cause was tried upon those lines alone. For this reason, if there was error, it became harmless by the subsequent action of the court.

It is claimed that the complaint failed to state a cause of action in not alleging the amount of money paid for the water rights. Section 3306 of the Civil Code provides: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto in case of bad faith the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach and the expenses properly incurred in preparing to enter upon this land." In view of the fact that the land and water rights were purchased for a lump sum, the proportion of that sum paid for the water rights could not be segregated, and therefore no allegation as to such amount could be made. But there is an allegation found in the complaint that at the time the conveyance was demanded and refused the value of the water rights was $2,000; and this allegation completes the statement of a cause of action. In many cases, where a vendor agrees to convey two separate tracts of land for a lump sum, and, conveying one tract, refuses to convey the other, it would be difficult to apply the measure of damages provided for the vendee by the foregoing section, for in such cases it would be impossible to segregate the purchase price between the two tracts. But no such difficulty arises here, for the section provides that, if bad faith upon the part of the vendor is shown, then the vendee is entitled to additional damages; that is, additional damages to the extent that the value of the property at the time of the breach exceeds the purchase price. In other words, in a case of bad faith upon the part of the vendor the measure of damages will be the value at the time of the breach, if such value exceeds the purchase price; and, if the value of the land at the time of the breach is less than the purchase price, then that price will be the measure of damages. In the present case defendants were the owners of certain water rights and privileges. They agreed to convey those rights and privileges to plaintiffs, who paid them the purchase price therefor. Without any just reason or excuse upon their part, they refused to perform their contract. This was bad faith in the eyes of the foregoing section of the Civil Code. Bad faith being present, the measure of damages would at least be the value of the property at the date of the breach of the contract. For these reasons we conclude that the complaint stated a cause of action.

It is claimed that the evidence does not sustain the judgment as to the amount of damages awarded. In this regard the evidence is sufficient. Judgment and order affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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(116 Cal. 512)

## Ex parte WILLIAMS. (Cr. 296.)

(Supreme Court of California. April 16, 1897.)

CRIMINAL LAW—DEMURRER TO INDICTMENT—DISCHARGE OF PRISONER.

Under Pen. Code, §§ 1008, 1009, providing that the allowance of a demurrer to an information is a bar to another prosecution, and that defendant must be discharged unless the court "directs" a new information to be filed, a mere permissive order, sustaining a demurrer, "with leave" to file a new information, entitles defendant to a discharge.

Van Fleet, J., dissenting.

In bank. Petition by Henry Williams for a discharge upon habeas corpus. Petition granted.

H. C. Head, for petitioner. Z. B. West, for respondent.

HENSHAW, J. The petitioner seeks his discharge upon habeas corpus, and shows the following facts: To the indictment charging him with forgery, he interposed a demurrer, which demurrer was by the court sustained, "with leave to the district attorney to file a new information." Section 1008 of the Penal Code provides that the allowance of a demurrer to an information or indictment is a bar to another prosecution for the same offense, unless the court, being of opinion that the objection on which the demurrer is allowed may be avoided by a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed. This section plainly contemplates that the filing of a new indictment or information after demurrer sustained shall rest in the discretion of the court, and not in the discretion of the district attorney, and that it shall be filed upon the court's direction or command to the district attorney so to do. We have frequently been compelled to comment upon the apparent unwillingness of trial judges to obey the plain mandate of the statute, and their carelessness in conforming to the clear requirements of the law. It would have been extremely simple for the court, in this instance, to have adopted the language of section 1008, and if, in its view, a new information should have been filed, to have directed the district attorney accordingly. Indeed, upon demurrer to an earlier information in the same case (for the information proposed to be filed will be the third), the court followed the provisions of the statute, and directed the district attorney to file a new pleading. But in the present instance, instead of so doing, and without warrant in law, the court merely extended leave to the district attorney to file such information, leaving the decision of the matter as to whether or not such new information would be filed to rest entirely in the discretion of that officer. This, however, was an attempted transfer of the duty of deciding from the court, where the law places that responsibility, to the district attorney, who, under the law, is not authorized to exercise it. It cannot be held that a permissive order granting leave is equivalent to a mandatory order dictating the performance of a given act. Under the order of court directing the filing of a new information, the district attorney, for his failure so to do, would be guilty of misfeasance or nonfeasance, and would be punishable accordingly. Under the permissive order given by the court he would violate no duty, and be amenable to no punishment, if he should never file a new information. It cannot be held, therefore, that the order here given is equivalent to the order which the statute contemplates should be made. The "leave" given to a party to file an amended pleading after demurrer sustained is never an order or direction to the party that he must file such pleading. As the only order which the court could properly make was an order directing a new information to be filed, and as the order in fact made by the court cannot be considered to be equivalent thereto, it follows, under sections 1008 and 1009 of the Penal Code, that the prosecution is at an end, and that the prisoner must be discharged. It is ordered accordingly.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; HARRISON, J.

VAN FLEET, J. I dissent. The order, in full, as made by the court below, omitting the part sustaining the demurrer, was this: "And it appearing to the court that the objections raised by the demurrer to the information may be avoided, leave is granted to the district attorney to file a new information." This order very clearly shows that the intention of the court was to direct that a new information, curing the suggested defects, should be filed, and I think the language used by the court equivalent to the direction provided by the statute. I am unable to coincide with the view expressed in the main opinion, that the language was merely a permissive direction, to be acted upon at the discretion of the district attorney. I think the petitioner should be remanded.

116 Cal. 553

## HERMAN v. HECHT et al. (S. F. 293.)

(Supreme Court of California. April 23, 1897.)

CORPORATIONS—STOCKHOLDERS' LIABILITY—PLEADING—VARIANCE—ASSIGNMENTS—EVIDENCE.

1. The requirement that an action to enforce the liability of stockholders for the corporation's debt must be on the original debt is substantially complied with by a complaint setting out a note of the corporation, and alleging that on the date of the note the corporation borrowed the amount thereof from the payee "on the terms and conditions, and according to the tenor and effect," of said note, since the inception of the debt and the execution of the note are coincident.

2. A finding that a corporation did not "borrow" a certain sum from a bank on its note, in an action against the stockholders on the note, is not justified where the undisputed evidence is that the note was given to the bank in exchange for a partnership note held by the bank, which the corporation had assumed, since the transaction was, in substance, a loan, and a payment of the partnership note with its proceeds.

3. The variance, if any, between a complaint alleging a loan, and proof of such exchange of notes, is immaterial, under Code Civ. Proc. § 469, providing that no variance is material which has not actually misled a party to his prejudice, where the facts as to the consideration of the note were alleged in the answer.

4. The indorsers of the note of a corporation for $40,000 paid it, and subsequently assigned it, in writing, for an expressed consideration of $5. They testified that they hoped to get something out of the collection of the note from the stockholders, but had no arrangement with the assignee therefor. *Held*, that the assignee was the "real party in interest," and could sue to enforce the liability of the stockholders.

5. Evidence that plaintiff's assignors were also stockholders of the corporation is immaterial in such an action.

6. The pendency of a suit and attachment proceeding on the note by the assignee against the corporation is no defense to the stockholders.

7. If a defense, it is not available unless pleaded.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Alexander Herman against Abraham E. Hecht and others. Judgment for defendants on facts found by the court. A new trial was denied, and plaintiff appeals. Reversed.

Wm. B. Sharp, for appellant. Wilson & Wilson, for respondents.

HAYNES, C. This action is brought by plaintiff against Abraham E. Hecht and 14 other defendants to recover from them, as stockholders in the Pacific Jute-Manufacturing Company, a California corporation, their proportion of a promissory note made by said corporation to the Farmers' & Merchants' Bank of Los Angeles, dated April 20, 1881, for the sum of $40,000, payable 15 days after demand, with interest at a specified rate. Said note was indorsed by William Scholle, J. Brandenstein, and I. Cahn. The defendants' answer, in addition to denials which put in issue the averments of the complaint, alleged, in substance, that in 1879 the said corporation borrowed from said Farmers' & Merchants' Bank of Los Angeles the sum of $40,000, and gave its note for said sum; that upon the maturity of that note a new note was given by said corporation for the same sum; that on or about March 10, 1880, said corporation sold and conveyed all its property and assets to the Oakland Bag Company, a co-partnership composed of William Scholle, Israel Cahn, and Jos. Brandenstein; that said co-partnership assumed all the liabilities of the corporation existing at the date of sale, and shortly thereafter said co-partnership gave its own note to said bank, and took up the note made by the said corporation; that on or about March 25, 1881, said corporation, the Pacific Jute-Manufacturing Company, purchased from said co-partnership all the real and personal property, effects, and assets then owned, used, and employed by them under said co-partnership name, and immediately thereafter said corporation commenced and carried on the business for which it was incorporated; that on April 20, 1881, said corporation executed to said bank the note here in suit, and took up the note made by said co-partnership to said bank; and that said note was so executed and delivered by said corporation in substitution of the said note of equal amount then held by said bank, and without any consideration being then, or at all, paid to said corporation. And as a further defense it was alleged that the plaintiff was not the real party in interest, but that said note sued on by him was at the time of the commencement of the action held and owned by said Brandenstein, Scholle, and Cahn, the said indorsers thereof. The action was tried by the court, and the following findings of fact were made: "(1) The plaintiff, Alexander Herman, is not the real party in interest in this action. (2) The Pacific Jute-Manufacturing Company did not on the 20th day of April, 1881, or at any time, for the uses and purposes of its business, or otherwise, borrow from the Farmers' & Merchants' Bank of the City of Los Angeles the sum of $40,000, or any part thereof, or any sum of money." Upon these findings, judgment was entered for the defendants. The plaintiff moved for a new trial, and this appeal is from an order denying said motion.

Appellant specifies, in proper and sufficient form, that said findings are not justified by the evidence, and also that the court erred in certain rulings upon the admission of evidence.

The exception to the second finding will be first considered. The complaint set out a copy of a promissory note dated April 20, 1881, made by the Pacific Jute-Manufacturing Company to the Farmers' & Merchants' Bank of Los Angeles, for the sum of $40,000, payable at 15 days after demand, and alleged that said corporation, in its corporate name, and for the uses and purposes of its business, on said date "borrowed the sum of $40,000" from said bank, "upon the terms and conditions, and according to the tenor and effect," of said note. These allegations show that the inception of the debt, obligation, or liability, and the execution of the note, were coincident; and therefore, so far as the question of pleading is concerned, respondents' contention that the action must be upon the "original indebtedness" is without merit. Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047. And as to the evidence it was shown that on April 20, 1881, the day upon which the note was executed, the board of directors of said corporation by resolution authorized the president and secretary to borrow money in such sum as might be necessary, not exceeding $500,000, and to execute the note or notes of the corporation therefor, and that the note set out in the complaint was executed in pursuance of said resolution. At the time of the sale by the corporation to the co-partnership,—the name and style of which was the Oakland Bag Manufacturing Company,—said co-partnership assumed all the debts and liabilities of the corporation, and when the co-partnership afterwards sold to the corporation all its property and assets the corporation assumed all the debts and liabilities of the co-partnership. At the time last mentioned the Farmers' & Merchants' Bank held the note of the Oakland Bag Company, indorsed by Brandenstein, Scholle, and Cahn, for $40,000, dated January 31, 1881, at 15 days, and at the time the note of the corporation set out in the complaint was executed the note of the bag company was taken up; or, as claimed by appellant, no money passed from the bank to the corporation, but the note of the corporation, indorsed by Brandenstein, Scholle, and Cahn, was substituted for it. It is not questioned that this transaction was the origin of the liability of the corporation to the bank, which is here in question, nor that the note of the bag company was thereby paid, and the liability of the co-partnership extinguished. The former liability of the corporation to the bank which existed at the time of the sale to the Oakland Bag Company was paid by the bag company, whether in money or by its note is immaterial; so that from that time until the transaction of April 20, 1881, the corporation was not indebted to the bank. So far as the actual liability of the corporation and its stockholders to the bank is concerned, it is immaterial whether the bank actually paid to the corporation $40,000, and took its note for that sum, or surrendered the note of the bag company for the same sum; for in either case there was a valuable consideration for the note. The question, therefore, is whether these facts, about which there is no conflict in the evidence, justify the finding that the corporation did not "borrow" from the bank $40,000, or any sum of money. There is no question that the note was executed by the corporation, nor is it questioned that the bank parted with value to the amount stated in the note. The transaction was, in effect, a loan of that sum to the corporation. If the cashier had counted out the money to the agent of the corporation, and he had taken it to the collection clerk, and there paid the same money and taken up the note of the bag company, there could be no question that it was a "borrowing" by the corporation. The law looks at the substance of the transaction, in determining its character, and does not require the doing of vain things. In Hamilton v. Starkweather, 28 Conn. 138, it was held that money paid to B. at the request of A., and upon A.'s promise to repay it, is money lent to A., and can be recovered under a count in general assumpsit for money lent. The court said: "The plaintiff having paid the money as requested, we think it was, in substance, a loan. And whether it might also have been treated as money paid is of no importance. There is no principle that requires a manual transfer of money into the borrower's hands in order to constitute a loan. The question is not so much what was the form of the transaction, as what was the substance of it. * * * The transaction has every characteristic of a loan, except that it was not paid over into defendant's hands. And this, in Wade v. Wilson, 1 East, 195, was held to be unnecessary." But, whether this be so or not, the finding should have been in favor of the plaintiff upon the issue of the defendants' liability for their proportion of the money represented by the note of the corporation; for, if it could not be considered as a loan of money by the bank, the facts show a liability of the corporation for the amount named in the note, and for which a stockholder's liability exists, and in that case it is a mere question of variance between the allegation of the complaint and the proof, and "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Wherever it appears that a party has been so misled the court may order the pleading to be amended upon such terms as may be just." Code Civ. Proc. § 469.

It cannot be said that the defendants were misled to their prejudice, since the fact that the money was not actually paid into the hands of the corporation, but was applied to the satisfaction of the bag company's note, or was given in lieu of it or in substitution for it, was distinctly alleged in the answer; and if no other issue had been raised, or defense pleaded by the defendants, the plaintiff would have been entitled to judgment on the pleadings. As it was, the court should have found according to the evidence, under section 470, Code Civ. Proc., and, if no other defense was established, should have entered judgment thereon for the plaintiff. The court found, however, that the plaintiff is not the real party in interest. This finding cannot be sustained. Said note was indorsed by Brandenstein, Scholle, and Cahn. It was not paid at maturity, and was duly protested for nonpayment, and the liability of the indorsers became fixed on April 19, 1883, and on May 31, 1883, they paid said note, and it was thereupon delivered to them; and afterwards they assigned and transferred it to the plaintiff by the following instrument: "In consideration of five dollars to us paid by A. Herman, the receipt whereof is hereby acknowledged, we hereby sell, assign, and transfer to said A. Herman a certain promissory note, dated 20th day of April, 1881, made by the Pacific Jute-Manufacturing Company, payable fifteen days after demand, for $40,000, and interest at the rate of four per cent. per year, indorsed and taken up by us. And we authorize him to collect the same against the maker of said note (but not against us, indorsers thereof) for his sole use and benefit. Witness our hands this 5th day of June, 1883." The indorsers who signed the above instrument were examined touching said transfer, and were asked whether Herman paid any consideration for the note, and whether they were to participate in the fruits of the litigation if the plaintiff should recover. The replies were to the effect that they thought five dollars was paid, but did not distinctly remember it; and to the second question the reply was that they had no legal or absolute right to get anything, but would be disappointed if they did not, or that they hoped to get something out of it, but that there was no understanding that they were to get anything. It was also admitted that these indorsers, Brandenstein, Scholle, and Cahn, were each stockholders in said corporation. It is contended by appellant that said finding is but a conclusion of law. Whether this be so or not, we need not inquire; for, if it be conceded that it is a finding of fact, it is not sustained by the evidence. The assignment vested the legal title to the note in the plaintiff, and, if the action had been against the corporation upon the same note, it is clear that this defense would not have availed it to defeat the action. See Giselman v. Starr, 106 Cal. 651, 657, 40 Pac. 8. That the assignment transferred to the plaintiff the indebtedness of the corporation is beyond question, and the liability of the stockholder must accrue to the creditor of the corporation, and cannot exist as to any one who it not such creditor. It is true that plaintiff's assignors are stockholders, but that does not affect the liability of the defendants; nor does the fact that they did not sue as plaintiffs affect any right of the defendants. Each defendant could be held liable only for his proportion of the debt of the corporation, and, such liability being several, one or more or all the stockholders may be joined as defendants, or a stockholder who is also a creditor may sue other stockholders. Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047, where it is also held that the assignment of the note carried with it the original debt. It is immaterial whether plaintiff's assignors received the money consideration mentioned in the assignment, or whether they hope to obtain a benefit from a recovery by the plaintiff. The writing imports a consideration sufficient to sustain the assignment, and as the defendants do not show that they have some equity or defense against plaintiff's assignors which they do not have against the plaintiff, or show that a judgment against them in favor of the plaintiff would not protect them, they are not concerned with what the plaintiff may do with the fruits of such judgment. Giselman v. Starr, 106 Cal. 657, 658, 40 Pac. 8.

The court erred in admitting evidence that plaintiff's assignors were stockholders in the Pacific Jute-Manufacturing Company. The fact that they were stockholders would have been no defense to the action if they had been the plaintiffs (Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047), and therefore could not be a defense to an action by their assignee.

The court also erred in admitting evidence that the plaintiff had sued the corporation and caused a writ of attachment to issue, and that said action was still pending. That fact constituted no defense to plaintiff's action; but, if it did, it was a defense which was not pleaded, and therefore not available to the defendants. The order denying a new trial should be reversed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and a new trial granted.

116 Cal. 518

## TERALTA LAND & WATER CO. v. SHAFFER, County Auditor. (L. A. 167.)

(Supreme Court of California. April 20, 1897.)

TAX SALES—REDEMPTION—VESTED RIGHTS.

Pol. Code, § 3817, which provided that where real estate had been sold for delinquent taxes, and the state had become the purchaser, and had not disposed of it, redemption might be made by paying the amount of the tax due, with interest at 7 per cent. per annum, subsequent taxes, costs, and a penalty of 25 per cent., was amended by Act March 28, 1895 (St. 1895, p. 309), in terms made retroactive, requiring the redemptioner to pay a penalty of 10 per cent. if redeemed within six months, 20 per cent. if redeemed within one year, etc., increasing the penalty by 20 per cent. each year till the fifth and subsequent years, the maximum penalty being 100 per cent. *Held* that, as applied to sales prior to its passage, the act is unconstitutional, as disturbing vested rights, since to the right to redeem it adds new conditions, more onerous than those which existed when such sales were made.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Writ of mandate, on the petition of the Teralta Land & Water Company, to compel E. E. Shaffer, auditor of San Diego county, to furnish an estimate of the amount required to redeem certain lands from tax sale. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. H. Sweet, Dist. Atty., for appellant. Collier, Pillsbury & Collier, W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, Dep. Atty. Gen., for respondent.

SEARLS, C. The Teralta Land & Water Company (a corporation), respondent herein, filed its petition, duly verified, in the superior court in and for the county of San Diego, showing that it was the owner of certain described lands, situate in said county of San Diego, which were sold for delinquent state and county taxes duly levied for the fiscal years 1889–90, 1890–91, and 1891–92, and purchased by the state of California. On the 25th day of September, 1895, plaintiff, being desirous of redeeming said lands, applied to defendant, auditor of the county of San Diego, to furnish to it an estimate of the amount required to redeem the same, and demanded that such estimate be made under the statutes in force at the date of the respective sales of said land, and prior to the year 1895. The auditor refused to furnish the estimate as demanded, upon the ground that the act of March 28, 1895, was the only statute in force relating to the redemption of real estate from sales for delinquent taxes, whether such sales took place prior to the passage of said act or afterwards. He offered to furnish an estimate under the act of 1895, but refused to do so under any prior statute. An alternative writ of mandate issued to defendant, who came in and demurred to the petition, upon grounds substantially involving the proposition that the petition or sworn statement of the plaintiff did not state facts entitling plaintiff to redeem from the sales therein mentioned under any law or laws except the statute of March 28, 1895. The court overruled the demurrer, and, defendant failing to answer, his default was entered, and the writ of mandate was made peremptory. Defendant appeals from the judgment.

Under the Political Code (section 3817) as it existed prior to 1895, where real estate was sold for delinquent taxes, and the state had become the purchaser, and had not disposed of the same, the former owner or his heirs, etc., had the right to redeem by paying to the county treasurer the amount of the tax due, with interest at 7 per cent. per annum, together with all taxes that were a lien on the real estate at the time said taxes became delinquent; an amount equal to the percentage of all subsequent taxes; interest thereon; all costs and charges; and a penalty of 25 per cent., etc. It became the duty of the county auditor to furnish the person desiring to redeem an estimate of the amount necessary therefor. The act of March 28, 1895 (St. 1895, p. 309), amended section 3817 of the Political Code so that, in lieu of the penalty of 25 per cent., the redemptioner is required to pay a penalty of 10 per cent. if redeemed within six months from the date of sale, 20 per cent. if redeemed within one year, 40 per cent. if redeemed within two years, 60 per cent. if redeemed within three years, 80 per cent. if redeemed within four years, and 100 per cent. if redeemed within five or any greater number of years after the date of sale. The section in terms applies: "In all cases where real estate has been or may hereafter be sold for delinquent taxes to the state, and the state has not disposed of the same, the person whose estate has been or may hereafter be sold," etc.

The sole question presented for determination is this: Is the owner of the land entitled to make redemption obliged to pay the amount to redeem required by the act of March 28, 1895, or can he redeem by paying the amount required under the laws in force at the date of sale? No part of the Political Code is retroactive unless expressly so declared. Pol. Code, § 3. This applies to amendments thereto equally with the original. Railroad Co. v. Shackelford, 63 Cal. 261. That the legislature intended to make the amendment of 1895 to section 3817 retroactive is amply attested by the language used: "A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb vested rights, and go only to confirm rights already existing, and, in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations." 1 Kent, Comm. 455. Remedial statutes which are retrospective, but do not impair contracts or disturb vested rights, are not unconstitutional; and the legislature may from time to time alter, change, or modify the remedy, provided in so doing they do not affect the right; but whenever they so far alter the remedy as to impair, destroy, change, or render the right scarcely worth pursuing, they necessarily impair the obligation of the contract upon which such right is founded. Smith v. Morse, 2 Cal. 524; Scarborough v. Dugan, 10 Cal. 305; People v. Seymour, 16 Cal. 332; Moore v. Martin, 38 Cal. 428; Redemption Co. v. Sedgwick, 15 Cal. 515; Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. 960;

Bates v. Gregory, 89 Cal. 387, 26 Pac. 891; Dentzel v. Waldie, 30 Cal. 138.

Appellant very properly admits that "an act which impairs the obligation of a contract, or devests a vested right, is in conflict with section 10, art. 1, of the federal constitution, and with section 16 of article 1 of the constitution of the state of California." He contends, however, that the amendment of 1895 to section 3817 of the Political Code does not impair the obligation of a contract, or devest a vested right. His theory is that a tax duly levied has the effect of a judgment against the person, and the lien created thereby has the force and effect of an execution duly levied against all the property of the delinquent (Pol. Code, § 3716), and that the sale of property upon default of payment and the right of redemption as an incident thereto is a remedy which may be changed at any time at the will of the legislature, and, though retroactive, will not be invalid for that reason. In support of this position, and of the argument in favor thereof, counsel cite: Redemption Co. v. Sedgwick, 15 Cal. 525; Loan Soc. v. Hayes, 56 Cal. 303; Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. 960; and several other cases. In Redemption Co. v. Sedgwick the change in the redemption law was made before the sale took place. In Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648, which was an action to foreclose a mechanic's lien, after a portion of the materials had been furnished, the law was amended, and it was held that the amendment shortening the time for filing a lien, but which afforded an adequate remedy, was not retroactive, and applied to pending cases of uncompleted buildings. In the Oullahan Case the court held that an amendment to the statute after a tax sale, requiring the purchaser to give notice before applying for a deed, went to the remedy only, and was applicable to cases existing at the time the law took effect. The court assumed, for the purposes of that case (but did not decide), "that the legislature cannot make an absolute extension of the time for redemption of property previously sold."

We think it well settled that the legislature may, at any time before a sale of property under a decree or execution, amend the law in relation to redemption, by extending or shortening the time therefor, and apply it to existing cases. The question here, however, is: Can the legislature, after a tax sale, lawfully amend the law so as to apply new and more onerous conditions to the right to redeem than those which existed when the sale was made? We think this question is answered in the negative by the elementary writers, and by the adjudicated cases. Cooley, in his work on Constitutional Limitations, at page 353 (6th Ed.), says: "So, a law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes, after the sale has been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note; so a law which shortens the time for redemption from a mortgage after a foreclosure sale has taken place is void, the rights of the party being fixed by the foreclosure and the law then in force." Black on Tax Titles, at section 175, says: "The right of redemption from a tax sale must be governed by the law in force at the time of sale. It cannot be affected by subsequent legislation." He quotes from Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721, as follows: "The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner, must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor." Negus v. Yancey, 22 Iowa, 57; Goenen v. Schroeder, 8 Minn. 387 (Gil. 344); Robinson v. Howe, 13 Wis. 380; Conway v. Cable, 37 Ill. 82; Moody v. Hoskins, 64 Miss. 468, 1 South. 622; Caruthers v. McLaran, 56 Miss. 371; Wolfe v. Henderson, 28 Ark. 304. Blackwell on Tax Titles, at section 729 (5th Ed.), expresses the same views in the following language: "The law in being at the time of sale governs the right of redemption. The time can be neither lengthened nor shortened by subsequent legislation. * * * The right to redeem is a condition attached to the sale, and the legislature cannot defeat it by a subsequent act. A provision affecting the period of redemption can only apply to sales after the day on which the act took effect."

The enforced sale of property on execution, or for the nonpayment of taxes, institutes a contract with the purchaser which cannot be materially altered without his consent. The right of the owner to redeem is perhaps, strictly speaking, one not resting in contract, but is a right vested in him under the law,—a right pertaining to the contract itself, and which, in reason and justice, is not more open to attack than that of the purchaser. It has been said in a few of the many cases on the subject that, so far as the right to redeem is concerned, it is not derived from any contract, but is given by the law only, and the time within which it may be exercised may be shortened by the legislature, provided a reasonable time is left within which to exercise it, without impairing the obligation of the contract. We think these cases are opposed to the weight of authority; but, concede that they are not, and we think the case at bar is clearly distinguishable from them.

Here an additional burden is cast upon the redemptioner, whereby his right to redeem is subjected to the payment of a sum of money greatly in excess of that required of him under the statute which conferred the right upon him. To require a party to perform an act at a time different from that required by a former statute is a difference only in point of time, and may be said to affect the remedy only; but to require him to pay a sum of money greatly in excess of that required by a former statute is to impose upon him a burden having no relation to the remedy. In Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84, it was held that a law which increased the rate of interest to be paid on redemption of a pre-existing mortgage could not be upheld. What the state could sell under the tax sale was limited by what the purchaser could purchase, and that was the right to have the title subject to the owner's right to redeem upon the payment of a given sum of money at any time before the state parted with its interest in the property. This right of redemption became a condition of the contract of purchase, and could not, in reason or justice, be ignored or changed by a subsequent statute, any more than the sale itself. It was an essential element of the contract of sale, and not a mere naked right, to be changed or abridged as a mere matter of public policy. Though intimately connected with the remedy, it was not a part of the remedy, but a substantive right preserved to the redemptioner, and equally sacred with those acquired by the purchaser, which latter rights it limited. It was a right of property remaining in the former owner after the exhaustion of the remedy by sale, and the statute which (passed after the sale) seeks to impair this right, by adding new burdens to its exercise, is violative of constitutional guaranties. We recommend that the judgment appealed from be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

116 Cal. 527

## RUSSELL v. PACIFIC CAN CO. (S. F. 615.)

(Supreme Court of California. April 22, 1897.)

MASTER AND SERVANT — NEGLIGENCE — DUTY TO INSPECT.

Defendant furnished at its factory a water-closet, into the vault of which hot steam was discharged for sanitary purposes. The steam exhaust pipe, as constructed, turned downward, and entered cold water in the vault. Plaintiff, —an employé,—while using the closet, was scalded by the steam. After the accident the end of the steam exhaust pipe was found to point directly upward. Defendant had not inspected the closet since its construction, four years before. *Held*, that the failure to inspect was negligence.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Nora Russell, a minor, by her guardian ad litem, against the Pacific Can Company. From a judgment on a verdict in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Reinstein & Eisner, for respondent.

GAROUTTE, J. The appellant is a corporation engaged in conducting a factory for the manufacture of tin cans and other articles. Nora Russell, a minor and employé, brings this action, in the name of her guardian ad litem, for damages for personal injuries received. The jury found in her favor, and assessed the damages at the sum of $2,500. The corporation appeals from the judgment and the order denying a new trial. The general facts to be considered may be briefly stated as follows: The plaintiff, a girl of 14 years, was an employé of the defendant, and upon the day of the accident, being the first day of her employment, was working for the defendant at its place of business in the city of San Francisco. Upon the premises there was a certain outhouse or water-closet provided for the use of employés. In connection with its business the defendant used and employed steam power, and had constructed and maintained an exhaust steam pipe which ran into said closet, and discharged steam immediately beneath the place where persons using said outhouse or water-closet were in the habit of sitting. While the plaintiff was in the act of using said closet, steam and hot water came through said exhaust steam pipe into said outhouse, immediately beneath the person of said plaintiff, whereby she was seriously scalded and burned. The steam was conducted to this place for sanitary purposes, and such arrangement had been in use for more than four years. Cold water was also emptied into the vault of this closet by means of a pipe, and when the end of the exhaust steam pipe penetrated the cold water there was no danger from the hot steam. The end of the exhaust pipe consisted of an elbow 18 inches in length, claimed by defendant to have been so placed as to extend directly downward to within 15 or 18 inches of the bottom of the vault. Immediately after the accident the place was examined, and it was found that the aforesaid elbow of the exhaust steam pipe pointed directly upward. The foregoing facts either appeared from the evidence of plaintiff's witnesses, or were admitted by defendant's pleading, save the position of the elbow of the exhaust pipe at the time of the accident; and its position, as pointing upward rather than downward at that time, was shown by the evidence of the defendant.

Defendant insists that its motion for a nonsuit was improperly denied, and also insists that the evidence, as a whole, is insufficient in law to make a case for plaintiff. Of course, if plaintiff's case is strengthened by defendant's evidence to the extent that, when finally submitted, it is strong enough to support a verdict, even though inherently too weak to accomplish that result when a nonsuit was denied, then a denial of the nonsuit is harmless error. And here, if it appears from all the evidence in the record that a case for plaintiff is made out, then the action of the court in refusing the nonsuit is not reversible error. With these principles in view, we pass the consideration of the question of nonsuit, and come directly to the examination of the bill of exceptions, with a view to testing the sufficiency of the evidence, taken as a whole, in supporting the verdict of the jury. In addition to the facts we have quoted, it further appeared that this steam pipe had been connected with the closet for some four years immediately prior to the accident, and that no examination of the closet had been made by defendant during that time. No question of contributory negligence is involved, and the case, upon its face, addresses itself to the single interrogatory, does the evidence indicate negligence upon the part of the defendant?

Plaintiff was an employé of defendant. It was defendant's duty to furnish her a closet reasonably safe. This it failed to do, but, on the contrary, furnished her a closet the use of which was accompanied with the greatest danger. There is no question but that the closet furnished plaintiff was not suitable for the purposes intended, and it was not suitable by reason of the fact that it was not safe. It may be stating the proposition too strongly to say defendant was bound to furnish a closet which could be used with safety; but, to be strictly within the law, we say defendant was bound to use reasonable and ordinary care in the selection of the closet furnished this plaintiff, and we think it plain the jury were justified in finding that such care was not used. Steam is a dangerous element to be used, under any circumstances; and we here find a closet, furnished by defendant for the use of plaintiff, into which steam had been emptied for a period of four years, and no inspection of its condition had been made during that entire time. A failure to examine the closet, in view of the fact that hot steam was being constantly, more or less, discharged into it, was sufficient to justify the jury in holding defendant guilty of negligence. Certainly the defendant was bound to furnish a closet that was not inherently and ordinarily dangerous, and this was not such a one. Defendant furnished a closet that, in effect, it had not seen for four years. Even if it should be conceded that an employer is not bound to know the condition of a defective appliance furnished his employé, still, as matter of fact, a jury will be justified in holding him guilty of negligence in furnishing an appliance he has not seen in four years' time. It is no answer to a charge of negligence to say that "four years ago I constructed that appliance, and it was then in perfect condition." The wear and tear of use, or of time alone, should be guarded against by the exercise of some degree of care upon the part of the employer. A stage company furnishing its driver with a stage which it had not seen for four years would be guilty of negligence justifying damages to him, if the stage gave way by reason of its defects, however perfect its condition four years before; and such recovery would be based upon the fundamental principle of a lack of ordinary care upon the part of the employer in selecting and furnishing the appliance to be used by the employé. And the principle in the case here under consideration is no different than if injury to this plaintiff had been produced by the giving way of the boards of the closet, or the caving in of the vault. It would be no answer to say that "four years ago I built the closet, and it was then in perfect condition." This appliance was furnished plaintiff upon the day of the accident, not at the date of its construction. It was furnished plaintiff at a time when defendant absolutely knew nothing of its condition. When the elbow of the pipe was changed from a downward to an upward direction is unknown. The evidence is not at all conclusive that it ever pointed downward. The builder of it did not testify, and no man ever saw it pointing in that direction. It undoubtedly was the intention of the defendant that it should be so constructed, but the evidence is not at all convincing that such was the fact. But whatever may be the true theory as to the fact we think immaterial, for the jury were justified in holding the defendant guilty of negligence in furnishing an appliance the condition of which it did not know,—an appliance which it had not seen for the period of four years. The principles of law here discussed are elementary, and for that reason no extended citation of authority has been made. The application of the facts to those principles, however, is plain and conclusive. As defining the duty of the master to his servant, the court of appeals of New York in Ryan v. Fowler, 24 N. Y. 414, said: "The location of the privy in a dangerous place made it more imperatively his duty to see to it that its foundations were made and kept sound and safe beyond contingency. He had no right to expose the female operatives of his factory to risks and danger in such a place. It was his duty to know that the privy was safe, and that the operatives for whom it was designed and provided might resort to it without personal risk, or peril to life or limb. * * * It was provided for her use. It was the master's duty to see that it was safe and secure, and not hers to watch and guard, by any particular vigilance, against accidents of the kind which caused her injury." In its facts this case is surprisingly similar to the case at bar. The damages recovered are not excessive. Neither is the alleged misconduct upon the part of plaintiff's counsel during the progress of the trial such as to demand a retrial of the case. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

116 Cal. 533

## YNDART v. DEN et al. (L. A. 165.)

(Supreme Court of California. April 23, 1897.)

USURY—COMPOUND INTEREST.

1. Civ. Code, § 1919, authorizing parties to contract that, on default of prompt payment of interest, it shall become part of the principal, and bear the same rate of interest, inhibits a contract for compound interest at a higher rate than the principal bears, though such interest is to run independently of the principal.

2. Where a contract for compound interest is illegal, because fixing a higher rate than the principal bears, no compound interest can be allowed.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by U. Yndart against N. C. Den and others. Judgment for plaintiff, and defendants appeal. Modified.

Boyce, Taggart & Kellogg, for appellants. Richards & Carrier, for respondent.

CHIPMAN, C. This is an appeal from the final judgment given in favor of the plaintiff upon foreclosure of certain four mortgages of real estate. The appeal is taken on the ground, as claimed in appellants' brief, that the clause in each of the notes secured by the mortgages, respectively, relating to interest, was illegal and void, in attempting to give a penalty for nonpayment of interest, and that the decree is excessive, and for an amount beyond what the plaintiff was rightly entitled to recover. One of the notes bears interest at 10 per cent. per annum, and three bear interest at 11 per cent. per annum, payable in each case semiannually. In each of said notes the following provision is found: "If any installment of interest be not paid when due, the amount of such installment shall bear interest at 20 per cent. per annum from the time the same was due until paid; or, at the option of the holder of this note, in default of payment of interest at the times herein provided the whole sum—principal and interest—shall be due and payable." Demurrer to the complaint was interposed and overruled, but defendants failed to answer, and their default was entered. No point is urged on the demurrer. The notes were all past due when the action was commenced. Appellant contends: First. The deferred installments of interest cannot bear a greater rate of interest than the principal debt. Second. If interest is allowed on deferred installments, by implication it must be limited to the legal rate. Third. If the penalty clause in the notes is void, no interest on deferred payments of interest can be recovered.

1. Appellant relies in support of his first contention upon the provision of section 1919, Civ. Code, as construed in the case of Society v. Horton, 63 Cal. 105, and Dean v. Applegarth, 65 Cal. 391, 4 Pac. 375. It is claimed that these cases decide that it is not competent for the parties to contract that interest upon interest can be legally enforced or fixed beyond the rate to be borne by the principal. Section 1919 reads as follows: "The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt." It is replied by respondent to the point that the cases upon which appellant relies "do not seem to have been elaborately argued, or the question carefully considered, * * * and we may consistently say that, if not directly overruled, they are rejected as barren." The question is an important one, and should be definitely settled, if it has not been. The case of Society v. Horton, supra, is not fully reported. The provisions of the note are not given, nor is the scope of the complaint stated. No synopsis of the briefs is given, nor are the facts stated in the opinion. The opinion is rendered per curiam, and two of the justices dissented, but upon what grounds does not appear. It was a default decree, and was reversed because in excess of the claim made in the complaint. The opinion concludes as follows: "The attention of the court below is directed to section 1919 of the Civil Code, in computing interest upon the interest which is not punctually paid. That section declares that the parties may agree that it shall become a part of the principal, *and thereafter bear the same rate of interest as the principal debt.* [Italics are in the report.] This appears to us to be the limit." There was a petition for rehearing denied. It would seem fair to conclude that the note there in question at least provided for payment of interest upon interest at a rate greater than that fixed for the principal; but whether it provided also, as in the notes here in question, that the interest upon the interest was not to become a part of the principal, but to run independently of the interest on the principal, cannot be assumed. The case of Dean v. Applegarth, supra, was more fully reported. The terms of the note are stated to be "that the principal was to bear interest at one per cent. per month, and it was agreed that, in case default should be made in the payment of any of the interest as stated above, that

such installment or payment thus in default should bear interest from the day of maturity until payment at the rate of two per cent. per month, compounding monthly." It was also provided that at any time during such default the entire unpaid balance of the principal sum should, at the option of the holder of the note, and not otherwise, become due and payable, and the principal sum so due and payable should bear interest thereafter at the rate of 2 per cent. per month, compounding monthly until paid. When the action was commenced the note, by its terms, had become due, and it did not appear from the complaint that any option was made in any way by plaintiff (mortgagee) prior to the commencement of the action, at which time the note by its terms was due. As to the interest on the principal sum compounding at the increased rate of 2 per cent., the court said the provisions of the note did not apply, because the option had not been exercised, except by bringing the suit after the maturity of the note. The court said: "As to the interest on interest in default, when default was made in the payment of any monthly installment it had become due and payable. No election was required to make that so. The plaintiff, under the contract, had a right to have such installment unpaid bear interest. But it cannot be made to bear interest at a rate greater than that borne by the principal debt (Civ. Code, § 1919), which in this case is one per cent. per month. This is the construction placed upon section 1919 of the Civil Code in Society v. Horton, 63 Cal. 105. The section 1918 of the Civil Code is limited by section 1919. The latter section applies specifically to agreements to pay interest on interest, and its particular words cannot be controlled by the general language of the preceding section, which refers to a different subject, and can have full application without affecting the provisions of the section which follows it." The decision of the court below was reversed because more interest was allowed than should have been. In the case in 63 Cal., supra, Mr. Justice Thornton and Mr. Justice Myrick dissented; but in the case in 65 Cal. and 4 Pac., supra, Mr. Justice Thornton delivered the opinion, in which Mr. Justice Myrick concurred. We must therefore assume that the dissent in the earlier case was on other grounds, and that the point under discussion was presented in both cases, and duly considered.

The provisions of the notes in the particular now being examined are apparently the same. In both cases the interest on the defaulted interest was to bear interest until paid at the increased rate, and was not, by the terms of the notes, to become part of the principal sum. The rule laid down in Dean v. Applegarth has stood unquestioned in this court since 1884, so far as I have been able to discover, until the case of Thompson v. Gorner, first decided in department (1894; 36 Pac. 434), and finally in bank (104 Cal. 168, 37 Pac. 900), in which respondent claims a different rule was laid down. In the case just referred to the note provided as follows: "* * * with interest thereon [the principal sum] * * * from the date hereof until paid at the rate of eight per cent. per annum, payable monthly in advance; and, if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent. per month." So far as the question here presented is concerned, the provisions of this note differ from the notes in the case at bar. The provision of the notes in this case is: "If any installment of interest be not paid when due, the amount of said installment shall bear interest at twenty per cent. per annum from the time the same was due until paid"; the interest on the principal sum being ten per cent. in one, and eleven per cent. in the others. In the case of Thompson v. Gorner, supra, the provisions are that, "if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent. per month." It is not entirely clear as to whether the additional interest is to be computed on defaulted interest or defaulted principal. The opinion in the department was written by Mr. Commissioner Searls, and in bank by Mr. Justice McFarland. A careful reading of both opinions will fail to disclose that interest upon interest was claimed or allowed. The court in bank allowed "judgment for the amount of the principal and interest thereon from and after February 20, 1892, at one per cent. per month." Interest had been paid at 8 per cent. up to that date, and accepted by the plaintiff (the holder of the note); and the court held that acceptance of the interest was a waiver of any claim for additional interest prior to that time, but not as to the future. It is to be observed, however, that neither the learned justice nor the learned commissioner referred to section 1919, Civ. Code, nor to the case in 63 Cal. supra, nor the case in 65 Cal. and 4 Pac., supra, nor does it appear that the attention of either was called to that section in the briefs of counsel. "Plaintiff's points and authorities were very meager, covering only one page and referring only to the question of penalty." Mr. Justice McFarland, 104 Cal. 170, 37 Pac. 901. I think, if this case had been intended to overrule Society v. Horton and Dean v. Applegarth, some mention of that fact would have been made, and, if a new interpretation of section 1919 had been intended, that fact would have been disclosed. Attention is also drawn by respondent to a recent opinion by Mr. Commissioner Britt in the case of Finger v. McCaughey, 45 Pac. 1004, 114 Cal. 64. In that case the note read: "With interest from date at the rate of ten per cent. per annum, provided this note is paid at maturity; but, if not paid at maturity, then it shall bear interest at the rate of twelve per cent. per annum from its date until paid; and, if the interest is not paid at the end of one year from date, it shall become a part of the principal, and bear twelve per cent. interest per annum." In this case counsel for appellant called attention to section 1919, Civ. Code, and to the cases in 63 and 65 Cal. and 4 Pac., supra, and claimed that, by the terms of the note, it precludes anything but simple interest at the rate of 10 per cent. per annum. Respondent cited Thompson v. Gorner, 104 Cal. 168, 37 Pac. 900, as deciding adversely to appellants' contention. The learned commissioner said: "It is competent for the parties to agree upon an increased rate contingent upon nonpayment of either principal or interest when due,"—citing Thompson v. Gorner, supra. We see no substantial ground for distinguishing this case from that; and the court gave compound interest for one year only at the increased rate of 12 per cent. In both cases last above referred to the notes provided: (1) In the case of Thompson v. Gorner, the provision was that, if the principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent. per month. The decree may well be assumed to have covered interest on the principal only. (2) In the case of Finger v. McCaughey, the provision was interest from date at 10 per cent. per annum, provided the note is paid at maturity, but, if not paid at maturity, then it shall bear interest at 12 per cent. from its date until paid; and, if the interest is not paid at the end of one year from date, it shall become part of the principal, and bear 12 per cent. interest per annum. I do not think that the precise question decided in Society v. Horton and Dean v. Applegarth is necessarily involved in either one of the two later cases just examined; nor do I think that the provisions of the notes in these two later cases are the equivalent of the provisions of the notes now before us. In the two later cases it may well be said that, upon the contingency named (nonpayment of principal when due), it (the principal) shall bear the increased rate of interest. It is a part of the contract as to payment of the principal, and is as much to be regarded as the part relating to the lower rate. Both rates are given; one to be in one event, and the other in another. But in the case before us it is the defaulted interest that must bear the increased rate, while the rate on the principal remains unaffected and unchanged. Now, it was exactly this provision in Dean v. Applegarth that the court said was prohibited by section 1919. This section, said the court, "applies specifically to agreements to pay interest on interest, and its particular words cannot be controlled by the general language of the preceding section, which refers to a different subject," etc. It will be noticed that, if the construction given to the note in Finger v. McCaughey be correct,—that the principal, by its terms, bore 12 per cent. per annum,—then it is not obnoxious to this section; for the defaulted interest was to bear only 12 per cent., and this the section expressly permitted to be done. The section is not designed to restrict the rate of interest that may be agreed upon as to the principal,—this has no limit (section 1918),—but it is aimed at rates of interest greater than those fixed for the principal to bear, and declares that the parties may agree that, if the interest is not punctually paid, it may become a part of the principal, and thereafter (not before) may bear the same rate of interest (no more) as the principal debt.

The respondent calls attention to the fact that section 1919 is taken bodily from the statute of 1850 (1 Hitt. Gen. Laws, § 3858), and was adopted for the simple purpose of legalizing compound interest; citing the note of the code commissioners. This need not be questioned. To say that, when interest is not paid when due, it shall become a part of the principal, and thereafter bear like interest with the principal,—which is the usual form,—is strictly within the section, and is compound interest. But to say that the principal shall bear 10 per cent. interest per annum, and, if not so paid, it—the interest—shall thereafter bear 20 per cent., is what is here attempted, but is what this court has said cannot be done, as the law now stands. It is not a question as to penalties. It is a question as to the right to contract to this effect. Section 1918, Civ. Code, provides that "parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement." But the legislature has placed this limit upon the power to agree as to interest, to wit, that the rate of interest upon interest, or compound interest, shall not be greater than that fixed upon the principal. Section 1918 presupposes an indebtedness which is the principal. As to that, any rate of interest, however extortionate or unconscionable, may be agreed upon by the parties. Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473. But, as to the interest yet to be earned, no rate of interest on that shall be still higher, or any higher. Counsel for respondent, with much seeming force, say: "If section 1919 really forbids the placing of a higher rate on the interest than originally stipulated for the principal, unless at the same time the rate on the principal is increased, the two last referred to decisions [meaning Society v. Horton and Dean v. Applegarth] have consigned its prospective power to technical operation upon one, and probably the least unconscionable, of a thousand and one devices to secure prompt payment of the compensation for the use of the money, or as damages for its detention, or for the creditor's forbearance, all of which devices, with this one solitary exception, are indorsed by the courts as legal and binding." The obvious reply to this is that we have no concern with the law, except to rightly interpret it as we find it. If we have not yet reached the point in legislation to adopt laws against usury, and if we still permit agreements to be made for the payment of 10 per cent. per month, or any other unconscionable per cent. per month interest on the money loaned, it would seem that a provision to limit the rate of interest that may be charged on the interest to a point not in excess of that placed upon the principal is at least humane, if it is "a curtailment of the freedom to contract in reference to the use, forbearance, and detention of money granted by the preceding section," as suggested by respondent. Respondent further suggests that "the provision for interest upon interest represents more than compensation for the use or detention of the interest money; it is one of two obligations stipulated for to insure prompt payment and obviate loss by delay, and thus imports a consideration outside what supports compound interest, and which brings it within the category of recognized subjects of unlimited contract between lender and borrower." But the Code law embraces the whole subject of interest, and must control it. There can be no such thing as unlimited contract between lender and borrower, as to payment of interest, outside these Code provisions. The Code says to the lender, "You may exact unlimited interest on your loan, but on the interest to be earned you must keep within this limit." Our law is quite liberal to the creditor. We are reluctant to extend its liberality. We can well see how a borrower, in his anxiety, may agree to almost any terms as to the interest on the interest, believing he will be able to avoid the default that may bring disaster upon him; but the legislature seems to have anticipated this prevalent weakness of the borrower, and has endeavored, in a measure, to shield him from his impetuosity. The legislature may also have considered that the lender who would part with his money for 1 per cent. per month interest should be content to receive 1 per cent. upon the accumulating interest. It may have considered that interest money is of no more worth than the principal. However this may be, with the policy of the law we can, as a court, have nothing to do.

2. Appellant claims further that, if interest is allowed on deferred installments of interest by implication, it must be limited to the legal rate. He claims in his third point that, the compound interest claimed being illegal, there is no contract to pay any compound interest. To this respondent replies that the most that can be claimed for the cases of Society v. Horton and Dean v. Applegarth is that they limit the rate of compound interest to the rate the principal bears; that only the excess can be treated as void and be rejected. In Dean v. Applegarth the court directed a modification of the judgment so that the compound interest should conform to the rate provided to be paid on the principal. Appellant assails this conclusion. He says: "The point was not dwelt upon, nor was the court's attention called to the fact that, if the provision in the note could not be upheld according to its terms, there was no provision for recovering interest at the same rate as that borne by the principal debt." In order that the point now under discussion may be clearly understood, I will restate the provisions of one of the notes,—and they are all alike in this particular: "* * * with interest thereon in like gold coin from date until paid, at the rate of ten per cent. per annum, payable semiannually at the end of each and every six months from date. If any installment of interest be not paid when due, the amount of said installment shall bear interest at twenty per cent. per annum from the time the same was due until paid." In the case of Doe v. Vallejo, 29 Cal., at page 392, Mr. Justice Sawyer, speaking for the court, said: "The only remaining question is as to the interest. The note was for fifteen thousand dollars, and interest at one and a half per cent. per month; 'said interest to be due and payable at the end of every six months.' The interest was not paid as it fell due, and the plaintiff claims that he is entitled to interest on each installment of interest from the time it fell due, by the terms of the contract, till paid, at the rate of ten per cent. per annum." The statute then in force is found in Wood's Digest, p. 551 (Act March 13, 1850, to regulate interest on money). Section 1 of that act is substantially the same as section 1917 of the Civil Code. Section 2 of that act is similar to section 1918 of the Civil Code, only the Code limits the agreed interest to entry of judgment, while the old act gave the same interest on the judgment that was given in the contract. Section 3 of the act of 1850 is verbatim the same as section 1919, Civ. Code. In Doe v. Vallejo, supra, the trial court did not allow interest at the statutory rate of 10 per cent. upon the accrued interest installments. Mr. Justice Sawyer said: "If section 1 contained the only provision upon the subject, there would be great force in the position taken by the appellant, and—although there is some conflict on the point—the authorities greatly preponderate in his favor. [Citing numerous cases.] But the third section of the statute, authorizing parties to contract in writing for interest upon interest in default of punctual payment, also bears upon the question. And this section has already been construed by our predecessors to exclude interest after it falls due, unless expressly so agreed in writing. Montgomery v. Tutt, 11 Cal. 316. The question in that case was precisely similar in principle to the one now under consideration." And the judgment was affirmed in Doe v. Vallejo. A comparison of the notes here and the notes in Doe v. Vallejo will show no substantial difference, as to payment of interest, in the first part of the notes; and, as the law then and now is substantially the same, I see no escape from holding that there is no agreement to pay interest on the interest, without overruling Doe v. Vallejo, unless the subsequent clause in the notes can be held to import an agreement to pay interest on interest. The notes do provide for payment of interest upon interest, but it is at a rate, as we have held, unauthorized

by law. The question remains can this court find that any contract exists, by implication or otherwise, to pay interest upon interest at any rate? It seems to me the imperative logic of the contract is that, the agreement to pay compound interest being illegal, there is no agreement at all to pay interest upon interest, and this court cannot make one for the parties. It must not be forgotten that there is a wide difference between interest upon money loaned and interest upon interest accrued. In the former case the law says that when money is loaned it is presumed to be loaned upon interest. Civ. Code, § 1914. And, as we have seen, the rate of interest may be fixed by the parties without limit. Id. § 1918. But interest upon interest must be contracted for in writing, and in no case must bear a greater rate than that placed upon the principal debt. Id. § 1919. Except in certain cases, where courts of equity may order interest to be computed with rests, no interest is computed on the accrued interest; it being a rule of law that interest shall not be compounded, unless by stipulation of the contract. In re Den's Estate, 35 Cal. 692. And see cases cited supra: Society v. Horton; Dean v. Applegarth; Montgomery v. Tutt; Doe v. Montgomery. Recurring to Finger v. McCaughey, supra, Mr. Commissioner Britt, in the opinion, said: "But in such a contract the right to compound interest must find support in the terms employed by the parties; and the stipulation in this note [the note there in suit] that, if the interest is not paid at the end of one year from date, it should become part of the principal, and bear interest, looks to the compounding of the interest accruing June 6, 1890, but not afterwards." The note was dated June 6, 1889, and only one year of compound interest was allowed under the terms of the note. This view makes any further discussion of appellants' third point unnecessary. My conclusion is that the decisions of this court in society v. Horton and Dean v. Applegarth are neither "overruled" nor "rejected as barren" by any subsequent decisions, and that the decree in this case allows excessive interest, and that interest should be computed at the annual rate of 10 and 11 per cent. upon the respective notes, and that no interest can be compounded. The respondent, by the terms of the notes, had the option, upon default of payment of interest as provided, to declare the whole sum—principal and interest—to be due. The first note and mortgage was dated April 16, 1892, and six months thereafter he could have exercised his option. The other notes, and the several mortgages given for their security, came along later, and he had a like option as to each. He chose to wait until April 20, 1895, without manifesting any intention to avail himself of the option, and then only by suit; during all which time the notes were running, and no payments either of principal or interest were made. Having failed to bring the defaulting makers of the notes to face their obligations may be unfortunate for the holder, but the consequences are the clear result of the contracts made, and he cannot reasonably complain. If he had adopted the almost universal formula of providing that the interest, when due, should become a part of the principal, and thereafter bear like interest as the principal, he would have brought himself exactly within the law, and this case would never have come here. I am, perhaps, not justified in having taken so much space to reach a conclusion; but the fact that the decision of this court of long standing was seriously assailed, and was claimed to have been recently overruled, seemed to demand that the question be placed beyond dispute. As the only objection made to the decree is that excessive interest was allowed, I see no necessity for doing more than to direct a modification of the judgment; and we recommend that the cause be remanded, with directions to modify the decree in accordance with the views laid down in this opinion, as of the date the judgment appealed from was entered, and, when thus modified and entered, that the decree stand affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion it is ordered that the cause be remanded, with directions to modify the decree in accordance with the views laid down in this opinion, as of the date the judgment appealed from was entered; and, when thus modified and entered, the decree will stand affirmed.

116 Cal. 405

## BENNALACK v. RICHARDS et al. (Sac. 162.)

(Supreme Court of California. April 6, 1897.)

SALE OF REAL ESTATE BY EXECUTORS UNDER POWER—NECESSITY OF CONFIRMATION—TRUSTS IN REAL ESTATE.

1. A sale of real estate of a testator by the executors under a power contained in the will passes no title unless confirmed by the court (Code Civ. Proc. § 1561), except where the will devises the property in trust, and vests the legal title in the executors as trustees.

2. Authority given executors by a will to sell the testator's real estate at public or private sale without an order of court, and to execute all necessary conveyances, does not create a trust, under Civ. Code, § 857, subd. 1, providing that express trusts may be created "to sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust," where the will does not direct the disposition of the proceeds.

3. No valid trust can be created to sell real property for the benefit of legatees, under Civ. Code, § 847, providing that "trusts in relation to real property are those only which are specified in this title," and section 857, subd. 2, which, as it originally stood, authorized the creation of a trust "to sell, mortgage, or lease real property for the benefit of annuitants or other legatees," but which, in 1874, was amended to its present form, and the word "sell" was omitted.

Department 1. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action to quiet title by Bennalack against Richards and others. Judgment for plaintiff, from which, and from an order denying a new trial, defendants appeal. Reversed.

Chas. W. Kitts, for appellants. A. Burrows and P. F. Simonds, for respondent.

HARRISON, J. Philip Richards died in 1887, leaving a last will and testament, by which he made certain specific legacies, and left the residue of his estate to his brothers, William S. Richards and Francis Richards. He appointed William G. Richards, Francis Richards, and John Bennalack as executors of his will, and gave them power, after the expiration of two years from his death, to sell any portion of his estate at public or private sale, "without any order of court, or being required to account to any court." Under this power the executors sold certain land at public auction May 11, 1891, and on the same day executed to the purchaser a conveyance, in which, as executors, they purported to convey to him, by virtue of the power given them in the will, "all the right, title, and estate of the said Philip Richards, deceased, at the time of his death, and also all the right, title, and interest that the said estate, by operation of law or otherwise, may have acquired, other than or in addition to that of said deceased at the time of his death," in and to the said land. The land was sold for its full value, and for more than an appraisement thereof made within a month prior thereto. The plaintiff has succeeded to the rights of the purchaser, and brought the present action against the executors of the will and the residuary legatees to quiet her title thereto. Judgment was rendered in her favor, and a new trial was denied. From this judgment, and order denying a new trial, this appeal has been taken.

Section 1561, Code Civ. Proc., provides that when a will gives to an executor authority to sell property, he may make such sale without the order of the court, but that he must make return of such sale, as in other cases; and that, if special directions are given in the will, he must observe those directions in the sale; and that "in either case no title passes unless the sale be confirmed by the court." The power of the legislature to restrict the testamentary disposition of property, or to place limitations upon the authority that may be conferred upon an executor or upon the exercise by him of the authority given by the will, is too well settled to require discussion. Decisions upon the effect of a conveyance by an executor without a confirmation by the court, rendered in other jurisdictions in which there is no statute similar to the foregoing provision of section 1561, are without authority in this state; nor are decisions given under rules prevailing in states where the executor is held to be a trustee under a continuing trust for the benefit of all the parties interested in the estate, until its final disposition in accordance with the terms of the will, applicable under the system prevailing in this state. Prior to 1861 a testator could confer upon his executor power to dispose of his estate, independent of any control by the probate court. Larco v. Casaneuava, 30 Cal. 560. But in that year the legislature passed an act requiring the confirmation of all sales made by executors under authority given by the will; and in 1872 the foregoing provision of the Code was adopted. The language used therein is too explicit to admit of construction, and we must hold that no title passed by the sale and conveyance of the executor to the plaintiff's grantor.

In Estate of Delaney, 49 Cal. 76, and Estate of Williams, 92 Cal. 183, 28 Pac. 227, 679, the testator devised his property to his executors in trust for the purpose of carrying out the provisions of his will, and it was held that their conveyance, without confirmation by the court, passed the title as fully as would the conveyance of any devisee in trust. The distinction between those cases and those in which the executors are given only a power of sale was pointed out in Estate of Durham, 49 Cal. 490, where it was said: "In the one case the freehold remains in the heirs until a sale. In the other it vests in the executors on the demise of the decedent. To the former class of cases the provision of section 1561, Code Civ. Proc., that no sale shall be valid unless confirmed by the probate court, is applicable. The account of sale spoken of in this section is the same as the 'return' mentioned in section 1552 of the Code, and the statute evidently contemplates that the same proceedings shall be had with respect to the return when a sale is made under a power in a will as when it is made under an order of court. The sale must be reported under oath, and confirmed by the probate court, before the title to the property sold can pass." In the present case the testator did not devise the land to his executors in trust for the purposes of the will, nor do the provisions of the will, including the power of sale conferred upon the executors, have the effect to create a valid trust in relation to the land, or any other trust than such as pertains to the office of executor. Section 847, Civ. Code, declares that "trusts in relation to real property are those only which are specified in this title," and section 857, Id., declares that: "Express trusts may be created for any of the following purposes: (1) To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust. (2) To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any other charge thereon." The will of Philip Richards does not direct the executors to make any application or disposition of the proceeds of the sale, but merely provides that "upon a sale of the property of my estate I desire that all legacies then unpaid be paid at once in full." This provision only fixes the time for the payment of the legacies then unpaid, but does not direct or empower the executor to apply or dispose of the proceeds of the sale in their payment, nor could they be required to pay these legacies without an order of the court therefor. Code Civ. Proc. § 1646. Whether there would be any legacies then unpaid, or the amount that might then remain unpaid, could not be known prior to the sale; and, if all the legacies had then been paid, the proceeds of the sale in the hands of the executors, or any surplus after paying such as were unpaid, would be subject to distribution by the court. No trust existed by virtue of the second subdivision of the section, since, under that subdivision, a trust can be created only "to mortgage or lease" real property. Upon the original adoption of the Codes this subdivision of the section authorized the creation of a valid trust "to sell, mortgage, or lease real property" for the purposes therein named; but in 1874 this section was amended according to its present form. As originally enacted, it was taken from the Revised Statutes of New York, and under its original provisions the cases cited [1] from that state would be applicable; but by the amendment in 1874 the legislature has declared that an express trust cannot be created to sell real property for the benefit of legatees. The provision in the will authorizing the executors to execute all conveyances necessary to dispose of said estate is merely incidental to the power conferred upon them, and cannot be regarded as creating in them any different estate in the land. The judgment and order are reversed.

We concur: BEATTY, C. J.; VAN FLEET, J.

5 Cal. Unrep. 663

## PEOPLE v. BELARDES. (Cr. 276.)

(Supreme Court of California. April 16, 1897.)

CRIMINAL LAW—REVIEW—CREDIBILITY OF TESTIMONY.

The determination of a jury as to the credibility of testimony is not subject to review.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Belardes was convicted of crime, and appeals. Affirmed.

A. A. Montana, for appellant. W. F. Fitzgerald, Atty. Gen., and H. E. Carter, Dep. Atty. Gen., for the People.

PER CURIAM. The only question presented by the defendant in support of his appeal herein from the judgment of conviction is that the evidence was insufficient to justify the verdict of guilty. Without analyzing the evidence in its details, it is sufficient to say that the bill of exceptions shows that there was sufficient evidence presented to the jury to justify it in finding that the defendant had committed the crime with which he was charged. Whatever inferences might be drawn by the jury from the testimony of the witnesses or from any discrepancy therein, or from any apparent conflict or inconsistency in their statement, was exclusively for the determination of that body. Their conclusion in these particulars is not subject to review in this court. The judgment and order are affirmed.

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[1] Morse v. Morse, 85 N. Y. 60; Kinnier v. Rogers, 42 N. Y. 531; Tobias v. Ketchum, 32 N. Y. 327.

116 Cal. 575

## WILLS v. PAULY. (L. A. 157.)

(Supreme Court of California. April 27, 1897.)

EXECUTORS AND ADMINISTRATORS—SALES OF REAL PROPERTY—VALIDITY—JUDGMENT—RES JUDICATA.

1. An administrator's sale of land of a decedent, by order of the probate court, is void where there is no attempt to follow the proceedings prescribed by Code Civ. Proc. tit. 11, c. 7, art. 4, § 1536 et seq., which provide fully and minutely for the sale of real property of a deceased person when such sale is for any purpose necessary.

2. Code Civ. Proc. § 1469, provides that when the estate of a decedent who left a widow and children does not exceed $1,500, the court shall set apart the whole estate to the widow and children, subject only to certain expenses. *Held*, that such statute does not validate an administrator's sale of land by order of the court to pay such expenses, without following the proceedings prescribed by title 11, c. 7, art. 4, § 1536 et seq., though the whole estate of which the land is a part has been set aside to the widow and children, as provided by section 1469.

3. A judgment of the United States court dismissing a bill because brought by a married woman in her own name, and for want of jurisdiction, is not a bar to an action in the state court between the same parties for the same cause of action.

In bank. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Mary E. Wills against A. Pauly. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Cole & Cole and C. C. Cowgill, for appellant. Millay & Bennett and Alvin Fay, for respondent.

McFARLAND, J. This action is brought by the plaintiff for the purpose of having it declared that defendant holds the undivided one-half of a certain tract of land described in the complaint as the trustee of the plaintiff, and to obtain a conveyance thereof by defendant to plaintiff, and an accounting for rents and profits. The court below rendered judgment for plaintiff, from which, and from an order denying a new trial, the defendant appeals. Respondent contends that upon this appeal nothing can be considered other than the judgment roll, for the reason that the appeal from the judgment was not taken within 60 days, and that the notice of motion for a new trial was given prematurely; but, as it is doubtful whether or not the respondent did not waive the irregularity of the notice of motion for a new trial by filing amendments to the statement without objection, we will not consider that question, as it does not appear to be very important in the case.

G. O. Glenn, father of the plaintiff, died on November 11, 1878, seised and possessed of the land in question, leaving, surviving him, his widow, Harriet F. Glenn, and his daughter, Mary E. Glenn (now Mary E. Wills), plaintiff herein, who was his only child. One John D. Glenn was appointed administrator of his estate, but he was afterwards removed, and the widow, Harriet F. Glenn, was appointed as administratrix. On the 17th day of November, 1879, said Harriet, as such administratrix, presented to the judge of the probate court her petition praying for a decree authorizing her to sell the land here in question, "without regard to the regular proceedings for the sale of real estate of deceased persons, for the payment of the debts of the estate, and dispensing with all the requirements of title 11 of the Code of Civil Procedure of the State of California then in force; and that said sale might be made without notice to any one of the filing of said petition or of said sale; and that the said sale so prayed for might be made at private or public sale, as the said administratrix might see fit." This petition was signed by the attorney of the administratrix, and was not verified; and on the same day said court made an order for the sale of said land by the administratrix, "without regard to the regular proceedings provided for in title 11, Code Civ. Proc., respecting the sales of property, which proceedings are hereby dispensed with for the purposes aforesaid, and that there need be no publication of this petition upon which this decree is based, nor any order to show cause why said land should not be sold, and that there need be no bids in writing received from intending purchasers thereof, but the same may be sold in any manner which seems to administratrix most beneficial for the interests of the heirs of said estate forthwith." Afterwards, on July 26, 1880, the said administratrix made a deed of the lands here in contest to the appellant, Pauly, in words and figures as follows: "Know all men by these presents that I, Harriet F. Glenn, wife of G. O. Glenn, late deceased, of Kern county, by virtue of an order issued November 19, 1879, to me as administratrix, and for and in consideration of the sum of seven hundred and fifty dollars, do hereby grant to A. Pauly all my right, title, and interest in and to the real property hereinafter described, and pray that a patent be granted to said A. Pauly to all that real property situated in Kern county, state of California, bounded and described as follows: The west half of section 16, in township 32 south, of range 33 east, M. D. B. & M., together with all and singular the tenements thereon. Witness my hand, this 26th day of July, 1880. [Signed] H. F. Glenn. [Seal.]"

It is quite clear from the record that, in the ordering and making of this sale, the provisions of title 11 of the Code of Civil Procedure were not substantially followed, and that in fact there was no attempt to follow said proceedings. The petition for the sale set forth that the whole of the estate of said Glenn, deceased, was not of any greater value than $1,500; and the court proceeded upon the theory that in such a case there could be a valid order of sale without any compliance whatever with the provisions of the Code with respect to the sale of real estate of a deceased party. The whole proceeding seems to have been based upon section 1469 of the Code of Civil Procedure as it existed at that time. Said section, so far as it is necessary to be considered here, read as follows: "If upon the return of the inventory of the estate of an intestate it appear that the value of the whole estate does not exceed the sum of fifteen hundred dollars, the probate court must appoint a day for the hearing, and cause notice to be given and proceedings had in the same manner as provided in sections 1633, 1635, and 1638 of article 2, chapter 10 of title 11, of the Code of Civil Procedure, relating to the settlement of accounts. If upon the hearing the court find that the value of the estate does not exceed the sum of fifteen hundred dollars, the probate court by decree for that purpose must assign for the use and support of the widow and minor children, if there should be a widow and minor child, and, if no widow, then for the children if there be any, the whole estate after the payment of the expense of his last illness, funeral charges, and the expenses of administration. And there must be no further proceedings in the administration unless further estate be discovered." At the time of the order for the sale, as above stated, there had been no decree of the probate court under said section 1469. Afterwards, however, upon the 18th day of September, 1880, the said administratrix did present a petition for a decree setting apart the property to the widow and minor child, as provided for in said section 1469; and on the 27th day of September, 1880, such a decree was made. But, if the latter decree had been made before the said order of sale, the results would have been the same. Section 1469 does not provide for any sale of the property of the deceased. It merely provides that the whole estate shall be set apart to the widow and children, subject only to the expenses of last sickness, administration, etc. If there is to be any sale of the real property of the estate to pay such expenses, such sale must be conducted under the provisions of title 11 of the Code, where alone the power to make and the method of such sale are to be found. Article 4 of chapter 7 of title 11 of the Code, commencing with section 1536, provides fully and minutely for the sale of the property of a deceased person when such sale is for any purpose necessary; and it has been frequently held that no sale is valid where there has not been at least a substantial compliance with that article of the Code. The court gets jurisdiction to order such sale only by compliance with those provisions of the Code, the very first of which is a verified petition. Beckett v. Selover, 7 Cal. 215; Pryor v. Downey, 50 Cal. 398; In re Boland's Estate, 55 Cal. 310; Richardson v. Butler, 82 Cal. 174, 23 Pac. 9. There are also various provisions in the Code respecting the necessary averments to be made in the petition, service of notice of application upon heirs, return of the report of the sale, confirmation of the sale by the court, etc., which need not be here inquired into, because, as before said, there is no pretense that there was any substantial compliance with the provisions of the Code upon the subject; the theory, as it appears upon the petition and the order itself, being that none of such provisions need be followed. It is clear, therefore, that the sale in the present instance was void; and therefore we need not inquire into the point, made by respondent, that the deed from the administratrix to the appellant, upon its face, conveyed only her undivided interest in the premises.

We see nothing in the point made by appellant that this action is barred by the statute of limitations. At the time of the sale, respondent was a minor; and the testimony was amply sufficient to warrant the court in finding that she had not discovered the facts upon which this action is based until within the statutory period before the commencement of this action.

The appellant contends that a judgment of the United States circuit court dismissing a bill brought by this respondent against the appellant for the same cause of action set up in the complaint in the present case is a bar to this action; but we do not think so. It does not appear that the merits of the case were determined in that action. It was held there that the plaintiff, being a married woman, could not sue in the federal court in her own name; and it also appeared that the only thing relied on by the plaintiff in that case to confer jurisdiction upon the federal court was that she was a citizen of the territory of Arizona, the defendant therein being a citizen of California; but it has been uniformly held by the federal courts that citizenship of a territory did not give jurisdiction to those courts, where the defendant was a citizen of a state. The case was decided upon a demurrer to the complaint.

It appears that the deceased had acquired title to the lands in controversy from the state of California, had fully paid for the lands, and received a certificate of purchase; and that, after the appellant here had bought the property from the administratrix he procured a patent from the state; and it is contended by appellant that the respondent should have offered to pay the appellant one-half of the purchase money. This, however, is not a case where the respondent had sold the property during minority, and retained the proceeds; and the case is not within the rule contended for by appellant. Townsend v. Tallant, 33 Cal. 45; Schouler, Dom. Rel. § 446, and cases there cited in note 1. No judgment was rendered for rents or profits. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

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116 Cal. 562

## PEOPLE v. HILL. (Cr. 214.)

(Supreme Court of California. April 23, 1897.)

Homicide—Insanity—Order of Proof—Hypothetical Questions—Evidence—Expert Testimony—Instructions—Failure to Submit Form of Verdict.

1. The opinion of an expert, produced by the people in rebuttal, that, from the facts adduced by defendant to prove insanity, he was not insane, is not new matter entitling defendant to introduce the contrary opinion of other experts.

2. A hypothetical question need not embrace all the evidence on the subject involved, but may be based on any facts within the range of the evidence.

3. Evidence of unchaste conduct of defendant's wife, with whose murder he is charged, not communicated to him before the homicide, is inadmissible.

4. The relative positions of defendant and deceased at the time of the shooting, as indicated by the location of the wound, is not a subject for expert testimony.

5. Error in admitting expert testimony for the people on such subject is harmless, where defendant admits the killing, and there is no issue on which the testimony could operate against him.

6. The competency of a nonexpert witness under the statute, as an "intimate acquaintance," to express an opinion of defendant's sanity, is in the discretion of the trial judge.

7. It is not error to refuse to instruct that the jury may disagree if by an agreement any juror would be required to surrender his honest convictions, where the jury were fully instructed as to the questions involved, and their duty in weighing the evidence; the right to disagree being a matter of common knowledge.

8. It is not prejudicial error to give the jury forms of verdict for acquittal, manslaughter, and murder in the first degree, but not for murder in the second degree; that degree being properly submitted to the jury in the charge.

In bank. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Benjamin L. Hill was convicted of murder in the first degree, and appeals. Affirmed.

Carroll Cook and Tom M. Brady, for appellant. W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, Dep. Atty. Gen., for the People.

VAN FLEET, J. Defendant was convicted of murder of the first degree, in the killing of his wife, Agnes Hill, and adjudged to suffer death. He appeals from the judgment and an order denying him a new trial, the exceptions urged all being based upon rulings at the trial.

1. To support the defense of insanity relied on by defendant, he introduced evidence tending to show certain peculiarities of temperament, disposition, and conduct in his father and in himself, from which an inference might have been drawn of a want of perfect mental balance in defendant at times. The prosecution did not attempt to controvert the facts thus shown, but, to rebut the inference of insanity therefrom, called Dr. Robertson as an expert on mental diseases, who, in response to a hypothetical statement of the facts, gave as his opinion that defendant was sane at the time of the commission of the act. Thereupon defendant desired to introduce the opinion of a physician on his behalf in rebuttal of the opinion expressed by Dr. Robertson. The court refused to permit such evidence as rebuttal, on the ground that it was properly a part of defendant's case in chief, but offered to permit defendant to reopen his case for the purpose of putting in such evidence if he so desired. This offer was declined, and the refusal to admit the evidence as rebuttal is now assigned as error. The defendant was entitled to rebut any new matter offered on the subject by the people, but the evidence of the expert involved nothing new. It was purely evidence in contradiction of defendant's evidence, and nothing more. Its purpose and effect were, instead of denying the facts shown by defendant, to rebut by a perfectly proper method the inference sought to be drawn therefrom. It was only the method of meeting defendant's evidence, and not the matter, which was new or different. No new fact was shown, and there was nothing, therefore, which was the proper subject of rebuttal. If defendant desired the evidence of experts to support the facts as to his state of mind, such evidence was a part of his original case.

2. Defendant objected to the hypothetical question put to Dr. Robertson, on the ground that it did not embrace a statement of all the evidence, and that it misstated that which it did embrace. It is not necessary, in fram-

ing a hypothetical question, to include a statement of all the evidence in the case upon the subject of inquiry. While the question should have for its basis some probable, or at least possible, theory to be deduced from the evidence in the case, counsel have a right to frame the question to accord with their theory of what the material facts are as shown by that evidence, and in so doing may omit facts which, from their point of view, have no material bearing upon the subject. As stated by Mr. Thompson: "The hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon an hypothesis specially framed of certain facts assumed to be proved for the purpose of the inquiry. Such questions leave it for the jury to decide in the first case whether the evidence is true or not, and in the second case whether the peculiar facts assumed are or are not proved." Thomp. Trials, § 604. "It is no objection to a hypothetical question," says that author, "that the state of facts which it assumes is erroneous, if within the possible or probable range of the evidence, since the judge cannot decide, as a preliminary question on an objection to evidence, whether it is erroneous or not, the question being for the jury. * * * It is the privilege of counsel in such cases to assume, within the limits of the evidence, any statement of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the question, and for no other purposes." Id. §§ 606–610. The rule thus stated is amply sustained by the great weight of authority found in the adjudged cases. See People v. Durrant (Cal.) 48 Pac. 75. The question objected to did not depart from this rule. It contained a fair statement of the case, as embraced within the prosecution's theory of what the evidence established, and made no material misstatement of the facts. If the theory on which the question proceeded did not accord with that of the defendant as to the effect of the evidence, it was the privilege of the latter, on cross-examination, to put to the witness questions formulated upon his theory of the case, and take the opinion of the witness thereon; leaving to the jury the question as to which theory, if either, was warranted by the evidence.

3. There was no error in excluding the evidence of Dr. Webster, offered by defendant, tending to show that deceased had been guilty of unchaste conduct with other men during defendant's absence from home. There was no offer or attempt to show that knowledge of such facts was communicated by the witness to defendant before the homicide. The evidence was wholly immaterial for any purpose, and irrelevant to the issues before the jury. The same is true of the evidence of the same general character sought to be elicited from the witness Susie Bolden and others. The trial court very correctly ruled that it would not deny the privilege of showing any statement of the kind made to the defendant, but that it was "not a question in this action as to the morality or immorality, good or bad character, of Mrs. Hill. It is simply a question of what was said to the defendant with reference to that, and the effect those statements and that information might have had upon his mind." Nor was there error in excluding the evidence of the witness Lamont as to a conversation with the defendant in regard to certain anonymous letters received by the latter relating to the conduct of his wife. The evidence was wholly without materiality, even if competent.

4. The question asked Dr. Hamlin as to the probable position of the person of deceased towards defendant at the time the fatal shot was fired, judged from the location of the wound, was clearly improper, and the objection thereto should have been sustained. The subject of inquiry involved no question of skill or science, and was not, as has been repeatedly decided by this court, a proper subject-matter of expert testimony. People v. Westlake, 62 Cal. 303, 309; People v. Smith, 93 Cal. 447, 29 Pac. 64; People v. Lemperle, 94 Cal. 46, 29 Pac. 709. But, while the evidence was erroneously admitted, it was manifestly harmless to defendant's case, since no question was made but that defendant killed the deceased by shooting her with a pistol, and there was no issue upon which the admitted evidence could have exerted any prejudicial influence with the jury. See People v. Lemperle, supra. The error therefore affords no ground for reversal.

5. We cannot say that the court erred in holding that the witness Peterson did not show himself an "intimate acquaintance" within the rule of the statute which requires a witness, not an expert, to sustain that relationship towards a party to qualify him to give his opinion on the subject of the latter's sanity. The question is largely one of discretion in the trial judge, and his ruling will not be disturbed except for manifest abuse, which the record does not disclose. Estate of Carpenter, 94 Cal. 413, 29 Pac. 1101; People v. McCarthy (Cal.) 46 Pac. 1073. There are two or three further assignments as to rulings on evidence, but they require no special notice. We have examined them, and are satisfied they involve no material error.

6. The defendant asked for an instruction to the effect that if, after a careful, honest, and impartial consideration of the law and the evidence, the jurors should honestly and conscientiously differ as to the weight and effect to be given the evidence, and the verdict to be rendered, or whether any verdict should be rendered, then they might disagree, if by an agreement any juror would be required to surrender his honest convictions as to any fact in the case. The instruction was refused, and it is complained that this was error. The jury were fully and

fairly instructed upon the affirmative propositions of law involved in the case, and their duty thereunder in weighing the evidence before reaching a verdict, from which the right and duty of any juror to dissent from a conclusion reached by his fellows with which he was not satisfied was necessarily implied; and, as the jury is presumed to be composed of men of ordinary intelligence and sufficient understanding to appreciate the full meaning and import of the charge of the court, the necessity for such an instruction as that requested, if proper to be given in any case, does not appear. Indeed, the right of a juror to refuse to concur in a verdict unsatisfactory to him is a matter of such common—it might even be said universal—knowledge with men possessing the ordinary qualifications of jurors, that it would be hard to imagine a case calling for the suggestion of such right. The other instructions requested and refused, so far as proper and pertinent to the case, are all fully and fairly covered in the charge of the court.

7. The jury were properly instructed as to the crime of murder, both of the first and second degrees, and also manslaughter, and that those three grades of the offense were included within the information, but in concluding its charge the court made this suggestion: "In accordance with the instructions which have already been given to you, gentlemen, there will be handed to you blank verdicts, one finding the defendant not guilty, one finding the defendant guilty of manslaughter, one finding the defendant guilty of murder in the first degree, and one finding the defendant guilty of murder in the first degree and fixing the punishment at imprisonment for life." It is complained that the court committed an error to defendant's prejudice in omitting to submit a form of verdict for murder of the second degree, and that by reason of such omission the jury were not given the opportunity to find a verdict of murder in that degree. Whether the omission was inadvertent or intentional does not appear, although from the fact that that degree of the offense was covered by the charge, and that a form of verdict for manslaughter was furnished to the jury, it is highly probable that the omission was unintentional. However that may be, we do not ascribe any such effect to the omission as that suggested by defendant. The law makes it no part of the duty of the judge to furnish forms of verdict to the jury, but the latter are presumed to be able to formulate their own conclusions, and in practice most usually do so. Where, therefore, the jury has been properly instructed as to the different degrees of the offense, it must be presumed that, if their conclusion called for a form of verdict with which they were not furnished, they would either ask for it, or write one for themselves. It certainly could have no necessary tendency to preclude them from finding such verdict. We discover no reversible error in the record, and the judgment and order must be affirmed. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

116 Cal. 571

## THIELE v. NEWMAN. (Sac. 143.)

(Supreme Court of California. April 27, 1897.)

FIRES—NEGLIGENCE—SUFFICIENCY OF EVIDENCE—STATEMENTS OUT OF COURT.

1. In a suit for treble damages for injury to property by fire, a recovery was not warranted where it appeared that one R., who owned land between plaintiff's and defendant's respective tracts, and who was employed by defendant to look after his cattle, set fire to a part of defendant's land by the latter's direction, and at the same time, for his own benefit, started on his own land another fire, which spread to plaintiff's premises, and caused the damage.

2. Declarations of a witness out of court, contradicting his testimony, are admissible only for the purpose of impeachment, and not to prove the truth of the facts stated in said declarations.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Frank K. Thiele against Simon Newman. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

P. J. Hazen, for appellant. P. H. Griffin and G. A. Whitby, for respondent.

McFARLAND, J. This action was brought by plaintiff against defendant to recover treble damages for injury done to plaintiff's land by a fire, alleged to have been kindled by defendant on his land adjoining the land of plaintiff, and to have been so negligently watched and tended that the fire came upon plaintiff's land, and burned and destroyed pasture, fences, etc. The jury found a verdict for three times the amount of the actual damage, for which judgment was rendered; and defendant appeals from the judgment, and from an order denying his motion for a new trial.

Passing other points made by appellant, we are satisfied that the record presents no evidence to support the verdict. The defendant resided in San Francisco, and owned land in the hilly part of Stanislaus county, which he used for pasturing stock. Plaintiff's land, upon which the damage is alleged to have occurred, was also in the same neighborhood, but did not join the land of plaintiff. Between the land of plaintiff and that of defendant there was land owned by a man named Richards. One Henry Mills was the general foreman and superintendent of the defendant, and attended to his stock business in Stanislaus county. Mills employed the said Richards to herd and look after the cattle on a part of defendant's land. As to the nature of Richards' employment, Mills testified as follows: "The scope of his employment was to ride the range, and look after the fences. His duties in riding the range were to see that nobody disturbed the cattle, if they were doing well, and put out salt for them, and see that the fences did not get down, and that they did not get out; simply caring for the cattle generally. He had no general oversight or control of the business other than simply to look after the cattle and fences." The only witnesses who testified as to any disputed issues were the said Richards and the said Mills. Richards was called as a witness by plaintiff. Richards testified in chief that he had charge of the stock; that "he [Mills] hired me to herd the stock on the place he had charge of. My occupation was riding after the stock." He further testified that on a certain day in July, 1894, he set fire on two or three places on his (Richards') land, the nearest place to plaintiff's land being three or four hundred yards from plaintiff's line, and that he also started another fire, on section 25, which was land belonging to the defendant. On cross-examination he testified that Mills told him to set a fire on section 25, near a certain sulphur spring, but did not tell him to set any fire on his (Richards') own land, and that he took a notion to set other fires, on his own account, on his own land; that he set the fires on his own land because he thought it would make better grass the next year; and that he did it for his own benefit, and not for that of Newman. He was then asked by plaintiff if at a certain time he had not stated in the presence of certain persons that he had set the fire on his own land for the benefit of Newman. This question was objected to by defendant, but was allowed, and two or three witnesses swore that, at the time named, they had heard Richards state that he had set the fire on his own land for the benefit of Newman. It is doubtful whether this testimony was a surprise to plaintiff, and therefore doubtful whether he had a right to impeach Richards by showing contrary declarations. See People v. Crespi (Cal.) 46 Pac. 863, and cases there cited. But, assuming that it was properly admitted, it was not admissible for the purpose of proving the truth of Richards' declaration, and the court so instructed the jury, saying upon that point as follows: "Some testimony has been produced before you of declarations made by Frank Richards out of court. You are instructed that you should not consider such declarations as tending to establish the truth of such declarations. Such declarations can only be considered by you in so far as they contradict or tend to contradict the testimony of said Richards, and not as proof of the statements made in such declarations made out of court." This was all the evidence introduced by plaintiff upon this subject. Upon the part of the defendant, said Mills testified as a witness; and, in addition to that part of his testimony above quoted, he said that, under Richards' employment, he had no right to set fire to any part of the land unless he was authorized so to do by him (Mills), and that he (Mills) never gave him directions to set fire on any of his (Richards') land; that the only instruction that he gave Richards about setting fire was to go upon section 25, in the forks of the gulch, and burn the brush out; that he wanted that done partly to get some cattle, which could not be found, out of the cañon, and also for the purpose of making the feed better the next year; that the defendant had bought the feed growing on Richards' land for that year, but had nothing to do with it for the next year. He also testified (and this testimony was entirely uncontradicted) that he was at the scene of the fire about two weeks after it occurred; that it was very plain to see where the fire had traveled, and that the fire on section 25 was never communicated to the land of plaintiff; that there was quite a wide unburned section lying between the land that was burned over on section 25 and the land that was burned on Richards' land; and that the fire set on defendant's land, on section 25, was clearly not the cause of the fire which extended from Richards' land to the land of the plaintiff. Under this state of the evidence, we see no ground upon which the verdict can be sustained. It clearly appears that the fire started on defendant's land, on section 25, did no damage whatever to plaintiff's land, and that Richards had no authority whatever from the defendant or his agent (Mills) to set the fire on his (Richards') land, which was the cause of the damage. It clearly appears that the scope of Richards' employment did not give him the power, as agent of the defendant, to set fire upon any land, and that his special authority to set fire upon section 25 did not in any way include authority to set fire upon his (Richards') own land. The alleged declarations of Richards to certain witnesses, which Richards strenuously denied, were of course no evidence whatever as against the defendant of the facts stated in said declarations. The judgment and order denying a new trial are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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116 Cal. 613

## SCRIBNER v. HANKE. (Sac. 155.)

(Supreme Court of California. April 28, 1897.)

BILLS AND NOTES—CONSIDERATION—INDORSEMENT—ACTIONS—FINDINGS.

1. The surrender of a note by the holder thereof to the maker is sufficient consideration for the making of a note for the same debt by third persons.

2. An indorsement of a note by the payee is prima facie evidence that it was duly assigned for sufficient consideration.

3. An indorsement of a note by the payee entitles the indorsee to sue thereon in his own name as legal owner, irrespective of consideration for the indorsement.

4. There is no conflict between a finding that as part of the consideration for the execution of the note in suit by defendant, and of a bill of sale by one D. to defendant, the payee of such note surrendered a note made by D., and

a finding that the note sued on was made for and as an accommodation to D., who was defendant's personal friend.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by O. Scribner against W. F. Hanke and another. There was judgment for plaintiff; a new trial was denied; and defendant Hanke appeals. Affirmed.

Frank H. Short, for appellant. J. P. Meux and Meux & Johnson, for respondent.

SEARLS, C. This action was brought to recover upon a promissory note made March 16, 1894, by appellant and Edwin Morris, for $457.50, and payable one day after date to Joseph Huber or order, and indorsed to the respondent herein. Morris made default. Appellant, Hanke, answered the complaint. The answer is in some respects sui generis. It admits making the note, denies that there is anything due thereon, etc., and then, for a separate answer, defendant Hanke avers that on or about the 16th of March, 1894, he took and received from W. D. Demming a bill of sale of certain saloon property in the town of Sanger, etc.; that he paid nothing therefor, and never became the owner thereof; that he took said bill of sale at the request of Huber, and at the same time and place with the giving of the note, and that the note was made at the instance and request of Huber; that the note in suit was given apparently to evidence an amount then and prior thereto due and owing from Demming to Huber upon a promissory note; and that it was expressly understood and agreed between all the parties that Hanke would receive the bill of sale, and sign the note with Morris, for the benefit of Huber. The answer further avers that he never received any consideration for signing the note, and avers that it was agreed between defendant Hanke and said Huber that said Hanke "should never be required to pay anything on account of said promissory note," or of said principal, or the interest or costs, etc. Defendant further avers that plaintiff took the note after maturity for collection only, and paid no consideration therefor, and had knowledge of all the facts. The cause was tried by the court without a jury, and, upon the written findings filed, judgment was entered in favor of plaintiff. Defendant Hanke appeals from the judgment, and from an order denying his motion for a new trial.

The first point made by defendant for reversal is that there was no consideration for the note in suit. There was evidence on the part of plaintiff tending to show that one W. D. Demming, at and prior to the date of the note, owned and conducted a saloon at Sanger, and had given his promissory note to Joseph Huber for beer before that time furnished him by Huber. This note was for, say, $457. Demming sold a half interest in his saloon to one E. Morris. Huber complained to Demming that he had sold while owing him, and received, as collateral security for the payment of his note, another note taken by Demming from Morris. Subsequently, Huber, being urgent for his money, was told by Demming that defendant Hanke, who was a friend of Demming, would purchase and run the saloon if Huber would take his note for the amount due him. Thereupon Hanke and Morris made the note to Huber involved in this action. Huber surrendered up his note against Demming and the Morris note held as collateral, and Hanke received a bill of sale of Demming's interest in the saloon. The firm name in the saloon, which had been Demming & Morris, was changed to Morris & Co. The promissory note was indorsed and transferred to plaintiff, and has not been paid. The theory of defendant's testimony may be briefly stated thus: Demming was owing Huber, who was anxious about his pay. At his request, and for his benefit, Demming transferred his interest in the saloon to Hanke, and the latter and Morris gave the note in question. Huber assured them that they would never be called upon to pay the note or any part of it. Hanke never took possession of or exercised any acts of ownership over the saloon. There being a substantial conflict in the evidence, the action of the court below will not be disturbed upon the ground that the findings are unsupported by the evidence.

1. The surrender by Huber of his note against Demming was a sufficient consideration to uphold the new note by Hanke and Morris.

2. The note in suit having been duly indorsed by Huber to plaintiff, Scribner, such indorsement was sufficient, in the absence of all evidence to the contrary, to warrant the court in finding that the note was, for a valuable consideration, duly assigned and transferred to plaintiff.

3. The note, having been regularly indorsed, entitled plaintiff to maintain an action thereon in his own name as the legal holder and owner, irrespective of consideration. It is not expressly so stated in the record, but seems conceded, nevertheless, that the indorsement of the note was after maturity, and hence that defendant could interpose any defense against the holder which he could have done against the original payee. This right was accorded defendant, and he failed by reason of not sustaining his attempted defense.

4. Whether defendant Hanke did or did not take the bill of sale from Demming was of no importance, but the court was justified in finding that he did, for the reason that in his answer he so affirmed. The allegation of the answer is as follows: "For a further and separate answer and defense herein, the defendant W. F. Hanke alleges that heretofore, to wit, on or about the 16th day of March, 1894, at the county of Fresno, state of California, this defendant, W. F. Hanke, took and received from W. D. Demming a bill of sale of certain saloon property, furniture, and fixtures in the town of Sanger, county of Fresno, state of California."

5. The court found that as a part of the consideration of the bill of sale from Demming, and the making of the note in suit, Huber surrendered to Demming a prior note held against

him, etc. The court again finds that the making of the note in suit was for and on behalf of and as an accommodation to said Demming, who was Hanke's personal friend. We see no foundation whatever for the statement of counsel for appellant that these two findings are conflicting. The first shows the consideration yielded up by Huber on the making of the note. The second shows the friendly relations existing between Demming and Hanke as an inducement for his making a note in security for the debt of the former.

The other objections are not more formidable than those mentioned, and do not call for especial mention. We recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

116 Cal. 596

### REA v. HAFFENDEN et al. (L. A. 139.)

(Supreme Court of California. April 27, 1897.)

Trial—Conclusions of Law—Appeal—Harmless Error—Mortgage—Description.

1. In foreclosure, the direction, "Let judgment and decree be entered accordingly," following a finding of facts that the interests and liens claimed by defendants were acquired with notice of plaintiff's mortgage, and were subject thereto, was a conclusion of law, within Code Civ. Proc. § 633, requiring the facts found and the conclusions of law to be separately stated.

2. Where the court found as a fact on foreclosure that plaintiff's mortgage was superior to the liens claimed by defendant, a direction, "Let judgment be entered accordingly," if insufficient as a conclusion of law, would not require a reversal of the decree of foreclosure, the substantial rights of the parties being unaffected by the defect. Code Civ. Proc. § 475.

3. Where the owner of a Mexican grant has adopted the government method of surveying and subdividing his land, and has caused a map to be made, showing such subdivision, a mortgage describing the land in accordance with the survey, though not referring to the map, is notice to subsequent purchasers who knew that such map existed, and bought in view thereof.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by John B. Rea against Albert Haffenden and others to foreclose a mortgage. From a decree for plaintiff, and from an order denying a new trial, defendants the Barona Company and others appeal. Affirmed.

Works & Works, for appellants. McNealy & Whitehead, for respondent.

BELCHER, C. This is an action to foreclose a mortgage upon certain real property, executed by the defendant Albert Haffenden to secure payment of his promissory note for $7,000. The complaint alleges that the other defendants have or claim some interests in or liens upon the mortgaged premises, which interests, claims, and liens are all subsequent and subordinate to the lien of plaintiff's mortgage. Defendant Haffenden suffered his default to be entered. The other defendants, by their answers, admit the execution of the note and mortgage set out in the complaint, and that they respectively have and claim interests in and liens upon the lands described, but deny that their said interests, claims, or liens, or any of them, are subsequent or subordinate to the lien of plaintiff's mortgage, and allege that the said mortgage is inoperative and void as against them, and each of them, for the reason that prior to the commencement of this action they never had any notice thereof, actual or constructive. They also further allege that plaintiff's cause of action is barred by section 337 of the Code of Civil Procedure. Upon the issues thus raised the case was tried, and the court found as follows: "(1) That the defendants other than the defendant Albert Haffenden, and A. R. Schulenburg, as administrator of the estate of Frederick Schulenburg, deceased, claim an interest in the lands described in the plaintiff's complaint, and the said Frederick Schulenburg acquired a lien on said lands, but that any and all interest, lien, or claim which the defendants, or either of them, have, or which Frederick Schulenburg acquired in his lifetime, in, to, or upon the lands described in plaintiff's complaint were acquired subsequent to the mortgage set out in plaintiff's complaint, and with notice thereof, and that the same is subordinate to said mortgage, and subject thereto. (2) That the plaintiff's cause of action is not barred by section 337 of the Code of Civil Procedure of the state of California, or otherwise. Let judgment and decree be entered accordingly." The findings were filed July 2, 1895, and on the same day the decree of foreclosure, signed by the judge, and containing the usual recitals, was also filed. From that decree and an order denying a new trial this appeal is prosecuted. Only two points are made for a reversal.

1. It is claimed that no conclusions of law whatever were found or stated, and that this constituted a fatal defect in the proceedings of the court below, and hence there was no basis to support the judgment. The Code of Civil Procedure contains the following provisions: "Upon the trial of a question of fact by the court its decision must be given in writing and filed with the clerk," etc. Section 632. "In giving the decision the facts found and the conclusions of law must be separately stated." Section 633. In Murphy v. Snyder, 67 Cal. 451, 8 Pac. 2, which was an action for forcible detainer, and involving the same point, the court said: "It is urged that the court below, in giving its decision, stated no conclusion of law. The record shows that after finding the facts the court adds this direction: 'Let judgment be entered in accordance with the foregoing find-

ings in favor of the plaintiff for restitution of said premises, and for his costs and disbursements in this action.' This, in our judgment, is, in substance, a conclusion of law that the plaintiff is entitled to recover the possession of the premises sued for. It would be yielding too far to mere form to hold that the above is not a conclusion of law." So in Miller v. Hicken, 92 Cal. 229, 28 Pac. 339, which was an action to foreclose a mortgage, the court said: "It is objected that the court did not find in terms that the defendants and intervener had not 'constructive' notice of plaintiff's mortgage; but that followed from the facts found, and it is immaterial that the court did not make an express 'conclusion of law' to that effect." Following in line with these decisions, we think the words added to the findings of fact in this case, "Let judgment and decree be entered accordingly," must be held to be a sufficient statement of the conclusions of law. But, if it were otherwise, still it is apparent that, if more specific conclusions of law had been stated, they must have been in favor of the plaintiff, and hence that the error or defect did not affect the substantial rights of the defendants, or furnish any ground for reversal. Section 475 of the Code of Civil Procedure declares: "The court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

2. It is claimed that plaintiff's mortgage was invalid for want of a description therein of any real estate; that, in effect, it contained no description whatever; that the attempted description was so insufficient that it afforded no basis for a decree of foreclosure, and gave no notice to the defendants, who were subsequent purchasers and incumbrancers. This claim is based upon the theory that the land attempted to be described was a part of a Mexican grant, and was described as if it had been a part of the public domain which had been legally surveyed and subdivided under the authority of the United States; that the government authorities never sectionize the lands within a Mexican grant, and, if the same are surveyed and subdivided at all, it is never by government subdivisions, but by numbered lots; and hence that the attempted description was wholly void. The description found in the mortgage is as follows: "All that certain piece or parcel of land situate in the county of San Diego, state of California, bounded and described as follows, to wit: The northeast quarter of section twenty-three (23), the fractional south half of section twenty-three (23), the northwest quarter of section twenty-three (23), the fractional north half of section twenty-four (24), and the fractional northwest quarter of section twenty-six (26), all in township fourteen south, of range one east, San Bernardino meridian, being all that portion of said sections included within the limits of the Rancho Cañada de San Vicente y Mesa del Padre Barona." At the commencement of the trial, counsel for appellants stipulated that the mortgage described in the complaint was filed for record in the recorder's office of San Diego county on a day named, and was thereafter duly recorded, and that any interests which appellants, or either of them, had acquired in the lands described in said mortgage were acquired subsequent to the recording thereof. It appears that after the making of the plaintiff's mortgage, the mortgagor, Haffenden, executed to the defendant Thomas J. Daley a deed of the same land, and by the same description, containing a recital that the conveyance was "subject to a mortgage of seven thousand dollars, given to J. B. Rea"; and that all of the other defendants subsequently acquired from Daley or his grantees, by deeds or mortgage containing the same description, whatever estate or interest they had in the said premises. To the description in some of these subsequent deeds were added the words, "as surveyed by Vitus Wackenreuder," and to the description in the mortgage to Schulenburg were added the words, "according to the map of said rancho made by Vitus Wackenreuder, A. D. 1869." Following the introduction in evidence of the said conveyances, and the objections of defendants that they were inadmissible, counsel for plaintiff stated that he was "willing to admit that Vitus Wackenreuder made a survey in 1869, by which he subdivided the interior of that ranch according to government sections." Counsel for defendants then stated: "We do not admit that he did it according to government sections. We will admit that his map indicated sections, but we do not admit that the sections connected with the government sections, or that you could locate the same land by reference to sections connecting with the government sections outside, for our information is that they do not connect." It must be assumed, then, we think, that the rancho referred to was a Mexican grant, which was surveyed and sectionized, and a map thereof made, by Wackenreuder, and that the descriptions found in the plaintiff's mortgage and in the defendants' deeds and mortgage were based upon that survey and map, and were of subdivisions as shown and established thereby. The question, then, is, were these descriptions void for uncertainty? We do not think they were. It is true that the government authorities do not survey and subdivide lands within a Mexican grant, and that there is and can be no government section of land until it has been located by an actual survey and establishment of the lines under the authority of the United States. Robinson v. Forrest, 29 Cal. 325; Middleton v. Low, 30 Cal. 605; Bullock v. Rouse, 81 Cal. 594, 22 Pac. 919. But, while this is so, still there is no reason why the owners of a Mexican grant may not have the same surveyed and subdivided in the same way that it would be if it were a part of the public

domain. And where the owners have adopted the government method of surveying and subdividing their land, and have caused a map to be made showing such subdivisions, a description in accordance with the survey so made must be held sufficient. It is only necessary that the description of premises in a deed or mortgage be sufficiently definite and certain to enable the land to be identified. "A deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. If a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient. And, generally, the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed. * * * If the description is general, the particular subject-matter to which the description applies may be ascertained by parol evidence, and the deed will not be held void for uncertainty if, with the aid of such evidence, the land intended to be conveyed can be located." 2 Devl. Deeds (2d Ed.) § 1012. And see McCullough v. Olds, 108 Cal. 529, 41 Pac. 420. It is objected that the map was not referred to in the description contained in plaintiff's mortgage, and that such a reference was necessary. This objection cannot, in our opinion, be sustained. The map might have been referred to as it was in the Schulenburg mortgage, but the failure to refer to it was not a fatal defect. That there was a map must have been known by all the parties, and all the transactions must have been had in view of it. Our conclusion is that the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

116 Cal. 583

## PEOPLE v. McELROY. (Cr. 239.)

(Supreme Court of California. April 28, 1897.)

LARCENY "FROM THE PERSON"—CONVICTION OF LESSER OFFENSE.

1. Stealing money from trousers folded and placed under the owner's head as a pillow, while he slept, was not a taking "from the person," within the definition of grand larceny.

2. A conviction of petit larceny may be had under an information for grand larceny.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Harry McElroy was convicted of grand larceny, and from the judgment and an order denying a new trial he appeals. Reversed.

H. B. McClure and D. E. Perkins, for appellant. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, Dep. Atty. Gen., for the People.

VAN FLEET, J. Defendant was charged with grand larceny, in stealing $17 from the person of one James Shaw, and convicted. He complains that the evidence did not warrant the verdict. Shaw and the defendant had their beds near together, in the open air. Shaw, in going to bed, removed his trousers, in the pocket of which was the money, and placed them under his head, as a pillow. While he slept they were abstracted by the defendant, and the money taken. The question is whether these facts show a taking "from the person," under our statute, which makes the offense grand larceny, without regard to the amount stolen, "when the property is taken from the person of another." If it was not such taking, the amount was insufficient to constitute any greater offense than that of petit larceny. Pen. Code, §§ 487, 488. The stealing of property from the person has been from an early period, under the English statutes, treated as a much graver and more heinous offense than ordinary or common theft,—partly by reason of the ease with which it could be perpetrated, and the difficulty of guarding against it, and partly because of the greater liability of endangering the person or life of the victim. The same general reason and purpose animate the modern statutes, including our own, and, as in England, the offense is made punishable as a felony. The difficulty has been in defining with precision in all cases what constitutes a taking from the person, and this has given rise to some confusion in the authorities on the question as to whether the property must be actually on, or attached to, the person, or merely under the eye, or within the immediate reach, and so constructively within the control, of the owner. According to Mr. Bishop, "The thing taken must be under the protection of the person, but need not be attached thereto." 2 Bish. Cr. Law, 898. But the only case he cites in support of the text is Reg. v. Selway, 8 Cox, Cr. Cas. 235, where the indictment was for robbery, and the facts clearly show that offense, and not larceny; the prosecutor being attacked while in his room, and struck violently on the head by one of the prisoners, while the other went to a cupboard in the room and stole a cash box. Mr. Bishop suggests, tentatively, that "probably in this particular the rule in robbery applies." But he cites no case in support of the suggestion, and we think the authorities against it. Thus, in Rex v. Hamilton, 8 Car. & P. 49, where a man went to bed with a prostitute, putting his watch in his hat on a table, and the watch was stolen by the woman while he slept, it was held that the offense was larceny from the house, and not from the person. So, in Rex v. Taylor, Russ. & R. 418, where the defendant invited an acquaintance to share his room and bed for the night, and then stole his guest's watch from the bed head, it was deemed by the judges not a larceny from the person. See, also, Owen's Case, 2 East, P. C. 645; Castledine's Case, Id. 645, 646; and Watson's Case, Id. 680, 681. In Com. v. Smith, 111 Mass. 429, it was held that where the prosecutor went to bed, leaving his clothes on a chair, and the defendant, lodging with him, took a key from a pocket of the clothes and opened the prosecutor's trunk, and took money therefrom, it was larceny from the house, and not from the person. And where a man, with his money in a satchel, went into a bank, and placed the satchel temporarily on the counter, within two feet of him, while he transacted his business, and his attention was distracted for a moment by one of the defendants while the other abstracted the money, the supreme court of Georgia considered that the larceny was from the house, and not from the person. Simmons v. State, 73 Ga. 609.

In view of these authorities, and the origin of the statute, we think its obvious purpose was to protect persons and property against the approach of the pickpocket, the purse snatcher, the jewel abstracter, and other thieves of like character who obtain property by similar means, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession,—such as clothing, apparel, or ornaments, or property or things contained therein or attached thereto, or property held or carried in the hands, or by other means, upon the person; that it was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from his person and out of his hands. Such has been the practical application and construction of this and like statutes by public prosecutors generally, as indicated by the facts of the cases which have been called to our attention. Had the legislature intended that the offense should include instances of property merely in the immediate presence, but not in the manual possession about the person, it would doubtless have so provided, as it has in defining robbery. Robbery is defined as "the felonious taking of personal property in the possession of another from his person or immediate presence," etc. (Pen. Code, § 211), while the requirement of this offense is that it shall be "taken from the person." Within this rule, we are of opinion that the facts did not constitute grand larceny, within the statute. The garment from which the money was taken was not at the time on the person of Shaw. It was folded up and used as a part of his bed. Had the garment alone been taken, under like circumstances, the theft could not be held to have been from the person. A man does not wear his bed as he does his clothes. The money was therefore no more on his person, in any proper sense, than if it had been concealed under his bed, or elsewhere about it, or left in his clothes upon a chair, or hanging on the wall. It is the frequent habit of cautious people upon retiring to place money or valuables under their pillow or between the mattresses; but property so concealed can no more be said to be upon the person of the owner than if it were placed in any other part of the room, and its taking while so placed would not constitute a larceny from the person.

The objection to the sufficiency of the information is not well taken. It informs the defendant, in ordinary and concise language, of the offense with which he is charged. Nor are we at liberty to order the defendant discharged from further prosecution. We cannot assume that the evidence upon another trial will be the same; and, even if we could, the facts show a case of petit larceny,—an offense of which defendant can be competently convicted under the information. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

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116 Cal. 548

## McGRATH v. WALLACE. (Sac. 111.)

(Supreme Court of California. April 23, 1897.)

TAX SALE—SHERIFF'S RETURN—AMENDMENT.

1. A sheriff's return of a tax sale, not stating that the sum received was the amount of the judgment and costs, and that a sale of the entire parcel was necessary to raise such sum, shows a void sale.

2. The sheriff cannot be permitted to amend such a return, 13 years after it was made, by adding thereto facts validating the sale.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by Catherine McGrath against Mary A. Wallace to quiet title. There was judgment for defendant. A new trial was denied, and plaintiff appeals. Affirmed.

Clinton L. White, for appellant. R. B. Wallace, Frank D. Ryan, and J. B. Devine, for respondent.

BRITT, C. Action to quiet title to a parcel of land in the city of Sacramento. On a former appeal it was held that plaintiff's claim of title by adverse possession was not supported by the facts, and a judgment in her favor was reversed. 85 Cal. 622, 24 Pac. 793. Upon a new trial the plaintiff relied on certain tax titles. It appeared that on December 26, 1864, there was a sale of the land in controversy, under decree of the former district court, for street taxes levied by the city in the year 1863; and again, on September 25, 1865, the land was sold under similar decree for city taxes levied for the fiscal year 1863–64. Said decrees, respectively, were entered in actions prosecuted in the name of the people against the owner—now the defendant here—and the land itself, to subject the land to sale for the taxes delinquent thereon. No question is made as to the relative values of the tax liens declared by the two decrees, or as to the effect of the second sale upon the former. At the tax sale of

December 26, 1864, three persons—Turton, Knox, and Ryan—were joint purchasers, and whatever interest they acquired passed afterwards to plaintiff. At the sale of September 25, 1865, one Mayo became the purchaser; in 1875 he made a deed of grant of the premises to one Reeves, which was duly recorded; and subsequently, on March 28, 1878, Mayo quitclaimed the same property to plaintiff. The sheriff's return of the sale of December 26, 1864, was indorsed upon a certified copy of the decree, and was filed January 20, 1865. It set forth that the sheriff levied on the property described, and, after notice according to law, sold the same, at a time and place specified, to Turton, Knox, and Ryan for the sum of $210.08. By an order made April 15, 1878, the court granted leave to the ex sheriff, who while in office had made such sale, to amend the return by showing that the whole of the land was the least quantity which any person would take and pay the judgment and costs, amounting to $210.08, which was the sum bid, etc. Thus amended, the return would exhibit compliance with the statutes in force at the time of the sale governing the procedure in that behalf. St. 1861, p. 435; St. 1862, p. 523. It may be assumed that the return was amended accordingly; and on April 18, 1878, the ex sheriff executed a deed of the land to Turton, Knox, and Ryan, reciting as facts the matters which by the said order of April 15th he had been authorized to insert in his return.

Since plaintiff can prevail in this action only on the strength of her own title (Henry v. Pesoli, 109 Cal. 53, 41 Pac. 819), and since she deraigns by a deed from Mayo subsequent to his conveyance of grant to Reeves, and not through the latter at all, it is obvious that her claims derive no support from the title of Mayo founded on the tax sale of 1865, whether that sale was valid or invalid. As the return made by the sheriff of the sale of 1864 contained nothing to show that the amount bid was the sum of the judgment and costs, and that the sale of the whole parcel was necessary to raise such amount, it reported a void sale. It was certainly no better than a return that he had sold the entire tract to the highest bidder, and this has been several times held to show that the sale was void. Hewell v. Lane, 53 Cal. 216; Reynolds v. Lincoln, 71 Cal. 183, 185, 9 Pac. 176, and 12 Pac. 449; French v. Edwards, 13 Wall. 506. The question then is upon the effect of the order allowing the sheriff to amend his return. This question arose and was elaborately examined in French v. Edwards, above cited, in the later stages of that case before the federal circuit court for this district, to which it was remanded by the decision in 13 Wall. 506. The learned circuit judge enlarged upon the considerations that under the statute of California the owner of real estate sold pursuant to a judgment for taxes had a right of redemption, exercisable within six months from the time of sale; that the certified copy of the decree, which was the sheriff's warrant for the sale, with his return indorsed, became part of the authentic public record of the proceedings, for the information and security of all persons interested therein; that if the owner relied, as he had the right to do, upon the information thus conveyed, he might justly conclude that the sale was void and redemption unnecessary; and that if, years afterwards, the ex sheriff can amend his return, and so validate an otherwise invalid sale, the owner is deprived of his right to redeem, and subjected to legal fraud. The difference between such a case and those in which a defective return of process, such as a summons, is allowed to be amended, was pointed out; and the conclusion was that the amendment of the return, "under the conditions of the case, so as to cut off the right of redemption, was not made in furtherance of justice, and was not authorized by law." French v. Edwards, 5 Sawy. 266, Fed. Cas. No. 5,098. These views, as applied to the facts before the court,—which were almost identical with those in the case here,—are consonant with the general rules for the construction of statutes which look to the divesting of titles by means of a tax sale. They seem also to accord with the tendency of the decisions in this court touching the general subject. Compare, besides the cases above cited, Carpenter v. Gann, 51 Cal. 193; Newhall v. Provost, 6 Cal. 86. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

**116 Cal. 604**

## GIRVIN et al. v. SIMON. (Sac. 197.)

(Supreme Court of California. April 28, 1897.)

STREET IMPROVEMENTS—LEGALITY OF CONTRACT—ASSESSMENTS—ESTOPPEL—PLEADING.

1. Under Laws 1891, p. 199, § 5, providing that a city council, in acting on bids for street work, may reject them, should it deem this for the public good, and also the bid of any party who has been delinquent in any former contract, "and may award the contract for said work or improvement to the lowest responsible bidder," a council can determine that a bidder has been delinquent in a former contract, and on such determination may reject his bid and award the contract to the lowest remaining bidder whom it decides to be responsible.

2. Under Laws 1885, p. 156, § 11, relating to street improvements, which gives all persons directly interested in the work or assessments therefor, who, for any reason enumerated, feel aggrieved by any act of the superintendent of streets, the right to appeal therefrom to the city council, and makes the decision of the council conclusive, and further provides that no assessment shall be held invalid, except on such appeal, on account of matters which the council had power to remedy, a property owner who makes

no objection to the action of a superintendent in accepting work done, and does not appeal therefrom, is estopped to set up as a defense to an assessment that the work was not performed according to the contract.

3. A complaint in an action by a contractor to recover an assessment for street work, which alleges that the contract required the plaintiff to do the work in accordance with specifications which are not set out, is insufficient to show that the contract complied with the statute, and is demurrable; but the error is cured where the defendant fails to demur, but himself sets out the specifications in his answer.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by R. D. Girvin, Barry Baldwin, and E. L. Eyre, partners as Girvin, Baldwin & Eyre, against J. Simon, to foreclose the lien of a street assessment. Judgment for defendant, from which, and from an order denying a motion for new trial, plaintiffs appeal. Reversed.

Jas. A. Louttit, for appellants. J. H. & J. E. Budd, for respondent.

SEARLS, C. This is an action to foreclose the lien of a street assessment levied by virtue of a contract for grading and paving in part with basalt and in part with bitumen, and for curbing, Channel street, in the city of Stockton, from the east line of Hunter street to the west line of California street, etc. The contract was let by the street superintendent of the city of Stockton on the 12th day of September, 1892, to one F. J. Owens, who thereafter, and on the 22d day of September, 1892, assigned it to the plaintiffs and appellants herein, by whom the work was performed. The cause was tried by the court without a jury, and, upon the written findings, judgment was entered in favor of defendant for his costs. The appeal is from the final judgment, and from an order denying plaintiffs' motion for a new trial.

There are two prominent questions involved in the appeal: The first relates to the validity of the action of the city council in awarding the contract to F. J. Owens; and, second, whether, conceding the work was not performed in accordance with the specifications of the contract, defendant is in a condition to take advantage thereof.

The facts upon which the first question turns are as follows: After taking the usual steps for the improvement, and advertising for bids to do the work in regular form, one McCarty bid for the work at $12,038.59, and accompanied his bid by a good and sufficient bond, as by statute required. One F. J. Owens made a like bid to do the work for $12,049.55, accompanying his bid with a bond, etc. The city council met on the 22d day of August, 1892, opened and examined the proposals for doing the work, and thereupon passed a resolution reciting that a former contract for street work had on July 29, 1892, been awarded to McCarty, and that he had failed and refused to enter into a contract to perform the work so awarded to him, wherefore it was resolved that the bond filed by him as security for the former work be declared forfeited, "and said McCarty is hereby declared delinquent and unfaithful, within the meaning of the law, inasmuch as he has failed and refused to make and enter into the contract hereinabove mentioned." Thereupon the council rejected the bid of McCarty, for the reasons assigned in the resolution, and awarded the contract for the work to said F. J. Owens. These proceedings are under the act of 1885, usually termed the "Vrooman Act," with the amendments thereto of 1889 and 1891. Section 5 of the act as amended in 1891 (St. 1891, p. 199), among other things, provides as follows: "The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent and unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder," etc. It will be observed from the foregoing quotation that power is given to the city council to reject all bids, if it shall deem it for the public good; (2) to reject the bid of any party who has been delinquent and unfaithful in any former contract; and (3) to reject all bids other than the lowest responsible bidder. Manifestly, under these provisions, power is conferred upon the council to determine what is for the best interests of the public; who have shown themselves delinquent and unfaithful; and who are responsible bidders. These are facts to be passed upon by the council, and its determination, once reached, is as conclusive as the verdict of a jury or finding of a court upon facts within its jurisdiction; that is to say, the propriety of the action can only be inquired into by such method as the law provides. The council, by its formal resolution, declared McCarty delinquent and unfaithful, within the meaning of the statute, and hence rejected his bid, as it had a right to do, notwithstanding it was some $10 or $11 lower than that of F. J. Owens, to whom the contract was awarded. As the council had jurisdiction to hear and determine the matter, there was no error in its determination.

2. As to the right of the defendant to object in this action that the work was not properly performed: The court permitted defendant, against the objection of plaintiffs, to introduce evidence tending to show that the concrete was not sufficient in quantity or equal in quality to the requirements of the specifications; that the curbing was not properly dressed, etc. There was a sharp conflict in the evidence on these questions, but the court found in favor of defendant, and that the contract was not complied with on the part of plaintiffs. The work was accepted and approved by the street superin-

tendent. All the several steps provided by statute were regularly taken, and in due time an assessment to pay for the work was duly levied, a warrant duly issued, a demand for payment duly made, etc. In short, no irregularity is found or complained of, except in the manner of the performance of the contract. Defendant did not make any objection to any act or determination of the street superintendent or of the city council, and did not appeal to the city council within 30 days after the date thereof, or at any time, in writing or otherwise, and has never filed any protest. Section 11 of the street law of 1885 (St. 1885, p. 156) is in part as follows: "The owner, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination or proceeding of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council." The section then provides for a hearing before the council, and gives that body full authority to correct all irregularities and errors, enumerating many of them; and, among other things, the council may "require the work to be completed according to the directions of the city council," etc. The section makes the decision of the council final and conclusive upon all persons entitled to appeal, as to all errors and irregularities which the council might have remedied and avoided. It further provides that no assessment shall be held invalid, except upon appeal to the city council as provided in the section, for errors or informalities or other defects in any of the proceedings prior to the assessment, or in the assessment itself, in cases where notice of intention to order the work done has been duly published as by law required before the passage of the resolution ordering the work to be done. In Manning v. Den, 90 Cal. 610, 27 Pac. 435, it was held that the property owner did not, by failing to appeal to the council, lose his right to resist the payment of an assessment when there had been a failure to perform any one of the jurisdictional prerequisites in the manner provided for by the statute. Harrison, J., speaking for the court, said: "The provision in the latter part of section 11, that 'no assessment shall be held invalid except upon appeal to the city council,' etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect." A void contract does not become valid by failure to appeal to the board of supervisors. Burke v. Turney, 54 Cal. 486; Capron v. Hitchcock, 98 Cal. 430, 33 Pac. 431; Brock v. Luning, 89 Cal. 316, 26 Pac. 972. But as to all matters which may lawfully be corrected on appeal to the city council or other governing body of the municipality, and for which an appeal is provided by the statute, the property owner deeming himself aggrieved must prosecute his appeal, failing in which he is estopped. McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Dyer v. Parrott, 60 Cal. 551; Bucknall v. Story, 46 Cal. 589; Dorland v. McGlynn, 47 Cal. 47; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Frick v. Morford, 87 Cal. 576, 25 Pac. 764. The question as to whether a contract for grading or paving or curbing has been properly performed is not one going to the jurisdiction of the council, or affecting the validity of its acts, and, as an appeal is expressly provided by the eleventh section of the act of 1885, it is under that section the only remedy; and defendant, having failed to take such appeal, was estopped from litigating the question in this action. Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943; Perine v. Forbush, 97 Cal. 312, 32 Pac. 226; Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127, and cases there cited. It follows that the court below erred in admitting testimony to show that the work was not performed as by the contract required.

Respondent urges that the contract for the work was invalid because of the omissions therein of matters essential to a valid contract under the statute. The contract is not set out in the record, and we have no means of determining its validity. The court below found that the contract was entered into, and, in the absence of a showing to the contrary, we must presume it was a valid one. It is further urged that there is no allegation in the complaint that such contract contained such essential matters. The complaint avers the execution of the contract in pursuance of the award, whereby J. F. Owens agreed to perform the work in a workmanlike manner, under the direction and to the satisfaction of the street superintendent, and to furnish all the necessary material required for the execution of the work, and in compliance with and as required by the plans and specifications thereof, and therein prepared by the city surveyor, and adopted and approved by the city council, and on file in the city clerk's office, which plans and specifications are referred to in said contract, and made a part thereof, etc.; that work was to commence within 15 days from the date of the contract, and to be completed within 90 days, etc. No demurrer was interposed to the complaint, and no objection based upon its insufficiency seems to have been interposed in the court below. It must follow that no objection can be heard here, except that it fails to state a cause of action. Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228, is relied upon by respondent in support of his contention. In that case a demurrer was sustained to the complaint, and this court, in affirming the judgment, held, among other things, that a general allegation that the contract was one by which the contractor agreed to do the work therein in accordance with specifications which are not set out, and under the direction and to the satisfaction of the superintendent of streets, was not sufficient, and that it must affirmatively appear from the statement of the contract that it contained all the essentials to make it a valid contract under the statute. In the case at bar the pleader failed to set out the specifications, which formed an important part of the contract, and a demurrer for that reason would have been good. Defendant, however, not only did not demur, but he set out these very specifications in his answer, and averred they were the specifications referred to in the complaint. This cured the error. We recommend that the judgment and order appealed from be reversed, and that the parties, and each of them, have leave to amend their respective pleadings if they shall be so advised.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the parties, and each of them, have leave to amend their respective pleadings if they shall be so advised.

(116 Cal. 617)

## PEOPLE ex rel. LIND v. CITY OF SAN LUIS OBISPO. (L. A. 103.)

(Supreme Court of California. April 29, 1897.)

JUDGMENT—ENJOINING PUBLIC NUISANCE—LIMITATION OF INJUNCTION.

Under findings that the discharge of sewage from the sewer system of a city into a creek created a public nuisance, a judgment enjoining such discharge is not erroneous because the injunction is not limited to a specified part of the stream.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action, on relation of Joseph Lind, against the city of San Luis Obispo, to abate a public nuisance. Judgment for the people, from which defendant appeals. Affirmed.

W. H. Spencer, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for the People.

BELCHER, C. This action was instituted by the people of the state of California, on the relation of Joseph Lind, to abate an alleged public nuisance caused by the discharge of the sewage in the city of San Luis Obispo, from the sewer system constructed therein and the vault located at the lower end thereof, into the San Luis Obispo creek. The cause was tried by the court, and very full findings of the facts were made and filed. As conclusions of law, the court found "that the discharge of the sewage into the vault and receptacle [as complained of and found], and from thence into San Luis Obispo creek, is now and has been a public nuisance ever since a time prior to the commencement of this action; that the discharge of said sewage into said vault and creek will be a public nuisance between June 1st and December 1st of every year, and at all times when there is not water sufficient flowing in San Luis Obispo creek to carry away said sewage"; and that plaintiff was entitled to a judgment and decree "enjoining defendant, its officers, agents, and servants, from discharging sewage from said sewer system or from said vault" into the creek between the dates named, "and at all other times when there is insufficient water flowing in said creek to carry said sewage away beyond the boundaries of said city." Judgment was accordingly entered granting the relief which plaintiff was found to be entitled to, and from that judgment the defendant has appealed on the judgment roll.

Only one point is made for a reversal. It is said: "San Luis Obispo creek is a living stream of water passing through the corporate limits of the city of San Luis Obispo, and extending ten miles beyond same to a point where it empties into the Pacific Ocean. Under the judgment, defendant is enjoined 'from discharging sewage * * * into San Luis Obispo creek.' This includes all of the creek, and goes beyond the complaint, evidence, and findings." And hence it is claimed that the judgment was unauthorized. We see no merit in the point made. Defendant was enjoined from discharging sewage from its sewer system, or from the vault described in the complaint, into San Luis Obispo creek. If the discharge of the sewage into the stream constituted a public nuisance, as found by the court, the continuance of that nuisance could certainly be enjoined. And that the discharge did constitute a nuisance is not questioned. The judgment should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(116 Cal. 593)

## PEOPLE ex rel. SAN JOAQUIN COUNTY v. SPERRY et al. (Sac. 206.)

(Supreme Court of California. April 28, 1897.)

STREETS—DEDICATION—EVIDENCE.

A finding that there was no dedication of land for a street is sustained where the evidence shows that there had been no offer or intention to dedicate; that the owners maintained visible obstructions across one end of it, while the public were using the remainder; and that purchasers of abutting lots were told that the street was a private way, though lots had been sold according to an unrecorded plat on which the strip involved was designated as a street.

Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by the people on the relation of the county of San Joaquin against George B. Sperry and another. Judgment for defendants, and relator appeals. Affirmed.

W. B. Nutter, Dist. Atty. (J. B. Hall, of counsel), for appellant. Nicol & Orr, for respondents.

HENSHAW, J. By this action plaintiff seeks to have a strip of land extending northerly and southerly across what is called "Sperry's Addition to the City of Stockton" declared to be a public highway, and to remove obstructions therefrom. Judgment passed for the defendants, and from this judgment, and from the order denying a new trial, plaintiff appeals.

The determinative question in the case is whether the evidence supports the findings of the court against the alleged dedication. Sperry's addition was suburban land adjacent to, but not within, the corporate limits of the city of Stockton. In 1891 or in 1892 a plat was made of these lands, upon which they were subdivided into lots and blocks. Streets were thereon indicated and named. The street in question was designated "El Dorado Street." It extended from North street, the northerly boundary of the city of Stockton, to the further limits of the tract. Thereafter some few lots were sold under descriptions referring to this plat. The map, however, was never placed on record, and during all of this time the land was inclosed with a substantial fence. Later, however, for the convenience of the purchasers of lots, the fence at the intersection of El Dorado street and North street was removed. At the northerly end of El Dorado street was maintained not only a fence, but during part of the time a corral. The street was graveled, not throughout its entire length, but up to the line of the corral. Purchasers of lots were informed that the streets were not dedicated to public use, but were to be maintained as private ways, subject to the rights of persons to whom lots in the tract might be sold, to use them in connection with their land. In April, 1893, the defendants caused to be filed with the recorder of San Joaquin county a map of the Sperry addition, containing upon the face thereof this reservation as to the streets. The northerly end of El Dorado street abutted upon the land of one Brown. The lower end of El Dorado street being open, the public could and did drive in upon the line of said street, but were obliged to retrace their course when they came to the fence and corral at the upper end thereof. One Zinck, however, purchased a lot at the northerly end of El Dorado street, and contiguous to the land of Brown. Zinck opened a passageway through his lot, and thereafter persons could drive along El Dorado street to the land of Zinck, and thence, turning off of El Dorado street, and passing through the land of Zinck, could reach the Brown tract beyond. The defendant Sperry and his agent for the sale of the lots both testified that it was never the intention to dedicate El Dorado street to public use; that they continually maintained the obstruction at the northerly end of it, and informed purchasers and intending purchasers of land that the streets were not public streets. There is no question but that a dedication after acceptance cannot be revoked so as to defeat the rights of the public which have vested under it. The question of fact here, and the one which the court found under conflicting evidence adversely to appellant's contention, is that there was no dedication or offer of dedication and acceptance by use by the public. The animus dedicandi must be clearly evidenced by unequivocal acts. City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693. When this is shown, and with it an acceptance by use upon the part of the public, the dedication is complete and irrevocable, and the actual consent and acquiescence of the owner in the public use being established, the length of time of the public use ceases to be of importance. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448. But in this case, while the use by the public is sufficiently established, that use was not referable to any offer of dedication upon the part of the owner. The mere marking of streets upon the unrecorded map, and the sales of lots thereupon with the declaration to the purchasers that the streets were not public streets, did not constitute a dedication thereof. People v. Reed, 81 Cal. 70, 22 Pac. 474; Phillips v. Day, 82 Cal. 24, 22 Pac. 976; Cook v. Sudden, 94 Cal. 444, 29 Pac. 949. During all of the time the street was never opened throughout its length to public use as a street, and the defendants constantly maintained visible obstructions across it. These facts, together with the testimony of Sperry and his agent, are certainly sufficient to support the finding of the court that there was no dedication of the street. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(116 Cal. 625)

BALDWIN et al. v. DURFEE. (L. A. 150.)

(Supreme Court of California. April 30, 1897.)

ADVERSE POSSESSION—SUFFICIENCY OF INCLOSURE.

Where the title to land by adverse possession is based on a claim that the claimant has had it protected by a substantial inclosure for more than the statutory period, the title is not defeated by a mere temporary destruction of portions of the inclosure by flood.

Department 1. Appeal from superior court, Los Angeles county; William A. Cheney, Judge.

Action by E. J. Baldwin and R. Garvey against James Durfee. There was a judgment for defendant, and plaintiffs appeal from an order denying their motion for a new trial. Affirmed.

Smith & Winder, George H. Smith, and A. W. Hutton, for appellants. Stephen M. White, for respondent.

GAROUTTE, J. This is an action to recover possession of two small tracts of land. Plaintiffs failed to recover, and now appeal from an order denying their motion for a new trial.

Defendant relied upon the statute of limitations, and the trial court found in his favor upon that plea. This finding of the court is assailed as not supported by the evidence, and the evidence upon that issue is before us. Defendant makes no claim of title founded upon a written instrument, judgment, or decree. Hence he was bound to show possession and occupancy by proof of a substantial inclosure, or that these two tracts of land had been usually cultivated or improved for a continuous period of five years. Appellants quote quite largely from the evidence of the defendant as to his acts of possession, and then insist that such evidence fails to satisfy the statute. It is but fair to the defendant that his evidence should be weighed and considered as a whole, and that he should not be bound—in this court, at least—by those portions of it which are against him, as against other portions that stand in his favor. Again, there is evidence in the record more favorable to him even than his own testimony. This evidence we are bound to consider, and are not at liberty to say that his case can be no stronger than his own evidence. Defendant's title by adverse possession, as to the 24-acre tract, is based upon his claim that he has had it protected by a substantial inclosure for a time longer than the statutory period. This claim is abundantly established by the evidence, unless the fact that during flood times, in the winter season, certain portions of the inclosure were washed away and destroyed, changes the legal aspect of the case. These disasters to the inclosure occurred but seldom, and were repaired within a reasonable time in each instance. It is claimed by appellants that the continuity of possession was broken by the destruction of the fence. It is asserted that the possession contemplated by the law must be continuous and uninterrupted, and that in a case like the present, where the inclosure is relied upon to establish the possession, that inclosure must stand continuously and uninterruptedly for the term of five years. In a general sense, this is true, but a mere temporary destruction of portions of the inclosure by fire or flood does not defeat the statute of limitations. Such a construction would sacrifice substance to shadow, and does not come within the spirit and intent of the statute. As to the remaining tract involved in this litigation, there was a great amount of evidence introduced tending to show that the particular parcel was substantially protected by an inclosure, and also usually cultivated. It would serve no good purpose to set out a detailed recital of this evidence. It was fragmentary, and came from the mouths of many witnesses; but, taking it all together, after careful consideration we are not prepared to say that the court was unjustified in finding facts sufficient to support the plea of the statute of limitations. It is further insisted that defendant failed to show a compliance with the statute as to the payment of taxes. There is no evidence in the record that either of the two tracts in dispute was assessed to anybody save the defendant. If the assessment and levy of these taxes were a valid assessment and levy,—and the various defective descriptions set forth in the assessment indicate grave doubt as to such validity,—then the taxes were paid by defendant. Where rests the burden of proof upon this question becomes immaterial, for it fairly appears from defendant's testimony that he paid all taxes assessed and levied upon the property in dispute. There is nothing further in the record demanding consideration. For the foregoing reasons the order appealed from is affirmed.

We concur: HARRISON, J.; VAN FLEET, J

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116 Cal. 587

SMITH et al. v. CORBIT. (L. A. 132.)

(Supreme Court of California. April 28, 1897.)

WATER AND WATER COURSES—EASEMENT BY IMPLICATION AND USER—RIPARIAN RIGHTS—USE OF WATER FOR IRRIGATION.

1. Where the owner of land on which is a natural stream, whose waters are used by him for domestic and irrigating purposes, conveys a part of the land, the grantees, who use one-half of the water continuously for 19 years, without objection by the grantor or the subsequent grantees of the remaining part of the tract, acquire a right to such use.

2. While one entitled to use one-half the water in a natural stream may change the place of diversion, such change will not entitle him to divert more than his former share of the water.

3. A riparian owner may only use a reasonable amount of the water in a natural stream for irrigating purposes, after the other owners have been supplied with what is necessary for domestic purposes.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Suit by J. W. Smith and others against John Corbit to determine a water right. From a judgment for defendant, plaintiffs appeal. Reversed.

Venable & Goodchild, for appellants. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

BELCHER, C. This is a suit to determine a water right. The court below adjudged that the defendant's right to take and use water out of the stream in controversy "for all his uses on the land occupied by him" was "paramount to the right of plaintiffs to use said water," and from that judgment the plaintiffs appeal on the judgment roll. The findings are, in substance, as follows: On November 3, 1875, and for a long time prior thereto, one Mrs. Munoz was the owner and in possession of a tract of land on which a small stream of water arose, and flowed thence through the same in a well-defined channel; and during the whole period of her ownership she used the said water for her household purposes, for watering her live stock, and for irrigating the parcels of her land respectively now owned by plaintiffs and defendant. On November 3, 1875, Mrs. Munoz conveyed to one Deleissiguez the tract of land described in the complaint as "Lot 5," the northerly line of which was run along the general course of said stream, crossing and recrossing the same. At that time a dam was constructed at a point on the stream near the northeast corner of lot 5 for conducting water upon said lot; and from the time of his purchase up to January 31, 1887, Deleissiguez continuously used on said lot one-half of the waters of the stream for domestic, irrigating, etc., purposes. On January 31, 1887, Deleissiguez conveyed to plaintiffs the said lot 5, and they immediately entered into, and have ever since remained in, possession thereof. And from the time of their purchase up to April 15, 1894 (the time of the diversion complained of), they continuously used one-half of the water of said stream for their household purposes, for watering their stock, and for irrigating their yard and garden and an orchard of lemon and other fruit trees, all upon said lot. In 1886, Mrs. Munoz conveyed to defendant two tracts of her land, one lying on the north side of plaintiffs' lot 5, and contiguous thereto, called the "Corbit Tract," and the other lying further up the stream, and including the place where the stream arose, called the "Goldtree Tract." In 1888 defendant changed the place of diversion of the water used by him from the said dam to a point higher up the stream on the Goldtree tract, and laid pipes therefrom to his house on the Corbit tract, through which he conducted the other half of the water. Thereafter he continued to use the water so diverted for his household purposes, for watering his live stock and for irrigating his land. In ordinary seasons, the stream carried about four inches of water measured under a four-inch pressure, but during the winter of 1893–94 there was very little rain, and after April 15, 1894, there was not sufficient water flowing in the stream to supply defendant's diversion. From the date last named to the time of the trial in September following, defendant's pipes diverted nearly all the water of the stream, and by reason of such diversion plaintiffs were almost entirely deprived of water. The defendant did not, however, waste any of the waters of the stream, but in good faith used the same upon his land for domestic, stock, and irrigation purposes. Upon these facts we fail to see how the conclusion of the court below that the rights of defendant were paramount to the rights of plaintiffs can be sustained.

1. The Civil Code, § 3522, declares that "one who grants a thing is presumed to grant also whatever is essential to its use." And in Cave v. Crafts, 53 Cal. 135, it is said: "When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it." And again: "The general rule of law is that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment." When, therefore, Mrs. Munoz conveyed to Deleissiguez a part of her land, on which she had been using the water of the said stream for many years, she must be presumed to have granted also a right to the water which was necessary for the reasonable enjoyment of the part granted. And that such was the intention and understanding of all the parties concerned is clearly shown by the fact that for more than 19 years the plaintiffs and their grantor appropriated and used upon their land one-half of the water of the stream, without any objection or interference on the part of defendant or his grantor, Mrs. Munoz. It must be held, therefore, we think, that plaintiffs, under their conveyances and long user, acquired a right to take and use one-half of the water of the stream. It is true, defendant, in 1888, changed the place of his diversion of the water to a point higher up the stream; but this he had a right to do, provided the rights of others were not injuriously affected thereby. Kidd v. Laird, 15 Cal. 162; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41. The change, however, did not increase or diminish the share of the water which he was entitled to divert. He still had a right to only one-half of the water flowing in the stream; and this continued to be his right in 1894, when the quantity of water flowing was diminished by reason of the dry season.

2. The plaintiffs and defendant are riparian owners, and, if their respective rights are to be considered and determined in view of the law applicable to such cases, the judgment must still be held erroneous. It appears that the stream enters the Corbit tract a short distance above the point where it crosses the line between the two tracts, and then flows down, crossing and recrossing that line several times. The fact that defendant diverted the water on the Goldtree tract did not give him any superior right to use it on the Corbit tract. As riparian owners, both parties were entitled to have their natural wants supplied—that is, to use so much of the water as was necessary for strictly do-

mestic purposes, and to furnish drink for man and beast—before any could be used for purposes of irrigation. Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645. After their natural wants were supplied, each party was entitled to a reasonable use of the remaining water for irrigation; and, if the circumstances were such that the interests of the parties would be conserved thereby, the court was authorized to apportion the flow of the water of the stream to the respective owners by periods of time, so that each would have the full flow during such designated period. Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Wiggins v. Water Co., 113 Cal. 182, 45 Pac. 160. The judgment, so far as it is appealed from, should be reversed, and the cause remanded.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment, so far as it is appealed from, is reversed, and the cause remanded.

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(116 Cal. 619)

## MERRIAM v. BARNUM, County Auditor.

(Sac. 190.)

(Supreme Court of California. April 29, 1897.)

COUNTIES—BOARD OF SUPERVISORS—AUTHORITY TO EMPLOY SPECIAL COUNSEL.

Under County Government Act (St. 1893, pp. 351, 356, 359) § 25, subds. 17, 35, which empower the board of supervisors to direct all suits to which the county is a party, and to employ counsel to assist the district attorney, and to do all other things necessary to the duties of the legislative authority of the county government, do not authorize the board to employ special counsel to attend it on all matters pertaining to the reconstruction of the courthouse, insurance matters, etc., at a monthly salary, until the further order of the board.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Application by C. C. Merriam for a writ of mandamus to compel H. E. Barnum, county auditor, to issue and deliver a warrant. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

C. C. Merriam, in pro. per. Alva E. Snow, for respondent.

HENSHAW, J. The application is for a writ of mandate. A demurrer was interposed to the petition, which was sustained by the court, with leave to plaintiff to amend. Plaintiff declined to amend, and prosecutes this appeal from the judgment of the court entered against him. His petition discloses the following facts: That he was an attorney at law, and that the defendant, Barnum, was and is the auditor of the county of Fresno, state of California. On the 29th day of July, 1895, the courthouse of the county of Fresno was partially destroyed by fire. On July 31, 1895, the supervisors of the county of Fresno, at a special session called for that purpose, unanimously adopted a resolution or order of which the following is a copy: "In the Matter of the Appointment of C. C. Merriam Special Counsel for the Board, etc. Upon motion of Supervisor Letcher, seconded by Supervisor Garrett, it is ordered that C. C. Merriam be, and is hereby, employed as special counsel to attend this board on all matters pertaining to the reconstruction of the court house, insurance matters, etc. It is further ordered that the compensation of said Merriam be, and the same is hereby, fixed in the sum of one hundred and twenty-five dollars per month until the further order of the board." Plaintiff served during the month of August as such special counsel in settling with insurance companies for losses sustained by fire, and in matters pertaining to the reconstruction of the courthouse. He performed all the conditions of his contract, and thereafter presented in due form for allowance his bill for services, which was allowed by the board of supervisors, and ordered paid. Plaintiff demanded of the auditor a warrant on the treasury for the amount of the bill as allowed, but the auditor refused to issue or deliver this warrant to plaintiff.

The sole question in the case may be thus stated: Had the board of supervisors the power to employ plaintiff in the manner and for the purposes indicated by the above-quoted resolution? The district attorney is the legal adviser of the board of supervisors, and it is made his duty by law to attend its meetings, and give all necessary advice. County Government Act, § 137; St. 1893, p. 381; Pol. Code, § 4257. Boards of supervisors are empowered (County Government Act; St. 1893, pp. 351, 356, 359), under such limitations and restrictions as are prescribed by law (section 25, subd. 17), "to direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same. * * * (35) To do and perform all other acts and things required by law, not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government."

Boards of supervisors are a creation of the statute, and, their powers being statutory, their acts must find warrant in the law, either expressly or by fair implication. Linden v. Case, 46 Cal. 172; County of Modoc v. Spencer, 103 Cal. 501, 37 Pac. 483. It is claimed that the authority of the supervisors in the matter under consideration is conferred by subdivision 35 of section 25 of the county government act last above quoted. St. 1893, p. 359. From the statutes above referred to, it is clearly the intention of the law that the district attorney, and no one else, shall be and act as the legal adviser of the board, with power to the board, however, to employ additional and special counsel to assist the district attorney in the prosecution or defense of suits to which the county may be a party. In the cases cited and relied upon by appellant the employment of counsel other than the city or district attorney had special reference to suits either commenced or which in the nature of things would probably be commenced. In Smith v. Mayor, etc., 13 Cal. 531, the suit was over the employment of Alpheus Felch for contesting before the supreme court of the United States, under employment by the city, the title of John Sutter to lands within the limits of the city. In Hornblower v. Duden, 35 Cal. 664, the board of supervisors of El Dorado county had employed James McM. Shafter to defend the interests of the county in a certain railroad matter which involved the prosecution of an action of quo warranto, and for his services in this action the fee was claimed. In Scollay v. Butte Co., 67 Cal. 249, 7 Pac. 661, it is declared that the cases of Hornblower v. Duden and Smith v. Mayor, etc., supra, authorize the employment of other counsel than the district attorney "to commence and prosecute suits for the county." In Lassen Co. v. Shinn, 88 Cal. 510, 26 Pac. 365, the firm of Shinn & Masten, attorneys at law, had been employed to collect all moneys due to Lassen county from the state of California on account of the keeping of indigent persons. The language used in the opinion in this case is somewhat broader than the authorities cited in support of it will justify, for the cases relied upon are Smith v. Mayor, etc., and Hornblower v. Duden, in both of which the employment was for the actual conduct of a suit. In Modoc Co. v. Spencer, 103 Cal. 498, 37 Pac. 483, the board of supervisors had undertaken to employ counsel on behalf of the county to assist the district attorney in the prosecution of criminal cases, and the contract was held to be in excess of the powers of the board, and void. In Kelley v. Sersanous (Cal.) 46 Pac. 299, the board of supervisors employed the petitioner as an attorney at law to collect certain claims of the county of Glenn "by action at law or otherwise." Here, again, the employment contemplated the prosecution of a suit, and the contract may be said to come within the spirit, if not the precise letter, of the law authorizing the employment of special counsel to assist the district attorney in conducting a suit. In general, therefore, the action of the supervisors in employing special counsel has been upheld in those cases in which counsel were employed to defend or prosecute a suit, or, as in the extreme cases of Scollay v. Butte Co. and Lassen Co. v. Shinn, where the contract contemplated the employment of an attorney at law to collect moneys, in the performance of which duty a suit might be necessary, and his knowledge and skill as an attorney at law be required.

The contract under consideration, however, is not of this kind. The nature of the employment is to be measured by the terms of the writing expressed in the resolution of the board of supervisors. By that contract it appears that appellant was "employed as special counsel to attend this board on all matters pertaining to the reconstruction of the courthouse, insurance matters," etc. Thus Merriam's duty was fully performed when he attended the sessions of the board, and advised it on all matters pertaining to the reconstruction of the courthouse, and (presumably) the collection of insurance money. There is in this contract no contemplated suit by or against the county, and, if there were, it was no part of appellant's duty to prosecute or defend such suit. His duty was completed when he advised the board, and he could be compelled by the board to do nothing more. The contract, then, was merely an attempt upon the part of the board of supervisors to pay special counsel by the month for performing a duty which the law imposed upon the district attorney. The time and term of employment were indefinite, and we have the situation presented of the supervisors creating the office of special adviser at a salary of $125 per month. If this could be done in the face of the law which limits the powers of boards of supervisors to the employment of counsel to prosecute or defend suits, then it might be done for any purpose that would meet the views of a complaisant board, and at the same time that the law commands the district attorney to be present and to act as general legal adviser of his board, we would have special counsel for such boards under salaries of $125 a month, advising upon road matters, others advising upon the collection of insurance, others again as special advisers upon matters relative to the levy and assessment of taxes, others employed upon matters touching the validity and legality of claims against the county, and still others upon any of the numberless legal propositions which at one time or another are presented for the consideration of such executive bodies. However valuable the services of the appellant may have been to the county in this instance, to permit compensation for them would be to override the law, and to destroy one of the strongest safeguards cast about the expenditure of county funds. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

116 Cal. 628

## HENRY v. CITY OF SACRAMENTO.

(Sac. 222.)

(Supreme Court of California. April 30, 1897.)

CONTRACTS—CONDITIONS—PLEADING.

1. A contract between a city and F. provided that F. was to supply the city with water of a specified quality and quantity, which he was to procure by means of wells near said city, if possible; that within 60 days he should begin prospecting, to determine whether a supply of water existed at the proposed location, and prosecute

such investigations so as to fully determine within six months after the signing of the contract whether such supply could be obtained; that, if it could not, both parties should be released from the contract; and that, if it could, certain other covenants were to be complied with. *Held*, in an action against the city on the latter covenants, that a complaint which did not aver a discovery and development of the supply was insufficient.

2. Such requirement was not met by an averment that plaintiff had in all respects fully complied with all the requirements and conditions of said contract by him to be done or performed, since he did not undertake absolutely to find water.

Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by W. E. Henry against the city of Sacramento on a contract between defendant and A. L. Fish, plaintiff's assignor, for furnishing defendant with a supply of water for city purposes. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Grove L. Johnson and Albert M. Johnson, for appellant. McKune & George, for respondent.

McFARLAND, J. A demurrer to the complaint was sustained, with leave to amend, and, plaintiff declining to amend, judgment was rendered for defendant. From this judgment plaintiff appeals.

It is alleged in the complaint that on September 11, 1893, one A. L. Fish entered into a certain contract, set forth in the complaint, with the defendant, the city of Sacramento; that thereafter on March 1, 1894, the said Fish duly assigned said contract to J. H. Henry and A. Abbott; that thereafter the said Abbott duly assigned all his interest in the contract to the said J. H. Henry; and that on November 27, 1894, the said J. H. Henry duly assigned the said contract to W. E. Henry, who is the plaintiff herein, and brought this suit on June 27, 1895. The demurrer states the general ground that the complaint does not state facts sufficient to constitute a cause of action, and also presents the point that the alleged contract was personal in its nature, and not assignable. This second point need not be here considered; for, in our opinion, the complaint in other respects does not state facts sufficient to constitute a cause of action. The contract is quite lengthy, and need not be here set forth in detail. It is sufficient to say generally that, in the event of a certain contingency happening, the said Fish was to supply the defendant for city purposes water, in quality "clear, sweet, and wholesome," and "suitable for drinking water and domestic uses," and in quantity not less than "one thousand million gallons per annum"; and the defendant was to pay for said water at a certain rate for a certain period mentioned, the said Fish to furnish a water main, and connect it with the water-pipe system of the city then existing. The water was to be procured by said Fish by means of wells to be dug by him near said city, provided he should be able by that means to discover and develop water of the quality and in the quantity specified in the contract. At the time of the execution of the contract no such water had been developed, and whether or not it could be so developed was problematical. It is provided that: "Within sixty days of the signing of this contract, the party of the second part [Fish] must begin in good faith such prospecting and investigations as may be necessary to determine whether an adequate and proper supply of water exists at the proposed location of his plant and well, and he shall prosecute such investigations in good faith, and with reasonable dispatch, so as to fully determine within six months after the signing of the contract whether such supply can be obtained." It was further provided that, if such water could not be developed as aforesaid, then both parties should be released from all liability upon the contract. It was further provided that said Fish should deposit with the defendant a certified check in the sum of $10,000, as security that he would faithfully endeavor during said six months to determine whether water in quantity and quality as aforesaid could be developed; and that, if it should appear that such supply of water could not be developed, then the check should be returned to said Fish. If, however, such supply should be developed within six months, then certain other covenants of the parties were to be complied with. It is quite clear that the contract and the covenants of the defendant were based on the possibility of Fish discovering and developing by means of said wells water for the supply of the city, of the quality and quantity before mentioned, within six months after the date of the contract. But it is nowhere averred in the complaint that Fish or his assigns ever discovered or developed water of said quality and quantity, or any water at all; and defendant was certainly not liable upon its covenants to do certain things after the development of such water, if such water was never discovered or developed. The complaint, to be sufficient to state a cause of action for damages against the defendant for not complying with said covenants, should have averred the conditions upon which said covenants rested. But the only averment upon this subject in the complaint is: "That the said plaintiff, and each and all of his said assignors, have in all respects fully complied with all the requirements and conditions of said contract by them, or either of them, to be done or performed." Fish, however, did not undertake to find water in the quality or quantity specified in the contract. He merely promised to diligently search and prospect for water during the six months succeeding the date of the contract; and his failure to find such water during said period would be perfectly consistent with the averments of the complaint, and yet leave the defendant entirely free from the obligations of any covenants on its part stated in the contract. The complaint is perfectly consistent with the fact that Fish and his assigns utterly failed to find and produce the supply of water upon which all the covenants of the defendant rested; and the failure of plaintiff to allege the conditions upon which alone the promises of the defendant were to be effective renders the complaint radically insufficient to maintain the action for damages herein sought to be alleged. It seems quite likely that the defect in the complaint arose, not from a want of knowledge how to plead, but from a want of facts to be pleaded. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(119 Cal. 183)

## SMITH v. SMITH. (L. A. 110.)[1]

(Supreme Court of California. April 30, 1897.)

APPEAL—NEW TRIAL—SPECIFICATION OF ERRORS—FINDINGS—CONCLUSIONS OF LAW—DIVORCE—CRUELTY—CONDONATION—RECRIMINATION—EVIDENCE—CORROBORATION—NEWLY-DISCOVERED EVIDENCE.

1. On appeal from an order denying a new trial, where the statement as settled shows a large number of rulings on the admission of evidence, which were excepted to by appellant, only those can be considered that were specified as errors in the specifications upon which the motion for a new trial was heard.

2. The fact that counsel for the respective parties discuss the other rulings in their briefs does not authorize the court to consider them, since the presumption is, under Code Civ. Proc. § 659, subd. 3, that they were disregarded by the court in passing on the motion.

3. Where a divorce is granted on the ground of extreme cruelty, a finding that defendant, by his conduct, impaired plaintiff's health, is not essential, and hence need not be supported by the evidence.

4. A finding that defendant was chargeable with extreme cruelty to his wife (plaintiff) is sustained by evidence that without sufficient provocation, and without reasonable grounds, he called her a whore, a hog, and a hypocrite; charged her with infidelity; and accused her, when she was ill, of having contracted her disease by illicit intercourse, though such illness was not of a character indicating such origin.

5. Under Civ. Code, § 118, providing that where the cause of divorce arises in case of cruelty from successive acts of ill treatment, which may aggregately constitute the offense, cohabitation or passive endurance or conjugal kindness shall not be evidence of condonation, "unless accompanied by an express agreement to condone," it is a question of fact whether acts of cruelty have been condoned.

6. In an action for divorce on the ground of extreme cruelty, where defendant has pleaded extreme cruelty by plaintiff, and condonation of defendant's offense, and there are findings of fact for plaintiff, a conclusion of law that plaintiff is entitled to a decree dissolving the bonds of matrimony, etc., is sufficient to support a judgment of divorce.

7. Though defendant relies on a recriminatory answer, a failure to find on his charges is not reversible error, where, had the court found the several acts and things complained of in the language in which they were alleged by defendant, the findings would not have justified a decree of divorce; Civ. Code, § 122, providing that "recrimination is a showing by defendant of any cause of divorce against plaintiff in bar of plaintiff's cause of divorce."

8. In an action for divorce, the testimony of plaintiff may be corroborated by that of defendant.

9. A motion for new trial on the ground of newly-discovered evidence, consisting of a letter written to defendant by plaintiff, is properly denied, where plaintiff had testified that she kept copies of all the letters she had written defendant, and had them then; since defendant should have requested the production of the copy relied on, and, if it was not produced, asked a postponement, to enable him to find the original.

10. A letter thanking a husband for a present, expressing best wishes for his future, and concluding, "With love, I am yours, M.," is insufficient to show a condonation of his prior acts of cruelty, since it lacks the "express agreement to condone," required by Civ. Code, § 118.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Mary M. Smith against Nelson Smith for divorce. From a judgment in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Isidore B. Dockweiler and J. Brousseau, for appellant. J. G. Rossitor, for respondent.

HAYNES, C. This appeal is from a judgment of divorce granted the plaintiff, and from an order denying defendant's motion for a new trial, based upon the insufficiency of the evidence to justify certain findings and also upon an affidavit of alleged newly-discovered evidence.

The notice of intention to move for a new trial also specified as one of the grounds of said motion: "Errors in law occurring at the trial, and excepted to by the defendant." The statement as settled shows a large number of rulings upon the admission of evidence, which were excepted to by the defendant; but none of these rulings are specified as errors in the specifications upon which the motion for a new trial was heard, and therefore cannot be considered. Code Civ. Proc. § 659; People v. Central Pac. R. Co., 43 Cal. 398; Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137; Bohnert v. Bohnert, 95 Cal. 445, 30 Pac. 590. The fact that counsel for the respective parties discuss these various rulings in their briefs does not authorize this court to consider them. The presumption is that they were disregarded by the court below in passing upon the motion. Code Civ. Proc. § 659, subd. 3; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680.

The ground of divorce alleged by the plaintiff is extreme cruelty. Defendant, in addition to denials, pleaded condonation, and by way of recrimination, but without seeking for a divorce against the plaintiff, charged that the plaintiff was guilty of extreme cruelty towards him.

The principal question made is that the third finding is not justified by the evidence.

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[1] Rehearing granted.

This finding, after reciting the principal probative facts charged in the complaint, and finding that they were committed by defendant, concluded as follows: "And the court finds that defendant, by his conduct towards the plaintiff as aforesaid, did willfully inflict upon plaintiff grievous mental pain and suffering, thereby greatly impairing her health." It is specified that the finding that plaintiff's health was greatly impaired is not justified by the evidence, and a like specification is made to the several findings of probative facts upon which is based the finding that grievous mental pain and suffering were inflicted by the defendant. Whether plaintiff's health was impaired or not it was not necessary to find. If it was in fact greatly impaired, and such impairment was shown to be the result of defendant's treatment, it would tend to characterize such treatment as extreme cruelty; but, in order to justify a finding of extreme cruelty, it is not necessary that such impairment of health is shown to have resulted, nor is it necessary to be alleged in the complaint. Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298. The sufficiency of the finding would not be affected if the words "thereby greatly impairing her health" had been omitted, and therefore we need not inquire whether the evidence justified that part of the finding. As to the essential part of this finding, it is only necessary to say that there was evidence given by and on behalf of the plaintiff to the effect that without sufficient provocation on the part of the plaintiff, and without any reasonable grounds therefor, the defendant called plaintiff a whore, a hog, and a hypocrite; claimed that she was untrue to him; that he accused her, when she was ill, of having contracted her disease by illicit intercourse with other men while she was absent, visiting her parents in Illinois, it not appearing that such illness was of a character indicating such origin; and that it was repeated after he had visited a physician with her, and was told by the doctor that it was not of that character. Defendant, in his answer, admitted that he did at one time charge her with having so contracted said illness, but that that was more than seven years ago. The plaintiff testified, however, that it was repeated on September 12, 1893, about six weeks before this suit was commenced; that defendant then said: "I didn't believe those insinuations at the time, but, because you get so excited now, I believe them." It will be observed that while the defendant, in his answer, admitted that seven years before he did charge the plaintiff with having contracted her illness by illicit intercourse, he did not disavow a present belief in the truth of the charge. Much of the testimony was seriously conflicting; but there was evidence, apparently credible, sufficient to support the finding of extreme cruelty, and which the trial court, charged with the duty of determining the credibility of the witnesses and the weight of the evidence, found to be true. It may here be added that the life of these parties had been unhappy for many years, and there are in the complaint several minor allegations of particular acts of alleged cruelty committed by the husband, and many of these are included in the third finding, and found to be true, and these several findings are attacked and argued by appellant. These need not be specially noticed, since, if not justified by the evidence, it would not affect the sufficiency of the finding in the particulars we have noticed, though we find evidence tending to sustain each of them.

It is also contended that there is no finding upon the plea of condonation tendered by the defendant. The court found that said acts of cruelty have never been condoned by the plaintiff; but this, counsel say, is only a conclusion of law. Counsel are mistaken. Whether an offense has been condoned is a question of fact. Being an operation of the mind, it is evidenced by acts or declarations, but evidence of the existence of a fact has no proper place in a finding. Section 118 of the Civil Code provides: "Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." It might be sufficient to say upon this point that, if the finding in question is a conclusion of law, the allegation which is supposed to have raised the issue is also a conclusion of law, and therefore raised no issue; for though the answer, in connection with the allegation that plaintiff "condoned said alleged charges of extreme cruelty," also alleged that she "freely cohabited with him and restored him to his marital rights," it did not allege that these acts were "accompanied by an express agreement to condone," which the Code makes essential.

Appellant, in his brief, specifies three particulars in which he claims that the findings are insufficient to support the judgment, viz.: That "the conclusions of law in said findings fail to specify (1) that defendant has been guilty of extreme cruelty towards plaintiff; (2) that plaintiff has not been guilty of extreme cruelty towards defendant; and (3) that plaintiff has never condoned the acts of extreme cruelty on the part of the defendant."

The first conclusion of law drawn by the court from the findings is: "That plaintiff is entitled to a decree of this court dissolving the bonds of matrimony heretofore existing between the plaintiff and defendant, and decreeing plaintiff and defendant each to be forever absolutely released from the bonds of matrimony and all the obligations arising therefrom." The remaining conclusions of law relate to the custody of the children, the division of the community property, etc. Such conclusion of law as that above quoted was held sufficient in Murphy v. Snyder, 67 Cal. 451, 8 Pac. 2, and, it may be added, is the more common form in which conclusions of law are stated.

Again, appellant contends that the judgment should be reversed upon the ground that there are no findings upon the charges of extreme cruelty alleged against the plaintiff in defendant's recriminatory answer. Section 122, Civ. Code, is as follows: "Recrimination is a showing by defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." In order to defeat the plaintiff's cause of action, the recriminatory answer must allege facts which, if proved, would authorize or justify a decree of divorce in his favor if he had sued therefor, and the evidence must be sufficient to sustain such of the allegations of fact as would justify the conclusion that they constituted extreme cruelty, as defined by the Civil Code. If this answer had been presented as a complaint for divorce, and the court had found the several acts and things complained of in the language in which they are alleged, we do not think it would have justified a decree of divorce. In White v. White, 82 Cal. 427, 452, 23 Pac. 276, the failure of the trial court to find upon the issue of extreme cruelty pleaded by the defendant in recrimination was considered. The court said: "The court is of opinion that the evidence on this issue was insufficient to have sustained or justified a finding by the court below of extreme cruelty by plaintiff to defendant. * * * As the evidence would not have justified a finding of extreme cruelty on the part of the plaintiff, and as this court would have reversed for such a finding, as not justified by the evidence, if it had been made, it will not reverse for want of such finding, and send the cause back for a finding upon such issue."

On one occasion the plaintiff, under provocation, said, "I don't love you!" while always before protesting that she loved him. Concerning the allegation that she had instructed their children that her authority was paramount, the controversy was, in substance, that she wished to educate them in her religious belief, which was different from his. He testified that "one day she came and sat down by my side, and threw her arms round my neck, and said, 'Nelson, do let me teach the children the Christian religion, and let us get along together.' I couldn't refuse under those circumstances, and I said, 'All right, if we can get along together, I will give up that point;' " and that, while it was still a subject of discussion between them, it was almost entirely dropped during the last two years. Nowhere in his evidence did he make the broad assertion charged in his answer. Concerning the allegation that she had refused to cohabit with him "ever since the 26th day of October, 1893," it is sufficient to say that the complaint in this action was filed the next day after the date mentioned; nor are any instances of the display of temper or passion given, either in said answer or in the evidence, which would be sufficient to support a finding of extreme cruelty. The allegations that plaintiff is extravagant and lazy, and neglected her necessary housework, are negatived in the findings.

A point made by appellant, that should have been noticed in another connection, is that plaintiff's testimony relative to the acts of the defendant which are alleged to constitute cruelty is not corroborated. As to what constitutes corroborating evidence in suits for divorce, see Evans v. Evans, 41 Cal. 103, 108. It is sufficient to say that defendant's testimony, while conflicting with that of the plaintiff in many of the details, yet in the more important matters was corroborative of the plaintiff's testimony. Other testimony might also be referred to. The principal object of the rule is to prevent collusion, and in this case it is clear there is no collusion.

In support of his motion for a new trial, defendant read his affidavit, in which was set out a copy of a letter written to him by the plaintiff, which reads as follows: "At Home, Oct. 2d, '93. Dear Husband: Henry handed me your note this morning. On opening it, I discovered a check for $5 as a present for my birthday. Please accept thanks for same, also for your kind wishes. Please accept my best wishes for your future as well. With love, I am yours, Mollie." It is contended that this letter proves that the husband's acts of cruelty were condoned, and that a new trial should have been granted because of this newly-discovered evidence. The affidavit is "that before and at the trial of the action he searched for and endeavored to find the letters and correspondence between plaintiff and defendant, for the purpose of using them at said trial as evidence therein; that since the said trial I have unexpectedly found a letter," etc., —setting out the above-quoted letter. Upon cross-examination plaintiff testified that she kept copies of all the letters she wrote to the defendant, and had them then. If the defendant had been unable to find letters he desired to use in evidence upon being informed that plaintiff had copies of them he should have requested the production of this letter; and, if it was not produced, he could properly apply to the court for a postponement of the trial for a reasonable time to enable him to find it. But, if it had been produced, it was insufficient to prove condonation, since it does not show "an express agreement to condone," as required by section 118 of the Civil Code. At most, it was only evidence of "conjugal kindness." The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

116 Cal. 632

## EARL FRUIT CO. v. CURTIS et al. (Sac. 173.)

(Supreme Court of California. May 1, 1897.)

CONTRACTS—ACTION FOR BREACH—INSTRUCTIONS.

1. Where defendant set up a counterclaim for plaintiff's breach of a contract to ship and market grapes, and, on the latter's claim that the fruit was unfit for shipment, and that it was agreed that it should not be shipped, contended that such unfitness resulted from plaintiff's refusal to accept the fruit in proper time, the evidence being conflicting, an instruction to find for defendant if plaintiff failed to ship the fruit was erroneous.

2. An instruction that the unfitness of the fruit for shipment was no defense if plaintiff inspected it before making the contract, was erroneous; since defendant suffered no damage if, without plaintiff's fault, the fruit was in such condition that it would have realized nothing; and, if such condition resulted from plaintiff's failure to make timely shipments, defendant's damage would depend on the quality of the fruit at the time it should have been shipped.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by the Earl Fruit Company against Marie A. Curtis and another for breach of contract. From an affirmative judgment for defendants on their counterclaim, and from an order denying a new trial, plaintiff appeals. Reversed.

Frank H. Short, for appellant. Geo. E. Church, for respondents.

TEMPLE, J. This appeal is from the judgment and from an order denying a new trial. Plaintiff sued to recover damages for the alleged breach of a written contract, by the terms of which the defendant Marie A. Curtis agreed to deliver to plaintiff, at its packing house in Fresno, all of her Malaga grapes, not less than 80 tons, then growing on her premises, as soon as they should be in a suitable condition for shipment, or on demand of plaintiff, to be shipped by plaintiff and marketed for said defendant. Plaintiff agreed to furnish boxes, and to pack, ship, and market the fruit promptly on delivery, and to account therefor within 30 days from the delivery of the fruit. It is averred that the plaintiff advanced to defendant on account of the grapes which were to be delivered under the contract $400, and that defendant delivered only 9,218 pounds of grapes, and wholly failed and refused to deliver the residue, to wit, 150,728 pounds. Judgment is demanded for the damages suffered by such failure, for the money advanced, and for some expenses incurred by plaintiff in attempted performance of the contract. For answer the defendant Marie A. Curtis denies the material allegations of the complaint, and as a separate defense avers that the plaintiff refused to receive and ship the grapes according to contract. Said defendant also filed a cross complaint, in which she claimed damages for the failure of plaintiff to receive and ship the grapes. The case was tried by a jury, which found for the said defendant, and assessed her damages at $600.

At the trial the plaintiff attempted to prove that the defendant Marie A. Curtis refused to deliver the grapes, because they were unfit for shipment, and that the grapes were unfit and unsuitable for the Eastern market; and in consequence thereof it was agreed between plaintiff and defendant's agent that they should not be shipped, but that defendant should repay to plaintiff the moneys advanced by it. The defendant denied that she refused to deliver the grapes, or consented that they should not be shipped, and contends that they were suitable for shipment, and that plaintiff wrongfully refused to receive them, and that, if, when plaintiff finally refused to take them, they were unfit, it was solely because plaintiff had refused to accept them until they became overripe. To those questions the evidence was addressed, and, as we have seen, the jury found for the defendant. The evidence is conflicting, but I think it sustains the verdict. A great deal of evidence on both sides was directed to the controversy as to whether the defendant, through her agent, had excused performance upon the part of plaintiff. The contention on the part of plaintiff was that the grapes were unfit for shipment, and that nothing could be realized upon them by shipping, and that defendant's agent agreed to this, and refused to deliver them for shipment. This, if true, was a complete defense to defendant's claim for damages, unless she established her further contention that the unfitness of the grapes for shipment resulted from the fact that they were overripe, and that plaintiff had refused to receive and ship them at the proper time. All this was for the jury. But the court, by its instructions, took the matter from the jury, telling them: "If the plaintiffs failed to pack the grapes and ship them as they had agreed to ship them, then it is your duty to find for the defendants in this case, and to find for the defendants in any sum that you may find from the evidence they have been damaged by reason of the failure of the plaintiffs to comply with their contract." The respondent replies to the charge that this was prejudicial error by saying that Wicks was not the agent of Marie A. Curtis, and there was, therefore, no consent on the part of defendant that plaintiff need not ship the grapes. But, while the evidence upon this subject was conflicting, two witnesses at least testified that Mrs. Curtis herself referred plaintiff's agent to Wicks as the person authorized to act for her. The court was therefore not authorized to assume that Wicks was without authority. This instruction ignored this special defense to defendant's counterclaim, and was therefore erroneous.

The court also gave the following instruction: "If you find further from the evidence, gentlemen, that the agents of the plaintiff in this case, before entering into the contract with the defendant, inspected the grapes themselves, then it is no defense for the plaintiffs to say that the grapes were not fit to ship. If they inspected the grapes before they entered into the contract, they cannot be heard to say anything about the quality of the grapes." I am at a loss to understand upon what theory defendant asked and obtained this instruction. There was no purchase by plaintiff, and the doctrine of caveat emptor had no application. Admitting that plaintiff was guilty of a breach of the contract, in that it wrongfully refused to accept and ship the grapes, the question still remained as to the extent of the defendant's damage because of such breach. If, without fault of the plaintiff, the grapes were in such condition that they would have realized nothing if shipped, the defendant has suffered no damage. Defendant was not entitled to the price which could have been realized by the shipment of Malaga grapes of a fair quality, without proof that these grapes were of that quality; and it was open to the plaintiff to show, if it could, that defendant's grapes were of an inferior quality. If the plaintiff neglected to make timely shipments, and is without excuse in so doing, this could be taken into consideration, and the quality of the grapes determined by their condition when they should have been shipped. Upon all these questions there was much evidence. The errors pointed out were not cured by any other instructions. Judgment and order reversed, and new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

116 Cal. 637

## In re REDFIELD'S ESTATE. (S. F. 59.)

(Supreme Court of California. May 4, 1897.)

WILLS—CONTEST—INSANE DELUSIONS—COMPETENCY OF PHYSICIAN AS WITNESS—PLEADING—AMENDMENT—REVIEW.

1. Sufficiency of a petition contesting a will cannot be considered on appeal from denial of new trial.

2. It is discretionary to refuse amendment of answer during trial to raise an estoppel against contestant by reason of acceptance of benefits under the will.

3. Statement of witness that he received no information about testatrix except as a physician to enable him to take care of her, standing alone, justifies the inference that this knowledge was necessary to enable him "to prescribe or act" for her, so as to render him incompetent under Code Civ. Proc. § 1881, to testify in regard to it.

4. A will is not invalidated by delusions of testatrix which do not relate to the persons or objects affected by it.

5. An opinion which is merely simulated and but a fleeting vagary is not an insane delusion.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Contest of will of Mary A. Redfield, deceased, by Mary Bowden. Verdict for contestant, and new trial denied; and Winslow G. Hall, executor, and others, appeal. Reversed.

Chickering, Thomas & Gregory, R. E. Houghton, and Van Ness & Redman, for appellants. Reddy, Campbell & Metson, for respondent.

PER CURIAM. When this cause was pending in department an opinion was prepared by Commissioner BRITT, and concurred in by Commissioners VANCLIEF and HAYNES. The case was subsequently ordered into bank. After a full hearing by the court, and a careful examination of the entire case, we are satisfied that we cannot give better expression of our views than by adopting Commissioner BRITT'S opinion, which we accordingly do; and, for the reasons therein stated, the order appealed from is reversed, and cause remanded for a new trial.

The following is Commissioner BRITT'S opinion:

"Mary A. Redfield, late of the city and county of San Francisco, died of pulmonary consumption October 4, 1891, being then aged about 50 years. She left a will, executed September 14th next previous, which was admitted to probate on October 21, 1891. By its terms she disposed of the whole of her estate, which was of the value of $73,000, or thereabouts. Her maiden name was Bowden. She was married in 1870 to one Francis S. Redfield, who died in 1881, and from him she derived the property which, with its accretions, was the estate disposed of by said will. The legacies given by the terms of the will were as follows: To the brothers of the testatrix, William, Joseph, and Andrew Bowden, $100 each; to her sister, Ellen Simmons, $3,000; to certain children of said sister, sums amounting to $4,250; to her mother, Mary Bowden, $80 per month during her life, the executor being required to retain in his hands upon distribution of the estate sufficient property to produce an income of that monthly sum, and to pay the same 'to my sister Ellen Simmons, who is enjoined to expend the whole of said amount in the support and maintenance of our mother'; to 10 named relatives of her deceased husband, sums aggregating $4,500; and the residue was given to her nephew, one Walter E. Johnson, upon condition that he assume, 'by proper legal process, the name of Francis E. Redfield,' which condition he complied with. One Winslow G. Hall was named executor in the will, and he received letters accordingly. On October 6, 1892, a petition was filed on behalf of testatrix's mother and heir at law, said Mary Bowden, praying the revocation of the probate of the will upon various grounds, which are here reduced to these, viz. that the deceased was not of sound and disposing mind when the will was executed, and that its execution was procured through undue influence exerted upon her by the residuary legatee and the executor Hall. An answer was filed by them, and also, separately, by the relatives of the husband of the deceased named as legatees in the will. Special issues were submitted to a jury, and a verdict was returned in contestant's favor upon all of them. The court thereupon adjudged said instrument not to be the last will and testament of said deceased, and revoked the probate thereof. The appeal is from an order denying appellants' motion for a new trial.

"The contesting petition proceeded thus: 'Now comes Mary Bowden, * * * by her guardian, Joseph Bowden, and contests and objects to the supposed and pretended will of Mary A. Redfield, deceased, * * * and for her grounds of contest avers * * * (1) that your petitioner is the mother of said deceased,' etc. It is subscribed, not by guardian, but by 'Attorneys for Contestant.' It is now argued that the contest is subject to the rules governing civil actions (Code Civ. Proc. § 1716; In re Flint's Estate, 100 Cal. 400, 34 Pac. 863); that the petition is that of Joseph Bowden; and that it does not state facts sufficient to constitute a cause of action in his favor as an individual, because he has no interest in the estate (Code Civ. Proc. § 1327; In re Sanborn's Estate, 98 Cal. 103, 32 Pac. 865), nor as guardian, because it is barren of averment to show his capacity as such. But plainly the petition is that of Mary Bowden. It contains no allegation that she is under disability, nor that a guardian has been appointed for her. If the manner in which the petition is prefaced created any uncertainty as to her capacity to institute the contest, the defect is yet not assignable as error on appeal from the order denying a new trial. Evans v. Paige, 102 Cal. 132, 36 Pac. 406, and cases cited. Near the close of the trial the respondents below asked leave to amend their answers by the addition of allegations showing that the contestant had received regularly from the executor the sum of $80 per month bequeathed to her by the terms of the will; this for the purpose of raising an estoppel against contestant, founded on the acceptance of benefits under the will. Hamblett v. Hamblett, 6 N. H. 333; Hyde v. Baldwin, 17 Pick. 308; Morrison v. Bowman, 29 Cal. 337. Admitting that the rule invoked should have any application in this case, where the contestant is the sole heir of the deceased, and therefore entitled to the whole estate if the will is overthrown,—a proposition which her counsel deny,—it was yet discretionary with the court to refuse the amendment, and we cannot say that its discretion was abused. There was no showing why the matter was not pleaded earlier. A physician, Dr. McNutt, attended the deceased in her last illness, being called early in September, 1891. He testified that he treated her for consumption, and not for any mental disorder; that he got no information about her condition, either physical or mental, except as a physician to enable him to take care of her. Proponents then put to him the question whether her mind was affected. Contestant objected on the ground that the information sought was privileged, and the objection was sustained by the court. 'A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.' Code Civ. Proc. § 1881. The question is whether the knowledge of the mental condition of Mrs. Redfield acquired by the physician 'was necessary to enable him to prescribe or act' for her in the treatment of her disease. This was a matter of fact to be determined preliminarily by the judge of the trial court; and upon the information before him we cannot say that his conclusion was erroneous. The sole care of her had by the physician being in the treatment of the disease, his statement that he received no information about her except as a physician to enable him to take such care, standing unqualified as it did, justified the inference that this knowledge was necessary to enable him 'to prescribe or act' for her. See, in this connection, In re Flint's Estate, 100 Cal. 391, 34 Pac. 863; Edington v. Insurance Co., 77 N. Y. 564; Hoyt v. Hoyt, 112 N. Y. 493, 20 N. E. 402; Steele v. Ward, 30 Hun, 555; Staunton v. Parker, 19 Hun, 55. As to the verdict affirming the charge that the will was procured through undue influence exerted by Hall, the executor, and Johnson, the residuary legatee, it is enough to say that the evidence wholly fails to sustain it, being materially weaker in that regard than that adduced to justify the same charge in the recent cases of Herwick v. Langford, 41 Pac. 701, and In re McDevitt, 95 Cal. 17, 30 Pac. 101, in each of which this court held the verdict to be without support, and not materially stronger than that held insufficient in Re Carpenter's Estate, 94 Cal. 406, 29 Pac. 1101.

"The serious question in the case is whether the evidence justifies the verdict that the deceased was of unsound mind when she executed the will. We approach this, mindful that any substantial conflict in the evidence must be determined here in contestant's favor; that the court below has signified its satisfaction with the conclusions of the jury; and that its ruling on the result of the facts in evidence before it ought not to be reversed unless manifestly infected with error. The deceased occupied a house, owned by her, situated on Taylor street, between Union and Filbert streets, in San Francisco.

Her property consisted mainly of real estate and of interests in certain shipping. Her husband had owned shares in several vessels jointly with Capt. Hall, the executor named in this will, who was his close friend. After her husband's death, Hall had the principal oversight of her interests in the vessels, and accounted to her for her share of the receipts therefrom. Her income was $5,000 per year or more. When the will was executed, and for some years previously, her household included, as nearly as we can make out, besides herself, her mother, aged at that date about 83 years, Walter E. Johnson, the residuary legatee, and a servant. A niece, Nellie L. Simmons, had also for the space of 11 years been accustomed to sleep and spend a great (perhaps the greater) part of the time at her house, being her nurse in her last illness. Said Johnson's mother was the sister of the testatrix. She died in November, 1881. Previously, in 1877, Johnson being then a lad about 11 years old, and his father long since deceased, he was taken into the home of Mrs. Redfield and her husband, and lived with them until Redfield died. After that he remained with his aunt, the testatrix, being supported by her, and in return rendering services of rather miscellaneous character. He says: 'I worked around the property [her houses], and took as good care of it as I knew how, and did whatever I could around there.' Another witness testified that Johnson did 'what he could to help her, working around the house, keeping the place in repair, helping, and looking out for things.' Mrs. Simmons, sister of the testatrix, lived close by. She and her daughters were on terms of intimacy with the testatrix.

"We state the more important parts of the evidence for contestant as briefly as may be done consistently with clearness. Said Nellie L. Simmons testified that Mrs. Redfield was sick for a month before her death, sometimes sitting up for a few hours and sometimes in bed; that, in her judgment, testatrix was not of sound mind when the will was executed. 'My reasons were because she acted so. She would sit for hours at a time, and even for a day, and stare into vacancy with her mouth open. At other times, she imagined that the neighbors were peering at her and trying to see into her affairs, when they were going about their own work. She would lock the doors to all the rooms and carry the key in her pocket. She would remove different articles of furniture from different rooms. She would take one article from one room and put it in another. She took the wardrobe from one room and placed it in another because she did not want the sun to strike on it, when the sun didn't strike on it at all. She removed the hatrack from the hall and put it in the girl's room for fear of scratching the paint. She took the books from the bookcase that was always locked. She acted as if she was haunted. She slept in most all the rooms of the house; took opium pills to produce sleep,—took them for about three years, off and on; was afraid to go down Filbert street for fear the groceryman's wife would see her, and she would go up Taylor street, and that was a steep hill. She gave no reason for not wishing the groceryman's wife to see her; it was just her imagination. She would lock the doors for no cause whatever,—parlors, bedroom doors, and the library door. * * * During her last illness, and prior to the execution of this will, I noticed her condition particularly. At times she was not able to conduct and carry on a connected conversation, and at times she was. Sometimes she would commence to converse, and before she finished what she was talking on, she would go off into a doze, and if we aroused her she would not remember what she had been talking about. This was quite frequent during her last sickness. Her face had a far-away look, as if her mind was affected, staring far away. If she was spoken to sharply while she had that look, it would startle her, and that would bring her back to her apparent self, at times. The will was made September 14th. Prior to this time she had been irritable, and sometimes got excited at the least thing. She told me that she had packed her dishes up,—she was afraid of having them broken,—when she had not done so. She said she was going to move. I investigated, and there was nothing packed at all. Said she had to go to Piedmont, and was going to stay there, while she had nothing at all prepared to go. Then said she was going to move to Berkeley, and she spoke of moving to the Mission, and of taking a room a block away on Filbert street. Said there wasn't a room in the house she could get a fire in or any heat. There could have been a fire in the library, in her bedroom, or the girl's room, or the room I slept in. She knew there were appliances for fire. The house has eleven rooms. She very seldom went out; was often silent, and during the latter part of her life quite frequently sat looking into vacancy. It was September 1, 1891, that she was taken sick. She had no company to speak of after January, 1881. When my mother or other members of her family went to see her, she would sometimes act all right, and sometimes she would sit and have hardly anything to say. She seldom visited our house; she never visited her other relatives at all; had two brothers here whom she didn't visit. At times she was very friendly with Ned [Johnson, the residuary legatee], and at times unfriendly. Sometimes she would be cross, and then very fine. She often said she could not afford this and that; she didn't have enough nourishing food in the circumstances she was in; would say she could not afford it. I never spoke to Ned in relation to my aunt's want of nourishing food. My grandmother's mind has been affected eight or nine years. One of my un-cles has shown peculiarities like those of Mrs. Redfield.' Mrs. Bruce, also a daughter of Mrs. Simmons, testified that on one occasion Mrs. Redfield said to her, 'Well, your mother has got just as much money and more than I have; she has a right to take care of grandmother,' meaning the contestant; that she, the witness, replied, 'You know you are not telling the truth; you know you have more money than ma, and can afford to take care of grandmother;' that in fact Mrs. Simmons was poor,—'just had the house we lived in.' That she saw testatrix during her last illness. Thought she looked like an imbecile. She said she was getting ready to go to the country, and had a quantity of clothing bought which she never used. Before her last sickness she would not allow gas to be burned in the house; it cost too much. 'When sleeping there we were obliged to go to our rooms with candles.' The majority of the inside rooms were kept locked, she giving as a reason that she did not want the servant girl going in when she was not there. Was easily enraged; would storm about trifles. Joseph Bowden, brother of the deceased, testified: That in his opinion she had not been of sound mind for the last 30 years. That their mother was twice confined in an insane asylum about the years 1842–43. That his father had told him that his mother's father became insane. That a sister of deceased, Johnson's mother, died while insane and confined in the asylum at Napa. That deceased thought a certain physician who was going around the neighborhood a good deal was trying to get hold of her property, when he was merely courting a girl whom he afterwards married. That his nieces got up a surprise party for Mrs. Redfield, and this made her angry. Said she didn't want anybody to come there; they destroyed her carpets and the paper on the wall; said she was sorry she had discharged a kitchen girl for playing on the piano in her absence; imagined everybody was interested in her affairs for the purpose of taking advantage of her; never had any company; often complained about having to keep Johnson when he was a small boy; complained of the expense and trouble of keeping her mother when the latter had had a fit of aberration of mind; had said she knew everybody was trying to get the best of her. She was married in 1870. On the first New Year's day after her marriage her husband prepared to receive visitors. He went out, and then she went to her father's house and stayed all day, and left the Chinaman to entertain the callers. Mrs. Clark, another daughter of Mrs. Simmons, testified: That she slept with her aunt from 1881 to 1886, because she said she didn't like to sleep alone after her husband's death. Judged her to have been of unsound mind during last two or three years of her life. At times she had hardly proper clothing Was afraid of her neighbors, especially one or two of them. In August before her death she refused to buy a glass of jelly at 50 cents, saying she was not able to pay it. When spoken to about her clothing she would say, 'Probably next month I will have more money to get it.' She suffered from asthma. A Mrs. Russell testified: That she had been much at Mrs. Redfield's house, —with her nieces, it appears. Thought she was the most peculiar person she ever met; thinks she could not have been of sound mind. 'She would make you take off your shoes to go upstairs, for fear of wearing out the carpet. Have known her to sleep in the library very often, on a cot, and in all the rooms in the house. She gave as the reason for going around she could not sleep.' There was other testimony for contestant cumulative of much of that above detailed, but nothing adding materially to its effect. Several physicians testified, upon hypothetical questions put to them, that they considered the subject of the interrogatories to be of unsound mind.

"On the other hand, we observe first the method with which deceased set about making the will. Said Nellie Simmons, testifying for contestant, stated: 'A little after the 1st of September I knew my aunt contemplated making a will. She said to me if she knew she was going to die she wanted to put her affairs in shape. She wanted me to ask the doctor first.' She did ask the doctor, and reported to her on September 12th that her illness was probably fatal. Mrs. Redfield at once sent for Capt. Hall. It further appears, without conflict, that when Hall came she told him she desired to make a will, and dictated to him notes of the same, of which he made memoranda for the information of an attorney. She said that she wanted to make Johnson 'her heir,' and wanted him to take the name of Redfield. She then gave him from memory the names of the other persons she desired to make legatees, and stated the amounts she wished to give them, respectively. Stated she was not on good terms with two of her brothers, and, as reason for not giving more to a third, that she did not know whether he was divorced. The will was prepared from these memoranda by Mr. Warren Olney, an attorney at law. When the first draft was presented to her she caused some alterations to be made, increasing the legacy to Nellie Simmons from $1,000 to $2,000, and changing it in some other particulars. It was finally executed at her house on the afternoon of September 14th, Mr. Olney and one Samuel Foster being the subscribing witnesses. The testimony of both of them on the trial was that she seemed to be perfectly sane, and that they so considered her. The former, a lawyer of many years' standing, testified: 'She did not look to me as if she were going to die very soon, and she talked with perfect intelligence. She took the will and commenced to read, and then spoke to me and said: "It is not necessary for me to read it aloud, is it?" I said, "Certainly not." She read it through carefully. I asked her if that was in accordance with her wishes. She said it was. * * * That is the only time that I ever saw her, * * * I paid particular attention to Mrs. Redfield at that time. I knew she was sick, and I wanted to be satisfied that this will was not to be executed under any improper circumstances.' Miss Simmons and her sister, who were with their aunt on that day, say that sometimes she seemed rational and sometimes not. Two days before, she gave to Mrs. Simmons her diamonds, watch and chain, ring, and pin. Throughout the affair of the preparation and execution of the will we find no evidence of word or act on the part of the testatrix indicative of a deranged mind.

"But it is contended that her mind was affected with 'general' or 'settled' insanity, and hence, presumptively, it was unsound when she made the will. Opinions of witnesses aside, there are several broad facts which do not consist well with that view. She had been administratrix of her husband's estate. The property he left to her increased under her charge from a valuation of some $35,000 to about double that amount. So far as shown, no one asserted her to be insane while she was yet alive. She had the care of her aged and imbecile mother, apparently without protest that she was incompetent for that purpose from any of those who now testify their opinion that she was insane. She kept with her own hand regular accounts of her disbursements and various other transactions for a series of years commencing in 1885 and ending but a few months before her death. These fill several hundred pages of the printed transcript in the case. No doubt she was penurious; yet her brother, who was poor, and who testified his belief that she was of unsound mind, assigning her shortsighted economy among the reasons, had nevertheless occupied one of her houses free of rent for seven years before her death. We note also in her said accounts that she was accustomed to make cash gifts varying from $2.50 to $20 at each Christmas season to several young relatives, and that those to Johnson usually greatly exceeded any of the others; tending to show that her disposition to favor him especially did not arise as a sudden caprice when the will was made. The executor and others who knew her well gave testimony of their belief that she was sane, and the grounds thereof; and most of her eccentricities of conduct, apparent in the summary we have given, take a quite rational coloring from other evidence in the case. But without entering into a consideration of this, and allowing that to support the verdict the whole evidence must be viewed in the phase least favorable to her sanity, it tends to show that she exhibited peculiarities of mind in the following particulars: (1) Parsimony; (2) aversion to society; (3) irritability; (4) unfounded fancies,—delusions. As to the first three traits, we do not understand contestant to maintain that they have greater effect in the case than to accentuate the inference of unsoundness founded on other circumstances. It is commonly held that, aside from those cases of dementia where the patient has not mental power to form any conceptions, whether true or false, of the relations of things, the true test of insanity is mental delusion; that if a person persistently believes supposed facts which have no real existence, and against all evidence and probability conducts himself upon the assumption of their existence, he is as to that belief under a morbid delusion, and delusion in that sense is insanity. Society v. Hopper, 33 N. Y. 624. But before a will can be rejected on that account it must appear that 'its dispository provisions were or might have been caused or affected by the delusion.' Id. 625. Delusions which are not operative in the testamentary act—do not relate to the persons or objects affected by it—are not permitted to invalidate it. Now, in the present instance the illusions of the testatrix had no relation to any person or object affected by the will. That she falsely imagined herself to have made preparations for a journey, or that she could get no fire or heat in any of her rooms, or that her carpets or walls would be marred by slight usage, or that her neighbors were prying into her affairs, or that the doctor paying court to a young woman of the vicinity had designs upon her property, or all of these together, fall short of showing that she was under any delusion respecting her relations with her mother or other kindred, or respecting her property or the distribution of it provided by the will. Thus, for example, where a testator imagined that but one-half of his body was alive, that he breathed with one lung only, and that but one-half of his heart performed its functions, etc., dosed himself in a most extraordinary manner, and finally committed suicide, the provisions of his will being unaffected by the delusion, it was upheld. Hollinger v. Syms, 37 N. J. Eq. 221. Cf. Field v. Shorb, 99 Cal. 661, 34 Pac. 504; In re Spencer, 96 Cal. 448, 31 Pac. 453; Banks v. Goodfellow, L. R. 5 Q. B. 549; Rice v. Rice, 53 Mich. 432, 19 N. W. 132; Society v. Hopper, 33 N. Y. 619; Thompson v. Kyner, 65 Pa. St. 378; In re Vedder, 6 Dem. Sur. 92, and numerous cases there cited. In the Vedder Case some of the reported extravagances in speech and act of the testatrix make those of Mrs. Redfield seem scarcely irregular in comparison; yet the will was admitted to probate.

"Counsel say, however, that 'this will was made under two false impressions which went to the very root of its provisions: that her sister was wealthy, and that she herself was poor.' The chief support for this contention, apart from the penurious habits of the testatrix, seems to be her single remark, related by Mrs. Bruce, daughter of the sister referred to

'Well, your mother has got just as much money and more than I have; she has a right to take care of grandmother.' But the whole case is inconsistent with the existence of any such fixed belief in the mind of the deceased. That such an opinion shall amount to an insane delusion, it must be a real belief,—not simulated,—and must be persistent, not a fleeting vagary. The facts are that the grandmother lived with Mrs. Redfield, and had no support from any other quarter, so far as appears. By the terms of the will testatrix gave her sister $3,000, and her mother $80 per month during her life, directing the retention of sufficient property in the hands of the executor as trustee to produce that amount. This, allowing for a return of 6 per cent., would require $16,000. Other legacies amounted to near $10,000. After these came the provision for Johnson, whom she designed to 'make her heir.' In view of death, she gave to her sister her diamonds, watch and chain, ring, and pin. Within a year preceding she had fixed a price at which she authorized the sale of certain real property at above $26,000. Obviously, we think, she was not insensible of the amount of her property, however close she may have been in its expenditure, nor of the claims of her sister upon her bounty. Besides, the reply made by the witness to the remark of Mrs. Redfield quoted above indicates that her statement was not considered expressive of any rooted conviction: 'You know you are not telling the truth,' etc. Moreover, it is clear, even if the testatrix had the insane delusion that her sister was rich, that this would be ground for rejecting the will. The sister is not an heir, and in contemplation of law would receive no benefit from the intestacy of deceased; and it has been held that a court will not refuse probate to a will 'unless by so doing the person concerning whom the delusion existed will be benefited.' Stackhouse v. Horton, 15 N. J. Eq. 202.

"We do not overlook the circumstance that there was a disposition towards insanity in the family of the deceased. But not all, nor a majority, of its members were of unsound mind. It cannot be assumed that she inherited the insane and not the sane tendencies of her family. Her mother's aberration seems to have recurred only at long intervals. Besides, there is no evidence that any of her insane relations were affected as she was. Much of the expert testimony related to the supposed 'phthisical insanity' of the deceased, but it did not appear that any other of her family had phthisis. It was in evidence for contestant that a brother of deceased had exhibited peculiarities similar to hers; yet it appears that he testified at the trial, and we find no charge that he was insane. Altogether, the evidence of the effect of heredity is so inconclusive as to add very little to the case made by contestant. Busw. Insan. §§ 235, 236, and cases cited.

"As to the testimony of medical experts, the following remarks of the prerogative court of New Jersey seem judicious: 'The abstract opinion of any witness, medical or of any other profession, is not of any importance. No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so; but whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property is a question which the court must determine upon its own responsibility. It * * * is to be ascertained by the court by the application of certain rules of law, in the exercise of a sound discretion regulated by these rules. The opinion of a witness must be brought to the test of facts, that the court may judge what estimate the opinion is entitled to. It is proper and legal to ask a witness his opinion as to the mental capacity of the individual to discharge the duty in question. The court will judge of * * * the proper weight to be given to his opinion from the facts and circumstances upon which he founds his opinion.' Stackhouse v. Horton, 15 N. J. Eq. 208. It was the province and duty of the jury to draw the inference of fact from the evidence before them, regulated by the rules of law stated to them by the court; being assisted but not superseded in that function by the opinions of experts. It is equally the duty of the court to determine whether there is any satisfactory evidence to justify the conclusion they reached. We find none, and therefore recommend that the order be reversed, and the cause remanded for a new trial.

"We concur: VANCLIEF, C.; HAYNES, C."

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(116 Cal. 656)

## PEOPLE v. AH NOON et al. (Cr. 246.)

(Supreme Court of California. May 6, 1897.)

CRIMINAL LAW—NEW TRIAL.

Refusal of a new trial on newly-discovered evidence that would serve the purpose only of impeaching a witness will not be disturbed, except on a very exceptional showing.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Ah Noon and others appeal from a conviction of robbery and denial of new trial. Affirmed.

Graves & Graves and Venable & Goodchild, for appellants. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, for the People.

PER CURIAM. The defendants have been convicted of the crime of robbery, and appeal from a judgment and order denying a motion for a new trial. A new trial is claimed upon the ground of newly-discovered evidence. This purported evidence, as shown by affidavits, consists of statements made by the prosecuting witness to various Chinese after the alleged robbery. These statements are to the effect that he (the prosecuting witness) had not been robbed by defendants. Upon a second trial of the case such evidence would only be admissible as tending to impeach the testimony of the witness as to the facts of the robbery. It is not possible that it could be material and relevant for any other purpose. It would have to be a very exceptional showing that would move this court to order a new trial upon newly-discovered evidence which would only serve the purpose of impeaching a witness, and the showing here made is not such a one. Taking into consideration the counter affidavits introduced upon the hearing of the motion, the showing made is not only very unsatisfactory, but inherently weak, and in no sense such as to demand a new trial of the case. Various exceptions were taken to the rulings of the court as to the admission and rejection of certain evidence, but upon consideration of those exceptions we find nothing demanding a reversal of the judgment or a new trial. For the foregoing reasons, the judgment and order are affirmed.

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116 Cal. 658

## PEOPLE v. BOYLE. (Cr. 235.)

(Supreme Court of California. May 6, 1897.)

SODOMY—WHAT IS NOT.

The crime of sodomy is not committed where the act is in a child's mouth.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Edward Boyle was convicted of a crime, and appeals. Reversed.

J. H. Boyer, for appellant. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, for the People.

PER CURIAM. The defendant was convicted of a felony, technically designated in the information as an assault with intent to commit the infamous crime against nature. He appeals from the judgment and order denying his motion for a new trial. The facts of the case do not make out the offense of which the defendant has been convicted. It has been so held in at least two cases. See Prindle v. State (Tex. Cr. App.) 21 S. W. 360; 1 Whart. Cr. Law, § 575. Judgment and order reversed, and cause remanded.

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116 Cal. 660

## WESTBAY v. GRAY et al. (Sac. 198.)

(Supreme Court of California. May 6, 1897.)

PLEADING — SUFFICIENCY OF DENIAL — ADJUDICATION—DISMISSAL OF ACTION—COLLATERAL ATTACK—ESTOPPEL—WAIVER IN PLEADING.

1. Where a complaint in an action to foreclose a mortgage alleged that no part of the sum secured had been paid, except certain interest and a further sum set out, an answer by which defendants "deny that no part of the principal sum mentioned in said promissory note has been paid, and deny that the whole of said principal and interest has not been paid," is insufficient to require proof of nonpayment by plaintiff.

2. Under Code Civ. Proc. § 581, providing that an action may be dismissed by plaintiff at any time before trial, on payment of costs, where a case has been tried and submitted to the court but the order of submission has been set aside and leave given to amend the pleadings, the court may, on application of plaintiff, enter a judgment of dismissal without prejudice, and such judgment will not bar a new action.

3. A judgment of dismissal cannot be attacked collaterally.

4. The fact that a plaintiff alleged the presentation of the claim sued on to the administrator of the debtor, but failed to sustain the allegation by proof, and dismissed his action, does not estop him to thereafter properly present the claim for allowance.

5. The waiver, in a complaint against an administrator to foreclose a mortgage, of any recourse against the estate for deficiency, is only effectual in that action, and, on a dismissal, is no longer binding on the plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by W. W. Westbay against W. W. Gray, administrator of the estate of W. C. Turner, deceased, and others, for the foreclosure of a mortgage. Judgment for plaintiff, from which, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

James F. Peck, for appellants. F. H. Gould and T. C. Law, for respondent.

SEARLS, C. Action to foreclose a mortgage executed by W. C. Turner, deceased, to secure his promissory note for $500 and interest, dated March 5, 1890. W. W. Gray is the administrator of the estate of Turner, and the other defendants are his heirs, and no personal judgment was asked or had against them. The note and mortgage were given to E. J. McKain, and by him indorsed and assigned to W. W. Westbay, the plaintiff herein. The cause was tried by the court, and a decree entered foreclosing the mortgage. Defendant W. W. Gray, the administrator of the estate of W. C. Turner, deceased, appeals from the decree, and from an order denying his motion for a new trial.

The first point made by appellant for reversal is that no evidence was introduced at the trial to show that the promissory note, the payment of which the mortgage was given to secure, had not been paid. The sworn complaint averred "that no part of the principal sum or interest mentioned in said promissory note has been paid, save and except the sum of $30 interest paid thereon November 18, 1890, and the sum of $30 interest paid thereon April 27, 1891, and the sum of $97.50 paid on October 6, 1893." The only denials of the allegations of nonpayment in the answer are as follows: "And deny that no part of the principal sum mentioned in said promissory note has been paid, and deny that the whole of said principal and interest has not been paid." Manifestly, this is not a sufficient denial of the allegations of the complaint to call for proof on the part of plaintiff. If some of the principal of the note was paid, defendant could truthfully swear to the denials of his answer. The complaint avers that two certain sums of $30 each, as interest, were paid. It then avers that $97.50 was paid, but does not aver, as in the case of the other payments, that it was on account of interest. The fair inference is—judging from the language used—that the last-named sum was paid on account of principal. The denial might truthfully have been made in its present form if any portion of the principal sum, however small, had been paid. Again, the denial "that the whole of said principal sum and interest has not been paid" is bad. More v. Del Valle, 28 Cal. 170; Doll v. Good, 38 Cal. 287; Hook v. White, 36 Cal. 299; Fish v. Redington, 31 Cal. 185. The denials of nonpayment are evasive, and as was said in Marsters v. Lash, 61 Cal. 622, are no denials at all, within the purview of the Code of Civil Procedure. These remarks apply to both the attempted denials of nonpayment. It follows that the contention of appellants cannot be upheld.

2. To the correct understanding of the other points made by learned counsel for appellants a brief history of the case and of certain antecedent transactions is essential. This action was brought February 6, 1895, and, as hereinbefore stated, is to foreclose a mortgage. The complaint avers the presentation of the note and mortgage on January 5, 1895, to W. W. Gray, the administrator of the mortgagor, for allowance, and his failure for 10 days to allow or reject the same. In other respects the complaint is in the usual form. The answer, in addition to its denials, sets up two defenses to the action: (1) That plaintiff had commenced a prior action for the same cause on, to wit, May 7, 1894, which action on the 2d day of January, 1895, after the trial thereof, on motion of plaintiff, was by the court dismissed; that said judgment of dismissal has not been modified or set aside, and is now in full force and effect. (2) That plaintiff's cause of action herein is barred by the provisions of section 1498 of the Code of Civil Procedure, and by section 1493 of the same Code. The court found against both these defenses, and that all the allegations of the complaint were true. The propriety of the findings against the defenses of defendant is the question for consideration. The evidence in favor of these defenses tended to show that on the 17th day of May, 1894, the plaintiff herein filed a complaint in the superior court in and for the county of Merced against the defendant, administrator herein, to recover judgment upon the same cause of action set out in this action. The plaintiff in his sworn complaint averred that his claim had been duly presented to the administrator on or about May 1, 1894, and a copy of the claim was attached to the complaint as an exhibit, and made a part thereof. It was further averred that more than 10 days had elapsed since the claim was presented, and, as plaintiff was informed and believed, the administrator had neglected to indorse either his allowance or rejection of the claim thereon. The answer of the administrator denied that the claim was ever presented to him. This answer was sworn to by defendant W. W. Gray, administrator. The only other evidence on this subject is that given by said Gray, wherein, after speaking of the presenting of the claim January 5, 1895, and upon being asked if a claim on the same note and mortgage had been previously presented to him, he answered: "No; I think I got the claim, I think some time in May last year." The evidence showed further that such first cause was brought to trial, and, after being submitted to the court, plaintiff moved, upon notice, for leave to amend his complaint so as to conform to the facts as proven. Upon a hearing the court set aside the order of submission, and granted plaintiff leave to file an amended complaint within five days, with leave to defendants to answer thereto in 10 days after notice thereof. Plaintiff filed his amended complaint, in which he omitted all averment of presentation of his claim to the administrator, waived all claim for attorneys' fees, and all recourse against any property of the estate except the mortgaged premises. Thereafter, and on the 2d day of January, 1895, the court, on motion of plaintiff, entered a judgment of dismissal of the action, in the following words: "W. W. Westbay vs. W. W. Gray, Administrator of the Estate of W. C. Turner, Deceased, et al. The plaintiff having dismissed this said action, judgment of dismissal thereof is hereby entered, without prejudice to the commencement of another action. [Signed] J. G. Elliott, Clerk." We may add that thereafter, and in due time, plaintiff presented his claim to the administrator, who failed for 10 days to allow the same, whereupon this action was brought, in which plaintiff seeks to hold the estate for any deficiency that may remain after exhausting the mortgaged property, and to recover an attorney's fee, as provided in the mortgage, etc. Upon the findings and this evidence, appellant claims in favor of reversal: (1) The dismissal of the first action after trial and submission to the court for decision is a bar to the present action. (2) That the commencement of the first action was an election by plaintiff that the administrator had rejected the claim presented, and that, having made such election, plaintiff cannot disregard it and present his claim anew, and institute a second suit. (3) That having amended his complaint in the first action, waiving recourse against the estate except as to the mortgaged property, plaintiff cannot afterwards dismiss his suit, present his claim, and bring another action seeking foreclosure and a deficiency judgment. (4) That the second action was not brought within the time provided by section

1498 of the Code of Civil Procedure, and is therefore barred. The foregoing points are in some instances based upon an assumption of facts not found in the findings or supported by the evidence. We will, when necessary, notice these discrepancies as we proceed.

(1) Was the dismissal of the first action a bar to the present one? It was not a judgment on the merits, and, if a bar to the case in hand, it must be because it was, in effect, a retraxit. A retraxit occurred at common law when a plaintiff came into court in person, and voluntarily renounced his suit or cause of action; and when this was done, and a judgment was entered in favor of defendant, the plaintiff's cause of action was forever gone. 3 Bl. Comm. 296. Under our laws this authority will be deemed to have been conferred upon the attorney of record in a cause. Board of Com'rs v. Younger, 29 Cal. 147; Merritt v. Campbell, 47 Cal. 542. In the case last cited the former cause had been, by agreement of the parties, dismissed, the judgment reading as follows: "By agreement it is ordered by the court that the cause be dismissed, each party paying his own costs." In upholding this judgment as a retraxit and bar to a subsequent action, the court, speaking by Wallace, C. J., said: "We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even entered by consent, would have that effect, but only that a judgment of dismissal, when based upon, and entered in pursuance of, the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action." Crossman v. Davis, 79 Cal. 603, 21 Pac. 963, is to like effect. The case at bar is differentiated from Merritt v. Campbell in that here there was no agreement between the parties for an adjustment and dismissal of the action, and the judgment, as entered by the court, contained the express proviso that the judgment of dismissal was "entered without prejudice to the commencement of another action." Subdivision 1 of section 581 of the Code of Civil Procedure provides that an action may be dismissed, or a judgment of nonsuit entered, "(1) by the plaintiff himself at any time before trial, upon payment of costs," etc. In Ditch Co. v. Bradford, 13 Cal. 637, in construing a like expression in our former practice act, the court said, "By 'trial,' here, is meant the determination or finding in the case." In Brown v. Harter, 18 Cal. 76, it was held that plaintiff had not an absolute right to take a nonsuit after the case had been finally submitted and the jury had retired, but that he might do so at any time before such submission and retirement. In Heinlin v. Castro, 22 Cal. 100, it was held that after a cause had been tried and submitted to the court, and was held under advisement, the plaintiff had no right to dismiss, and the court had no authority to dismiss. In the case at bar the action had been tried and submitted, but the order of submission had been set aside, and leave given to amend the pleadings. It stood, therefore, as though no submission had ever been had. Under these circumstances, the plaintiff had a right to apply for, and the court had a right to grant, the dismissal. Again, if the dismissal was improper, defendants' remedy was by appeal from the judgment, and not by a collateral attack upon the judgment. Higgins v. Mahoney, 50 Cal. 444. The claim of appellant that the judgment of dismissal was entered by the clerk without authority of the court does not find warrant in the record. The clerk testified that a book handed him was a judgment book of the superior court of Merced county, "in which was entered the judgment of said court," etc. The judgment was then offered and admitted in evidence. The doctrine that a dismissal, in the cases provided for by our Code, does not operate to bar another action for the same cause, has ample support in the decisions. Davenport v. Turpin, 43 Cal. 597; Parks v. Dunlap, 86 Cal. 189, 25 Pac. 916; Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121.

(2) Was the plaintiff concluded by bringing an action in which he averred the presentation of his claim to the administrator for allowance from presenting it thereafter, and bringing a suit thereon? The law does not go to the romantic length of holding a pleader bound beyond the power of remedy for every mistake made in pleading. To do so would annul all statutes enacted and rules adopted to obviate the effect of such mistakes. In the present case the pleader in the former action averred the presentation of plaintiff's claim to the administrator. His complaint was verified. The verified answer of the administrator denied that it was presented to him. At the trial of that case, it is apparent from the record that plaintiff failed to prove the presentation of the claim; and the court in this case, upon testimony quite sufficient to authorize it in so doing, found that such claim was not presented to the administrator prior to the first suit. If a party makes an attempt to present a claim to an administrator for allowance, but from some cause fails to properly do so, it is not perceived upon what principle he is estopped from again presenting it in due form, if within proper time.

(3) The waiver in the amended complaint in the first action of all recourse against the estate, except as to the mortgaged premises, was only effectual in that action, and when

the action was dismissed it ceased to have any efficacy or binding force. To illustrate: An appearance and answer operates as a waiver of service of summons, but it would hardly be contended that upon a dismissal of the cause, and institution of another action for the same cause, the waiver in the first action excused service of summons in the second.

The fourth point made for reversal does not call for extended comment. It is based upon section 1496, Code Civ. Proc., which provides that when a claim is rejected by the executor, administrator, or judge of the superior court, the holder must bring suit in the proper court against the administrator, etc., within three months after its rejection, or it shall be barred. The objection is based upon the allegation of presentation contained in the complaint in the first suit, but, as the court found no such presentation was made, the statute did not begin to run until the presentation of the claim made a few days before this action was brought. We recommend that the judgment and order be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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116 Cal. 682

## PEOPLE v. ARNOLD. (Cr. 234.)

(Supreme Court of California. May 8, 1897.)

ASSAULT—EVIDENCE—IMPEACHING DEFENDANT —INSTRUCTIONS.

1. Evidence that defendant was informed that his wife was running with other men for illicit purposes, and merely surmised that she was leaving home for some such purpose when he intercepted her, and, on her refusal to turn back, assaulted her, was inadmissible to show want of malice, there being no claim that he was acting under the influence of passion aroused by any recent information of his wife's infidelity.

2. The purpose of Pen. Code, § 1093, providing that when defendant has confessed a prior conviction, the clerk, in reading the indictment, shall omit all that relates to such prior conviction, is not violated by asking defendant on cross-examination, if he has ever been convicted of a felony; his privilege to have such fact withheld from the jury being waived by offering himself as a witness.

3. On a trial for assault with intent to kill, the court instructed that defendant might be convicted of the lesser offense of assault with a deadly weapon, but omitted to state that simple assault was also included in the offense charged. *Held* no error, in the absence of a request for such instruction.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Bill Arnold was convicted of assault with a deadly weapon, and from the judgment and an order denying a new trial he appeals. Affirmed.

Barham & Miller, for appellant. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, Dep. Atty. Gen., for the People.

VAN FLEET, J. Defendant was charged with assault with intent to murder, and was convicted of an assault with a deadly weapon. He appeals from the judgment and from an order denying him a new trial.

1. The person upon whom the assault was committed was one Clara, an Indian woman, who was at the time living with defendant as his wife. It appeared by the evidence of the prosecution that the parties were encamped near the town of Cloverdale. Clara and one Lena Pete, another Indian woman, started from camp on their horses to go to the town. Defendant objected to Clara's going, and, upon her insisting, he dragged her from her horse, struck her on the head with a rock, knocking her down, and rendering her insensible, and cut her on the scalp with a knife. Defendant desired to show in his defense that the occasion or provocation of the assault was that he had been informed that his wife was running with other men for immoral and illicit purposes, and that he supposed she was leaving the camp for some such purpose when he stopped her. The court very properly refused to admit such evidence. It was wholly immaterial, since it would not, if true, have justified the assault.

Defendant contends that: "If he had knowledge of acts of infidelity upon the part of his wife, recently communicated to him, and the further information that she was then about to go away in company with the witness Lena for the purpose of assignation, that she intended to meet for the purposes of illicit intercourse other men, and that such knowledge of her intentions formed the grounds of defendant's objections to her going, then such evidence was proper to go to the jury to show the animus with which the assault was made, and would have had a tendency to eliminate from the case the malicious and premeditated intent which the law presumes to flow from the commission of an unlawful act, even though it had not gone to the extent of justifying his interference." In other words, that it was proper for the purpose of showing an absence of malice and premeditated design, if not a defense to the assault. But defendant did not offer to show either that he had knowledge that his wife was in fact leaving the camp at the time for any such purpose, or that he had been so informed; but simply that he had been informed (he did not offer to show when) that she had been guilty of such conduct before, and, in effect, that he did not wish her to have the opportunity to do so again. While "the sight of adultery committed by his wife" may be, as suggested by Mr. Rice (3 Rice, Ev. § 475), provocation to the husband which will justify that "heat of passion" which is sufficient to reduce murder to manslaughter, the knowledge of such fact must be based upon something more tangible than mere surmise, and the knowledge must be so recent as to preclude the idea of cooling time or premeditation. It was not claimed or pretended that defendant could show that he was acting under the influence of passion aroused by any recent information of his wife's infidelity. His own testimony showed that he had been aware for some 18 months that she "was running with every Tom, Dick, and Harry" for such purposes, and yet had continued to live with her. Moreover, the evidence sought was in substantial effect all placed before the jury, and would seem to have produced the only effect for which it is contended such evidence was admissible, since the verdict was for a grade of offense lower than that charged, and of which malice is not an essential ingredient. Pen. Code, § 245; People v. Urias, 12 Cal. 325.

2. The information charged a prior conviction of a felony, and, defendant having at his arraignment confessed the same, no reference thereto was made by the clerk in reading the information and stating the plea to the jury. The defendant, however, took the witness stand in his own behalf, and gave his version of the circumstances of the assault. In cross-examination the prosecution was permitted, against defendant's objection, to ask him if he had not previously been convicted of a felony; and it is urged that the effect of this was to defeat the purpose of section 1093 of the Penal Code, which in prescribing the conduct of the trial provides that, when the defendant has confessed a prior conviction therein, the clerk, in reading the indictment or information, "shall omit therefrom all that relates to such previous conviction." The obvious purpose of this section was to give the defendant the benefit of withholding from the jury a knowledge of such prior conviction in all instances other than where, by the conduct of his own case, the production of such fact is rendered essential to a proper presentation of the case of the people. It was not designed thereby to change or affect the ordinary rules of evidence for the elucidation of truth, to which a defendant, like any other witness, subjects himself upon taking the witness stand. Under the rule established in this state, the defendant's character for truth, honesty, and integrity is in issue when he offers himself as a witness, and he thereupon becomes, as held in People v. Hickman, 113 Cal. 80, 86, 45 Pac. 175, 176, "subject to the same rules for testing his credibility before the jury by impeachment or otherwise as any other witness." One of the authorized methods of impeachment prescribed by the Code is "that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a felony." Code Civ. Proc. § 2051. Section 1093 did not protect defendant from the operation of this rule. He must be deemed to have waived the privilege given by that section upon becoming a witness. See People v. Chin Mook Sow, 51 Cal. 597; People v. Meyer, 75 Cal. 383, 17 Pac. 431. The cases of People v. Wheatley, 88 Cal. 117, 26 Pac. 95, People v. Sansome, 84 Cal. 449, 24 Pac. 143, and People v. Thomas, 110 Cal. 42, 42 Pac. 456, cited by appellant, all present instances where the defendant's privilege to have the fact of prior conviction withheld from the jury was violated without any act on his part waiving such right.

3. The court instructed the jury that they could convict defendant of the offense charged, or of the lesser offense of assault with a deadly weapon, but omitted telling them that included in the charge was also the offense of simple assault, and no request for such instruction was made. It is urged that such omission was virtually telling the jury that they could not convict of simple assault, and that this was error. It is doubtful if there was any evidence in the case to which such an instruction would have been pertinent. It is true that the defendant denied using a knife or a rock, and testified that the instrument used was a "stick," the dimensions of which were not given; but he admitted that he hit the woman on the head, and that the blow knocked her down, and he did not pretend to deny the fact shown by the prosecution that she was rendered unconscious thereby. It might well be assumed, in the absence of anything showing the contrary, that a stick or club which would administer such a blow was a deadly weapon, and, if it was such, the omitted matter was not pertinent. But, however that may be, if defendant deemed such instruction pertinent or material, he should have requested it. The failure to give it, in the absence of such request, has been repeatedly held not error. People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Scott, 93 Cal. 516, 29 Pac. 123; People v. Guidice, 73 Cal. 226, 15 Pac. 44. We discover no error in the giving or refusing of instructions. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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(117 Cal. 1)

## BARNES v. GLIDE et al. (Sac. 236.)[1]

(Supreme Court of California. May 8, 1897.)

MANDAMUS—LIMITATIONS—RUNNING OF STATUTE.

1. Code Civ. Proc. pt. 2, § 343, providing that "an action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued," applies to a mandamus proceeding, even if section 337, 338, or 339 does not apply thereto, under section 363 of the title, "Of the Time of Commencing Actions," providing that the word "action," as used in such title, is to be construed, wherever necessary, as including a special proceeding of a civil nature, and section 1109 of the title relating to writs of mandate, etc., providing that, except as otherwise provided, the provisions of part 2 (section 307 to section 1059) are applicable to proceedings mentioned in said title.

2. Limitations begin to run against a mandamus proceeding to compel the proper officers to levy a tax to pay warrants issued by a swampland district at the time a cause of action on the warrants accrues, and not at the time demand is made on the officers to levy the tax.

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[1] Rehearing denied.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Petition by Charles Barnes for a writ of mandate to swamp-land district No. 307, and J. C. Glide and others, trustees of such district, to compel defendants to levy a tax to pay certain warrants issued by said district, and held by plaintiff. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Albert M. Johnson and Wm. Gwynn, for appellant. Alvin J. Bruner, Devlin & Devlin, and McKune & George, for respondents. John T. Harrington, amicus curiæ.

McFARLAND, J. The plaintiff filed a petition or complaint in the superior court, in which he asked for a writ of mandate to be directed to the defendants, swamp-land district No. 307, and J. C. Glide, Francis T. Dwyer, and Joseph L. Monica, the present trustees of said district, commanding them "to proceed to have an assessment levied upon the lands in said district sufficient to pay, and for the purpose of paying," certain warrants described in the complaint. The defendants filed a demurrer to the complaint. The demurrer was both general and special, and it was sustained by the court below, and judgment rendered for defendants. From this judgment the plaintiff appeals.

The complaint contains quite a number of counts; but they are all alike, except that a different warrant is described in each count. The first count is a sample of them all. In that count it is averred that swamp-land district No. 307 was duly organized in September, 1877, and has ever since been an existing corporation; that the other defendants, Glide, Dwyer, and Monica, are now, and for more than six months last past have been, the duly-elected and acting trustees of said district; that on the 10th day of September, 1877, the said district, through its then board of trustees, issued to H. M. Hawley & Co. its certain warrant, numbered 23, upon the treasurer of Yolo county, in which county the district is situated, directing said treasurer to pay to said Hawley & Co., or order, "from the swamp-land fund in the treasury of said county to the credit of said district No. 307, the sum of $372.96"; that the said warrant was presented to the board of supervisors of said county, and was by them approved, and was thereafter presented to the treasurer of said county, and was by him on the 12th day of November, 1887, marked, "Not paid for want of funds," and registered; that since the issuance of said warrant there never has been in the treasury of said county, to the credit of said swamp-land district, or in the funds of said district, sufficient money with which to pay said warrant, or any interest thereof, and that there never has, during any of said time, been any money whatever in said treasury to the credit of said district, except only the sum of $380, which remained in the treasury for 14 days, and was paid out upon another warrant; that prior to the 1st day of November, 1895, the said Hawley & Co. assigned said warrant to plaintiff, who is now the owner and holder thereof; that on the 5th day of November, 1895, the plaintiff demanded in writing of defendants that they provide for the payment of said warrant; that the defendants failed and neglected to pay said warrant, or to provide for the payment thereof, or to comply with the demand aforesaid, and no part thereof has ever been paid, but the whole thereof "is due, owing, and unpaid from the said swamp-land district No. 307 unto this plaintiff." The prayer is that the defendants be required "to proceed to have an assessment levied upon the land in said district sufficient to pay, and for the purpose of paying, each and every warrant hereinbefore described, and all interest due thereon, and to collect all taxes thereon, and to pay all taxes and moneys so collected into the treasury of the county of Yolo," etc. There is also an averment, "upon information and belief," that the defendants have moneys in their hands belonging to said defendants, and a prayer that they pay the same into the treasury of said Yolo county; but as no point is made in the briefs as to this averment, and as it is evidently considered by the parties as unimportant, it is not necessary to consider it. The defendants, in their demurrer, set up the statute of limitations, and particularly sections 337, 338, 339, and 343 of the Code of Civil Procedure. They also pleaded by the demurrer that the complaint did not state facts sufficient to constitute a cause of action, and these two grounds of demurrer are the only ones discussed by counsel.

Counsel for respondents strenuously contend that the thing which plaintiff seeks to have defendants compelled to do is not a duty "which the law specially enjoins as a duty resulting from the office, trust, or station"; that the law does not specially enjoin the defendants to have an assessment levied upon the land in said district; and particularly that it is not their special duty to have such an assessment levied for the purpose of paying the warrants, or either of them, mentioned in the complaint. This and many other points are pressed by respondents under that part of their demurrer which asserts that the complaint does not state facts sufficient to constitute a cause of action; but we do not consider it necessary to inquire particularly into these points, because, in our opinion, the proceeding is barred by the statute of limitation. A proceeding in mandamus between two private parties to enforce a money obligation, where there is no statutory provision giving it a different character, is generally considered as a mere action at law, in which case all ordinary rules of practice, including the statute of limitations, apply. In Com. v. Dennison, 24 How. 97, the supreme court of the United States say: "It is equally well settled that a mandamus, in modern practice, is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process, in cases to which it has application. It was so held by this court in the cases of Kendall v. U. S., 12 Pet. 615; Kendall v. Stokes, 3 How. 100." In New York, before the adoption of the Code, and when there seemed to be no provision of the statute of limitations expressly applicable to proceedings in mandamus, the court held, in People v. Supervisors, 12 Barb. 446, that a proceeding in mandamus should, by analogy, be commenced within "the time given by the statute to obtain a remedy for injuries substantially of a similar character in the ordinary way, if that could be pursued"; and in People v. French, 12 Abb. N. C. 156, the court alluded to the former case of People v. Supervisors as founding the doctrine of limitation upon analogy, but said that "whether the proceeding then under review was to be considered as an action under section 3333 of the New York Code, or a special proceeding under section 3334 of that Code, the result would be the same, because by section 414 of the Code the rules of limitation were made applicable to special proceedings as well as civil actions." Our Code has substantially the same provisions as section 414 of the New York Code. Section 1109 of the Code of Civil Procedure, which is a part of the title under which writs of mandate, certiorari, and prohibition are provided for, reads as follows: "Except as otherwise provided in this title, the provisions of part 2 [section 307 to section 1059] of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." And part 2, from said section 307 to said section 1059, includes the provisions of the Code upon the subject of the limitations of actions. Moreover, section 363 of the Code of Civil Procedure, which is the closing section of the title "Of the Time of Commencing Actions," reads as follows: "The word 'action,' as used in this title, is to be construed, wherever it is necessary so to do as including a special proceeding of a civil nature." Therefore it is quite clear that not only under the general authorities, but under the provisions of our Code, a proceeding like the one at bar, in mandamus, is subject to the rules which govern the limitation of actions; and if the present proceeding is not subject to section 337, section 338, or section 339, it is certainly subject to the provisions of section 343, which declares that "an action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." The reason and philosophy upon which the statute of limitations is based apply here with full force. The warrant set up in the first count of the complaint was issued, presented, and payment thereon was refused, in November, 1877; and this present suit was not commenced until November, 1895, which was 18 years thereafter. The date of the latest warrant set up in the complaint is 1881,—more than 14 years before the commencement of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than 6 months prior to the commencement of the suit. The warrants sued on were issued, if at all, by other trustees, who were in office from 15 to 18 years before this proceeding was instituted. They may have been issued illegally; the act of issuing them may have been ultra vires; they may not have been issued for any labor done in the construction of the works of the district; they may have been issued without consideration and fraudulently; they may be forgeries. And it is quite evident that the present defendants, after such a lapse of time, would be in no condition to make any of the defenses above indicated, when witnesses who knew of the facts at the time may be dead, or may have allowed the recollection of them to vanish from their memories. And the evident purpose of the statute of limitations is to prevent such a condition of affairs, and to preclude parties from disturbing that repose which is intended to be final after the lapse of certain periods of time designated in the statute itself. The position cannot be successfully maintained that no action could be commenced until a demand had been made by plaintiff upon the defendants to act. Whether such demand be necessary in a case like the present, it is not necessary to determine, for the demand itself was an act within the power of the plaintiff.

In Prescott v. Gonser, 34 Iowa, 179, the court say: "That the action of mandamus cannot be maintained until there has been a refusal to perform the official duty sought to be enforced, is true; but to hold that a plaintiff who has a right to demand performance at any time may delay such demand indefinitely would enable him to defeat the object and purpose of the statute. It is certainly not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him, in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled for even fifty years unaffected by the statute of limitations, thereby rendering it a dead letter. In such a construction of the statute we cannot concur." See, also, to the same effect, Baker v. Johnson Co., 33 Iowa, 151. If the facts stated in the complaint in the case at bar constitute a cause of action, they constitute a cause of action which accrued, and for which an action might have been instituted, from 14 to 18 years before the present complaint was filed. The statute of limitations is intended to embrace all causes of action not specially excepted from its operation, and there is no exception applicable to the present proceeding. Bates v. Gregory, 89 Cal. 387, 26 Pac. 891, was an application for a writ of mandate to compel the trustees of the city of Sacramento to do certain acts. The defendants therein set up the statute of limitations, and this court said: "A municipal corporation has the legal right to avail itself of the defense of the statute of limitations as fully as any other creditor. It is a privilege personal to the debtor, and whenever, in any legal proceeding, it is invoked by the debtor, the court is compelled to recognize it as a proper defense. This defense is pleaded in the present proceeding, and, as we have before shown, is sustained by the facts, and must therefore be held sufficient." Appellant relies greatly on Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646, but that case is not pertinent to the case at bar. That case was simply mandamus to the treasurer of the city of Sacramento to compel him to pay the interest on certain bonds. Those bonds had been issued by the city under the act of April 24, 1858 (St. 1858, p. 280), which has frequently been held by this court to constitute an express contract between the city and the bondholders, by which the latter were prohibited from suing the city, and were to rely exclusively upon a certain special fund, distinct from the general fund and from all other funds of said city. The only remedy which the bondholders had was mandamus against the city treasurer to compel him to pay the interest on the bonds when there was money in the fund to which they could alone look under their special contract; and all that the court decided in Freehill v. Chamberlain was that no cause of action in mandamus against said treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced 15 years before it was instituted. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(117 Cal. 12)

## DAVIS v. RANDALL et al. (Sac. 177, 178.)

(Supreme Court of California. May 12, 1897.)

MORTGAGE—MERGER IN DEED—INTERVENING LIENS.

After defendant had declared a homestead in her husband's land, which he had previously mortgaged, the holder of the second mortgage purchased the fee, and thereafter took an assignment of the first mortgage to enable him to foreclose defendant's rights, neither mortgage being satisfied of record. *Held*, that the mortgages did not merge in the deed, so as to make them subject to the intervening homestead lien.

Department 2. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Action by J. T. Davis, substituted for E. C. Vancil, the original plaintiff, against Nicholas W. Randall, Mary J. Randall, and others, to foreclose two mortgages. From a judgment holding said mortgages subject to the homestead right of defendant Mary J. Randall, and from an order denying a new trial, plaintiff appeals. Reversed.

H. M. Albery, for appellant. C. W. Eastin and Mr. Griffin, for respondents.

McFARLAND, J. In August, 1893, there were pending in the superior court two certain actions, in each of which the appellant here (Davis) and the respondent Mary J. Randall were the main contestants. One of these actions was brought in the name of E. C. Vancil to foreclose two certain mortgages upon the premises described in the complaint,—one executed October 19, 1883, by the defendant Nicholas W. Randall, who was then the owner of the premises, to one A. Montgomery to secure a promissory note made by said Randall to said Montgomery for the sum of $9,000, with interest, and the other a mortgage upon said premises executed October 1, 1884, by said Randall to said E. C. Vancil to secure a promissory note made by said Randall to said Vancil for the sum of $5,000 and interest. The said mortgage to Montgomery had been assigned to said Vancil before the commencement of this suit, and during the pendency of the action the said Davis was substituted as plaintiff in place of said Vancil, upon a showing that said Vancil had assigned both of said mortgages to said Davis. In said action the said Nicholas W. Randall made default, but the said Mary J. Randall filed a lengthy answer, in which, after a general denial, she made a great many averments of matters in defense; but the only averment of the answer necessary just now to be noticed was that she held a homestead to the extent, in value, of $5,000, upon the mortgaged premises, which she claimed to be superior in right to the said mortgages. The court found and decreed that the said mortgages sought to be foreclosed were subordinate and subject to the said homestead right, and from the judgment the said Davis appeals. He also appeals from an order denying a motion for a new trial. Said appeal is numbered in this court 178, and is the one in which this opinion is written. The said other action then pending was a partition suit by the said Mary J. Randall, as plaintiff, against Nicholas W. Randall, J. T. Davis, and others, in which she averred that she held a homestead interest to the extent, in value, of $5,000, upon the premises described in said mortgages, and also an undivided interest in the rest of said premises, and that said Nicholas W. Randall was the owner of the undivided one-half interest of said premises not covered by said homestead. She prayed to have her homestead, to the value of $5,000, set apart to her out of the said premises, and also that she have awarded to her the undivided one-half of the rest of said land. To the complaint the said Nicholas W. Randall and J. T. Davis filed answers, in which they denied the plaintiff's homestead right, and set up that the said Davis was the sole owner of all of said premises. The court found in favor of the plaintiff, Mary J. Randall, as to her homestead right, and ordered that a homestead to the extent, in value, of $5,000, be set apart to her. Nothing seems to have been found or decreed as to her undivided interest in the rest of said premises. From this judgment, and from an order denying a new trial, the said Davis and the said Nicholas W. Randall appeal, which appeal is designated in this court as No. 177. On the 24th day of April, 1893, the said two actions above referred to were, by the consent and agreement of the respective parties, "consolidated and tried together, and upon the same evidence, said evidence to be introduced at the trial of this action [the foreclosure suit], and considered as if the same were offered and submitted on the trial of each of said actions separately, and that both the said actions may be submitted for decision and decided upon the said evidence." Thereafter the said two actions were tried and submitted together; the evidence being introduced in the case in which this present appeal, No. 178, is taken.

The appellant attacks a great many of the findings of the court, and the record shows some 70 different assignments of errors in rulings upon the admissibility of evidence; but, under our views of the case, many of the points made for reversal need not be noticed. The court finds that while the said Davis was pretending to act, in the various transactions brought before the court, as the agent of said E. C. Vancil, he was really acting for himself; that the note and mortgage purporting to have been given by Nicholas W. Randall to said E. C. Vancil were in fact given to the said Davis on his own account; that the purchase of the Montgomery mortgage was made really by Davis, and that Vancil had no interest in it, and that, in all the transactions, Davis, and not Vancil, was the real party in interest. But this finding, as well as many others attacked by appellant, are, in our opinion, unimportant. The main question in the case is whether or not the said mortgages were subject to the said homestead right of Mary J. Randall; and, if the court erred in finding that they were subordinate to said homestead right, then the judgments in both cases must be reversed, and the other findings become unimportant. And in our opinion the court below did so err.

Assuming, as the court found, that Mrs. Randall lived upon the land at the time she filed her homestead, and that it was in all respects a valid homestead, still her declaration of homestead was not made until the 20th day of July, 1886, and at and before said time the said two mortgages were valid and subsisting liens on said premises, prior and superior to any homestead right which Mrs. Randall could acquire thereto; and said mortgages at the time of the commencement of this suit were, and still are, subsisting liens, not affected by said homestead, unless they have been satisfied and ended as such liens. But there is no evidence warranting the court in finding that said liens have been paid and satisfied, except the naked fact that in September, 1886, about two months after the filing of said homestead, the said Nicholas W. Randall made a deed to said Davis, conveying the fee of said mortgaged premises to said Davis. The only ground upon which it could be held that said mortgages have been satisfied is that they were merged in said deed. But the case is not one to which the doctrine of merger can be applied. In Scrivner v. Dietz, 84 Cal. 298, 299, 24 Pac. 172, the principle that a merger will not be implied in a case like the one at bar is stated, with the authorities cited, as follows: "Merger is always a question of intent, when the question is as to whether a mortgage lien is merged in the fee, upon both being united in the same person. Jones, Mortg. §§ 848, 856, 857, 870, 872, 873. Equity will keep the legal title and the mortgagee's interest separate, although held by the same person, whenever necessary for the full protection of the person's just rights. Carpentier v. Brenham, 40 Cal. 221. If there is an intervening mortgage, the acquirement of the title will not operate as a merger. Brooks v. Rice, 56 Cal. 428. The same rule would apply as to an intervening attachment or other lien. The same rule as to merger is laid down in Rumpp v. Gerkens, 59 Cal. 496." In 2 Pom. Eq. Jur. par. 788, it is said: "If, from all the circumstances, a merger would be disadvantageous to the party, then his intention that it should not result will be presumed and maintained." Again the same author (paragraph 792) says: "If there is no expression of an intention at the time, then all the circumstances should be considered, in order to discover what is the best interest of the party. He will be presumed to have intended that the charge should be kept alive, or to merge, according to the benefit resulting from either." In the case at bar there is no evidence showing an intent upon the part of Davis that the mortgages should be merged in the deed. At the time he took the deed he was not the owner of the Montgomery mortgage. Indeed, the court finds that, when Davis bought the Montgomery mortgage, "instead of having Montgomery execute a satisfaction of said mortgage said Davis procured said Montgomery to make an assignment thereof, as herein found, for the purpose of placing said Davis in a position to foreclose the rights of said Mary J. Randall," and that "neither of said mortgages have been paid in any other manner or way than by the means and the manner herein found." Both Randall and Davis testified that the deed was given for about $3,000 additional indebtedness of Randall to Davis over and above the amount of said mortgages. Neither of the mortgages was satisfied of record, and both still remain recorded as valid and unpaid mortgages. There is no pretense that the mortgages given by Randall to Montgomery and to Vancil prior to the filing of the homestead claim were not just and valid liens upon the property, to the full amount stated upon their face. The court finds that "on the 19th day of October, 1883, the defendant Nicholas W. Randall was indebted to one A. Montgomery in the sum of $9,000, and, to secure the payment of the same," made and executed said note and mortgage. The court further finds that "on the 1st day of October, 1884, the defendant Nicholas W. Randall was indebted to the substituted plaintiff, J. T. Davis, in the sum of $5,000, and, to secure the payment of the same," gave a note and mortgage in the name of E. C. Vancil. There is no doubt, therefore, that those mortgages wer just liens upon the premises at the time the homestead was filed; and the respondent seeks to avoid them, not upon any equitable consideration, but solely upon the technical ground of merger. But, as we have seen, the doctrine of merger does not apply here, and equity will keep the liens alive for the purpose of doing justice.

Under the foregoing views, the judgment and order denying a new trial must be reversed, and it is unnecessary to inquire into the many other questions presented in the complicated record. Whether Davis, when taking a mortgage from Randall, which was in form to Vancil, and when purchasing and taking an assignment of the Montgomery mortgage, was acting for Vancil or for himself, seems to be an immaterial matter, and of no consequence to respondent. Any rights she has as against the one she has also as against the other. The objective and controlling question in the case is whether or not the prior liens of the mortgages were lost, as against the subsequent homestead, because they were merged in the deed afterwards executed by Randall to Davis. If, as we have above held, they were not, then the judgment was clearly erroneous. We cannot make findings for the court below; but it is apparent that if, at another trial, no different state of facts appears, there should be a decree foreclosing the mortgages as liens prior and superior to respondent's asserted homestead, and not subject or subordinate to said homestead. And for these reasons the judgment and order denying a new trial in the said partition suit (appeal 177), must also be reversed. The judgment and order denying a new trial are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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(117 Cal. 10)

## PEOPLE v. CADY. (Cr. Sac. 212.)

(Supreme Court of California. May 11, 1897.)

HOMICIDE—DEPOSITIONS—BRIEFS.

The introduction of the testimony given at the preliminary examination by an absent witness for the prosecution in a homicide case is not inhibited by Const. art. 1, § 13, providing for the taking in defendant's presence of depositions in criminal cases other than of homicide, where there is reason to believe that the witness will not attend at the trial.

In bank. Appeal from superior court, Shasta county; Edward Sweeny, Judge.

George D. Cady was convicted of manslaughter. A motion for a new trial was denied, and he appeals. Affirmed.

Clay W. Taylor and J. Chadbourne (H. E. Highton, of counsel), for appellant. W. F. Fitzgerald, Atty. Gen., W. H. Anderson, Dep. Atty. Gen., M. P. Rose, and A. M. McCoy, for the People.

McFARLAND, J. The defendant was charged in the information with the crime of murder, and was convicted of manslaughter. He appeals from the judgment and order denying his motion for a new trial.

1. The main point made by appellant for a reversal is that the court erred in permitting the testimony of one Champion, taken at the preliminary examination, to be read in evidence by the prosecution; the contention being that such testimony cannot, under the constitution, be admitted under any circumstances. But this cause had been submitted upon oral argument and written briefs some time before the decision by this court of the case of People v. Sierp, 48 Pac. 88, and in the latter case the arguments presented upon this point in the case at bar were fully considered. In the Sierp Case the point as to the admissibility of testimony given at a preliminary examination was thoroughly considered, and determined adversely to the contention of the appellant in the present case. We adhere to the rule there declared. See People v. Sierp, supra.

2. Appellant contends that the verdict was unwarranted by the evidence, but an examination of the record clearly shows sufficient evidence to justify the jury in finding the appellant guilty of manslaughter. We do not deem it necessary to state the evidence here in detail.

3. Under the head of "Assignment of Errors," the appellant states 17 alleged errors of the court below in ruling upon the admissibility of evidence. These assignments of errors are little more than mere concise statements of conclusions that the court did err in its rulings, with but little, if anything, in the way of argument to show the correctness of the conclusions arrived at by appellant as to such rulings. All these "assignments" are answered quite fully in the brief of the attorney general; and in appellant's reply brief he merely says that "in reference to the seventeen assignments of error shortly discussed by the state, with the exception hereinafter mentioned, there is neither time nor opportunity for a reply, even if a reply be needed; but they are, and each of them is, implicitly relied upon." "The exception hereinafter mentioned" was the objection to the testimony of the witness Champion hereinbefore alluded to, which objection was also put in a concise way in said "assignment of errors" in addition to being elaborately argued in another part of the brief. Under these circumstances, we do not feel called upon to notice the other 16 alleged errors in detail. It is sufficient to say that we have examined the rulings of the court so excepted to, and find in them no prejudicial error. The judgment and order appealed from are affirmed.

We concur: HARRISON, J.; HENSHAW, J.; VAN FLEET, J.; TEMPLE, J.; GAROUTTE, J.

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(117 Cal. 19)

## BOEHMER v. BIG ROCK CREEK IRR. DIST. et al. (L. A. 187.)[1]

(Supreme Court of California. May 14, 1897.)

QUIETING TITLE—BURDEN OF PROOF—NEW TRIAL—JOINT MOTION—RIPARIAN RIGHTS—IRRIGATION DISTRICT—LIABILITY TO SUIT.

1. In an action to quiet title, where plaintiff's title is denied, and it is stipulated that the land was within a government grant in aid of a railroad, under which plaintiff claims, and that before plaintiff purchased a decree was entered, at the suit of the United States canceling the patent, but saving the rights of certain classes, plaintiff must show that he is within one of the exceptions.

2. Under Code Civ. Proc. § 475, providing that the court must disregard any error or defect which does not affect the substantial rights of the parties, a new trial may be granted to one of several parties who join in the motion, though as to others it must be overruled.

3. Where two quarter sections were granted, each by a separate patent, mere contiguity cannot extend to one a riparian right which is appurtenant to the other, though both have come into the possession of the same person.

4. An irrigation district, though a public corporation, may be sued, under the Wright act (St. 1887, p. 35, § 14), providing that in all courts, actions, suits, and proceedings, its board

of directors "may sue, appear and defend, in person or by attorneys, and in the name of such irrigation district."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by F. Boehmer against the Big Rock Creek Irrigation District and its board of directors. There was a judgment in favor of plaintiff, and from an order granting defendants a new trial, the plaintiff appeals. Affirmed.

Schutze & Luckel, for appellant. Will D. Gould and Mulford & Pollard, for respondents.

HAYNES, C. This action is prosecuted by the plaintiff to quiet title to certain water rights alleged to be appurtenant to certain of his lands as riparian owner. The cause was heard upon an agreed statement of facts and the deposition of one witness. Written findings were filed, and judgment entered. The defendants moved for a new trial, and upon the hearing thereof the following minute order was made: "Defendants move the court for new trial herein on the grounds stated in the notice of motion on file. Motion is argued, and thereupon granted on the grounds stated, and also on the court's own motion, for the reason that the findings are contrary to the evidence, and were signed and filed inadvertently by the court without observing the error, the same having been prepared by counsel for the plaintiff." This appeal is by the plaintiff from said order. Defendants' motion for a new trial specified three findings as not justified by the evidence.

1. That the second finding, in so far as it finds that the plaintiff and his predecessors in interest have been since the year 1871 the owners and seised in fee of the N. E. ¼ of section 7 in township 4 N., range 9 W., S. B. and M., is not justified by the evidence. Plaintiff's ownership of said quarter section was denied by the answer, and therefore the burden was on the plaintiff to prove title. The stipulation shows that said land was within the grant to the Southern Pacific Railroad in aid of its branch line, under the act of March 3, 1871, and also within the grant to the Atlantic & Pacific Railroad under the act of July 27, 1866; that said quarter section was patented to the Southern Pacific Company in 1876, and was conveyed by said company in 1882 to one James O'Reilly, under whom the plaintiff claims; that before O'Reilly conveyed the United States brought suit against the railroad company and O'Reilly to cancel the patents to a large quantity of land, embracing the above quarter section; that a decree was entered adjudging that the United States was the owner thereof, and canceling the patent issued therefor, but saving the rights of preemptors and homesteaders holding under patents issued to them, and also saving the rights of the defendants other than the railroad company acquired under the act of congress entitled "An act to provide for the adjustment of land grants," approved March 3, 1887. The patent to the railroad company having been canceled, and the plaintiff not having given any evidence to show that he or his grantor was within any of the exceptions named, he failed to prove his allegation of ownership.

2. It is also clear that defendants' exception to the third finding is well taken. The second finding is that plaintiff is seised in fee of a large number of quarter sections therein described by section, township, and range, but not otherwise; and the third finding is that said lands lie along and adjoin natural streams of running water, namely, the Rio Llano, or Big Rock creek, and another stream known as "Pallett's Creek." The individuals named as defendants—as to whom the only allegation is that they constitute the board of directors of said irrigation district—disclaimed all interest in the controversy, and the corporation disclaimed all interest in the waters of Pallett creek. The stipulation shows that three of the quarter sections in township 4, range 9 W., do not touch Big Rock creek, though they adjoin other quarter sections owned by plaintiff through which said stream runs; and the same is true of certain quarter sections in township 4 of range 10 W. The third finding would show, therefore, that all the lands of plaintiff described in the complaint are riparian, and would eliminate the question whether the quarter sections which do not touch the stream are riparian because they are contiguous to other quarter sections through which the stream runs, and which are thus brought within the fourth finding, which is that plaintiff's lands through which the streams run are riparian, and entitles the plaintiff to the reasonable and necessary use of the water therefrom for domestic and irrigation purposes, while said fourth finding clearly limits plaintiff's riparian rights to those quarter sections through which the streams run.

3. The fifth finding is also excepted to so far as it finds that certain springs on plaintiff's land are fed solely by percolating waters. This exception is unimportant in view of the sixth finding, which is to the effect that the rights of the defendants to the waters of Big Rock creek, or to said springs, is subject to said rights of the plaintiff; and it is therefore not necessary to consider whether the presumption is that said springs are fed by percolating waters, in the absence of any evidence as to how they are fed.

Appellant further contends that the order appealed from must be reversed because the motion for a new trial was made by all the defendants, while the individuals named as defendants, having disclaimed all interest in the controversy, were not affected or injured by the findings or judgment; in other words, that "a motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all." Appellant cites six or seven cases from Nebraska, about the same number from Indiana, one from Minnesota, and one from Wyoming, which sustain his said proposition. The early Indiana cases —which seem to have been the pioneers of this line of decisions—adopted it in analogy to the ruling that a joint demurrer will be overruled unless it is well taken as to all the demurrants jointly; and Asevado v. Orr, 100 Cal. 293, 34 Pac. 777, and Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899, are cited to the point that a joint demurrer by all the defendants is properly overruled if the complaint is good against either of them. The question here presented has not before been considered or decided by this court so far as I have been able to find. Whether the cases cited by appellant were rightly decided under the practice prevailing in those states, we need not consider. Obviously it is one of those questions which should be determined in harmony with the principles governing our own practice. It is true that the individual defendants, having disclaimed all personal interest in the controversy, were not injured by the findings or judgment, and were not "aggrieved" thereby. But, the order granting a new trial having been rightly made as to one of the defendants,—the irrigation district,—the plaintiff was not injured by the joinder of the individual defendants in the motion, nor by the granting of the motion as to all; and he should not be permitted to profit by findings which do not accord with the facts which he has stipulated to be true, if it can be avoided. Section 475, Code Civ. Proc., provides: "The court must in every stage of an action disregard any error or defect in pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." In the face of this provision, appellant's contention cannot be sustained.

It is also contended by appellant that the court had no power to order a new trial of its own motion, the cause having been tried by the court without a jury. The order granting a new trial does not profess to have been granted solely upon the court's own motion, and, as the grounds stated in defendants' motion fully justified the order, the point made by appellant need not be considered.

Appellant also contends that his riparian rights extend to those quarter sections not on the stream, inasmuch as they are contiguous to those that are washed by it. As already seen, the fourth finding obviously intended to limit plaintiff's riparian rights to those descriptions through which the streams run; but this intention was defeated by the third finding, and, the judgment having been entered in accordance therewith, the result is that all of plaintiff's tracts of land described in the complaint are adjudged to be riparian, except two quarter sections constituting the N. ½ of section 2 in township 4, range 10 W., and there is nothing in the findings to show that these parcels are differently situated. If appellant's contention as stated in his brief were sound, it would follow that, if A. owned a tract of land upon a stream, his riparian rights which he acquired by the purchase of that tract would extend to all lands he might subsequently acquire, no matter from whom, nor under what circumstances his vendor obtained title, nor how distant from the stream, provided he owned all the land between the stream and the land so purchased. The facts stipulated are, however, that all the lands described in the complaint, except the N. E. ¼ of section 7, township 4 N., range 9 W., and two quarter sections in range 10, were patented by the United States to William S. Chapman on June 1, 1870, by 14 separate patents based on 14 different entries, and that plaintiff is the owner of each of these 14 quarter sections "by mesne conveyances under said William S. Chapman." With the exception of lands within confirmed Mexican grants, the Virginia military reservation and perhaps some other reservations, granted in early days, it has been the policy of the general government to subdivide the public domain into small tracts, and to dispose of them as such, and, for the purpose of carrying out such policy, it has restricted the right of entry under the homestead and pre-emption laws to 160 acres. Even in its grants to railroads, by granting alternate sections, it prevented the acquisition from the government of large bodies of contiguous lands, and a similar policy is pursued by the state in disposing of state lands. In Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, at pages 424, 425, 69 Cal., and page 773, 10 Pac., it was said: "It is to be borne in mind that if the court had found a water course to, through, or past any one of the tracts described in the complaint, only such of the certificates of purchase would have been admissible as showed the purchase of tracts so found by the court to be touched or traversed by the water course. * * * If we shall say, in general terms, that the certificates of purchase ought to have been admitted, this must be understood in a limited sense, and to apply only to the certificate with reference to the land described, as to which there is evidence that they are lands by or through which the water course passed. All the sections or fractional sections mentioned in any one certificate constitute a single tract of land." In the case at bar the stipulation is that these 14 quarter sections were granted each by a separate patent, each patent being based upon a separate entry, and these 14 quarter sections therefore constitute 14 distinct tracts of land, and mere contiguity cannot extend a riparian right which is appurtenant to one quarter section to another, though both are now owned by the same person.

It is alleged in the answer that said irrigation district "is a municipal corporation, and is not subject to be sued in this action," and we are asked by respondent to adjudicate that question. It is true, as appellant suggests, that it cannot be considered as affecting the order appealed from; but as that order must be affirmed, and as the question must again arise, unless abandoned by the defendant corporation, it should be disposed of now so as to avoid another appeal. We are not referred to any case where this question has been raised or decided. The fact that it has not been before made, while by no means conclusive, is suggestive of the construction given to the statute by the bar. Section 14 of the Wright act (St. 1887, p. 35), after giving express authority to the board of directors "to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by this act, or acquired in pursuance thereof," adds: "And in all courts, actions, suits, or proceedings, the said board may sue, appear, and defend, in person or by attorneys, and in the name of such irrigation district." This language is quite as effective to subject the district to an action as the more common expression "to sue and be sued." "Appearance" is defined by Bouvier to be "a coming into court as a party to a suit, whether as plaintiff or defendant"; "the formal proceeding by which a defendant submits himself to the jurisdiction of the court"; while the word "defend" is defined in Black's Law Dictionary as follows: "To contest and endeavor to defeat a claim or demand made against one in a court of justice." It is conceded that the state and its public agencies cannot be sued without express authority from the state itself, and that, as held in Re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675: "An irrigation district organized under the Wright act becomes a public corporation, and its officers become public officers of the state." Undoubtedly a general statute authorizing individuals or private corporations to sue or be sued would not be construed to include municipal corporations; but where, as here, the statute in question relates directly and exclusively to corporations formed under it, that part relating to its liability to sue or be sued must be determined by those rules of construction intended to aid in ascertaining the intention of the legislature, for whatever power it does bestow is granted directly and expressly to such corporation. If such corporations may not be sued, no judgment can be rendered against them, whether they appear and defend or not, and certainly the legislature did not intend that such actions should be profitless to the parties and only profitable to the attorneys, and perhaps not even amusing to the court. The right to appear and defend implies the liability to be sued. The order appealed from should be affirmed.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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116 Cal. 670

## ROTHSCHILD v. SWOPE. (L. A. 220.)

(Supreme Court of California. May 7, 1897.)

FRAUDULENT CONVEYANCE — STOCK IN TRADE — CHANGE OF POSSESSION — INTENT — CONDITIONAL SALE — PAROL EVIDENCE — AGENCY — EVIDENCE OF AUTHORITY.

1. A debtor wrote certain of his creditors, informing them of his financial embarrassment, but stating an intent not to quit business, and a belief that, by the end of three weeks, he would have sold enough goods to pay all his debts, and offering to give them a bill of sale of his stock if they felt insecure. About 10 days later, such creditors assigned their claims to plaintiff, with authority to buy the stock, "the goods to be taken in full of the creditors' claims"; and possession was taken by plaintiff under a bill of sale absolute on its face, and sales were made by the agent of such creditors, with the debtor's assistance, for two weeks, when the agent surrendered possession to the debtor, and the latter erased plaintiff's name from the sign in front of the store. There was no consideration for the transfer other than the claims, and the sale was advertised by plaintiff to continue for 14 days only, and there was evidence that plaintiff authorized an advertisement that, after part of the goods had been sold, the debtor would again conduct the business. The testimony as to whether the bill of sale was to be conditional for the payment of the creditors' debts, or absolute, was conflicting. *Held*, that a finding that the sale was fraudulent as to creditors, under Civ. Code, § 3440, because of the equivocal nature of the transaction and of the possession taken, was justified.

2. Though a creditor knew of a sale of the debtor's goods to other creditors, he may attach them in good faith if they are afterwards found in possession of the debtor with all the indicia of ownership.

3. Evidence that creditors assigned their claims to plaintiff for the purpose of conducting a sale of the debtor's goods; that plaintiff took possession under the belief that it was to be surrendered to the debtor when enough to cover the claims was realized from sales; that plaintiff employed an agent to make the sales, with authority to act generally for him; and that thereafter the creditors corresponded with such agent,—sustains a finding that a surrender of possession to the debtor by the agent, after conducting sales for two weeks, was authorized by the creditors.

4. Evidence of things said and done by the parties before and after the execution of a bill of sale absolute on its face is admissible to show that the instrument was intended to operate as conditional security.

5. Where creditors, after receiving an offer of a bill of sale from their debtor, assign their claims to an agent for the purpose of conducting the transaction, with authority "to take the goods in full of the creditors' claims," the agent has authority to agree with the debtor that the sale shall be conditional, and that the goods will be surrendered to him when enough is realized from the sales to satisfy the claims.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Henry L. Rothschild against F. W. Swope. There was a judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

Geo. A. Rankin, for appellant. Oscar Philo Taylor, for respondent.

CHIPMAN, C. This is an action for conversion, brought by plaintiff against defendant, for a certain stock of goods and merchandise which defendant had seized by writ of attachment, as sheriff of Riverside county, in the suit entitled "J. A. Simms versus E. M. Stanton." The defendant justified under his writ. Plaintiff claims ownership of the goods at the time of their seizure. The cause was tried by the court, and it rendered judgment for defendant. Plaintiff moved for a new trial, which was denied, and this appeal is from the order denying the motion.

The testimony tended to show the following facts: The said Stanton, in 1893, was engaged in the jewelry business at Riverside. He made a proposition to certain San Francisco creditors by letter, dated December 10, 1893, as to his financial situation, the result of which was that these creditors assigned their claims to plaintiff, and empowered him, as they testify, to purchase the stock of goods held by Stanton, and receipt the several claims so assigned; "the goods to be taken in full of the creditors' claims." This letter becomes important in the decision of the case, and should be at least partly given. Stanton inclosed a statement of his condition. He called attention to the fact that he owed much more than he or his creditors had supposed, and explains how he lost sight of his true condition. He disclaims having attempted to deceive his creditors. I quote: "Now, if you feel that you would be more secure, I will give you a bill of sale of stock and fixtures, as I do not want to do anything that is not satisfactory to all my creditors. They have all been kind to me. I send you a paper containing an advertisement to close out my business, which, of course, I do not intend to do, but had to write it in such a way as to convey that idea in order to make a success. I expect to sell enough by December 31st to pay all I owe." The letter continues in some detail to show how he hopes to work out. He explains why he has advertised the special cut-rate holiday sale, and that he thought it best for all concerned, etc. Following this letter, the creditors addressed sent plaintiff as their representative to Riverside. They also employed one Hugh Mauldin, an expert jewelry salesman, to go with plaintiff. On December 23, 1893, Stanton made and delivered to plaintiff a bill of sale, and plaintiff went into immediate possession of the property. Attached to the bill of sale was an inventory headed "Invoice, Riverside, November 20, 1893," purporting to contain an inventory of the goods sold, including book accounts, fixtures, and a horse and saddle, and on the bill of sale was recapitulated Stanton's assets and liabilities, showing: Assets, $11,874.86, and liabilities, $6,342.09. The sale was absolute on its face, and was for the consideration of $5,532.77. Plaintiff took the assignment of two insurance policies covering the property, which were accepted by the companies. Plaintiff testified that by his own inventory, made at the time, the goods were reasonably worth $7,007.81, besides fixtures and tools, etc., worth $1,200 more. He also testified that, at the time of the sale, he receipted to Stanton the bills due to the creditors whom he represented to the amount mentioned in the bill of sale, to wit, $5,532.77, and there was no other consideration. The sale and transfer took place about 9 o'clock Saturday evening. The following Monday was Christmas, and the inventory was begun on the following Tuesday, and the store was closed until Thursday, December 28th, when plaintiff opened it. On that day, as plaintiff testifies, he "placed Mr. Hugh Mauldin in charge, who is a jewelry salesman, and makes a specialty of forced sales in the jewelry line; * * * employed him to take possession of the store for me"; and plaintiff himself went away. He testified also that Mauldin "was employed as a clerk for the purpose of carrying on the business, and not otherwise." One of the creditors testified that Mauldin was authorized to be employed by them, and that his employment was for a short time, and the sale was to be forced. In the daily papers of Riverside, Mauldin caused the following notice to be published, as he testified: "Sale Extraordinary. For Only Fourteen Days. By authority of San Francisco creditors of E. M. Stanton, I will offer for sale at cost, for a limited number of days, the entire stock of the Stanton jewelry establishment, 855 Main street, Riverside, commencing to-day, December 28th, at 10 a. m., and continuing until the evening of January 13th prox. In no instance will more than the cost the dealers pay at wholesale be asked, and, as no new goods will be added to the stock, it is confidently believed that fourteen days will attain the object of the sale. Mr. Stanton himself and his able assistant, Mr. J. S. Baker, will be in attendance. Come early, and get your pick. Hugh Mauldin, Manager." He testified that he received $1,459.81 from sales. I quote further from his testimony: "I ran the sale until the night of 13th January. Q. What did you do with the store then? A. I left it. I was through. Q. To whom did you give the keys? A. I left them on the cases. I put Mr. Stanton in my position, and left the thing that way." Mauldin added to this notice of sale, and it was published on the last day of the sale, the following: "Closes to-night. The Stanton sale closes to-night, at ten o'clock." On January 19, 1894, the defendant levied a writ of attachment upon the remaining goods then in Stanton's possession, at the suit of said Simms, and subsequently sold them for $2,270.94.

From plaintiff's statement of the facts it appears that Mauldin returned to San Francisco on the 14th of January, and informed plaintiff and the creditors that he had turned over possession of the goods to Stanton. On the 15th of January, plaintiff wrote one J. S. Baker (who had been a clerk of Stanton, and had assisted Mauldin) to get the keys from Stanton, and take charge of the store, to which Baker replied on the 17th, stating that Stanton was in charge of the store; that Mauldin had expected instructions, and, receiving none, turned over the store to Stanton. Stanton refused to turn over the store to Baker. As to the real purpose of the bill of sale the evidence is conflicting, as indeed it is almost throughout the record. The creditors concur in testifying that plaintiff had no authority to promise Stanton anything but that the goods would be taken in payment of the debts; that it was to be an unconditional sale; and that plaintiff had no authority to make it a conditional sale. The evidence of Stanton was to the effect that the bill of sale was given as mere matter of security; that Rothschild (plaintiff) so recognized it; that it would not take over two weeks to realize the amount due, and he would then return the stock; that the purpose of the bill of sale was merely to protect plaintiff, as well as himself, to show authority; that it would be better for him (Stanton), so that people would think it a bona fide sale. Plaintiff, as a witness, denied substantially that any such understanding existed as testified to by Stanton, and objected to the latter's testimony as incompetent, because it contradicted the terms of his written bill of sale, and because plaintiff, as agent of these creditors, had no authority to make such agreement. This objection will be dealt with later.

Before Mauldin turned the goods over to Stanton, they had some conversation on the subject, and to the statements of Mauldin objection was made by plaintiff, on the ground that he (Mauldin) had no authority to make them, and this objection will be hereafter noticed. Stanton testified that, two or three days before turning over the store, Mauldin said to Stanton that he expected to be through on Saturday night, and would turn the keys over; that he (Stanton) had better stay out of the store until Saturday evening; then he would turn it over to him. On January 20th plaintiff wrote to Stanton a letter, from which I quote: "In a letter from Mr. Baker this morning, I learned that Mr. Mauldin gave you the keys, and placed you in possession of the store, which he did without my knowledge, and without any authority whatever. For the present such was not my plan, and I request you to kindly give the keys to Mr. Baker, and leave him in the possession of the store. In a very short time we can make satisfactory arrangements between us, but for the present the above instructions are necessary to be followed; else people will think the sale is over, and that things are again in their normal condition, which spoils every possibility of realizing money to any extent. For the same reason, I would request you to keep out of the store as much as possible, until we make other arrangements." It appeared also that, when plaintiff took possession, Stanton had a sign over the door in letters two feet long, and eight inches wide, and covered most of the sign. Plaintiff caused to be painted on the margin of this sign, in letters about one-half inch in size, "Henry L. Rothschild, Successor." There were two small bevel signs, consisting simply of Stanton's name in black letters, one inch in size, that were placed in the windows as part of the dressing of the windows. These were not removed. Stanton erased the name of Rothschild from the large sign when he retook possession. Defendant introduced in evidence a local item published in the Riverside Daily Press of December 26, 1893, reading as follows: "E. M. Stanton's jewelry store was closed to-day pending taking invoice. Hugh Mauldin, who closed D. E. La Rues' jewelry stock a couple of years ago, is here in charge of the store. After a certain amount of goods have been sold, we understand Mr. Stanton will take charge again, and conduct the business. We sincerely hope they will come out all right, for Ed. Stanton is a popular and highly esteemed young man." Stanton testified that this was inserted by either plaintiff or Mauldin, and it was while plaintiff was there. As to Mauldin's authority, the plaintiff testified as follows: "Q. Did you ever give Hugh Mauldin authority to turn this store back to Stanton, or return the possession of it? A. I told him to act for me. Q. Act for you in what? A. In every capacity that I could act for myself." At another time he testified that Mauldin was simply a clerk to sell the goods, and his further instructions were not to leave until further directed.

Appellant makes two points in his brief as to the findings of the court: First, that Mauldin had no authority to turn over the goods to Stanton, and that in doing so it did not revest the title in Stanton; and, second, that, if Mauldin acted within the scope of his authority, it does not follow that the goods became subject to attachment at the suit of Simms, because plaintiff's possession was open, notorious, and continued.

The view of the case taken by the court below was that the possession was not open and notorious and continued, and that the sale was fraudulent and void as to the then existing creditors, under section 3440, Civ. Code. It appears to me that the court was fully warranted in reaching this conclusion from all the facts and circumstances, and therefore neither the question as to the authority of the vendee, as the representative of the creditors, nor of those who were acting as agents of the vendee, need be considered, except so far as their acts and conduct may throw light upon the original transaction. If, as to creditors of Stanton, the sale to plaintiff was void ab initio, it becomes immaterial whether Stanton was or was not revested with title by Mauldin. As to creditors, the title never left Stanton. There is perhaps no one section of our Civil Code that has given rise to greater perplexity in its application to the transfer of personal property than section 3440. Notwithstanding the numerous decisions of this court, and the many lucid and comprehensive opinions found in our Reports, it has been found impossible to formulate a rule for all cases. It must always rest with the enlightened judge or jury to say whether, under the given facts and circumstances, the sale should be upheld as against existing creditors. The justice and wisdom of the statute are too deeply intrenched both in the lay, as well as in the judicial, mind, to longer admit of question. The law has the sanction of adoption by all civilized countries, and has found application in the affairs of men everywhere since the days of Queen Elizabeth. Counsel for appellant is quite correct in saying that the statute of frauds should not be "changed into an instrument for the perpetration of fraud, instead of its prevention"; but neither should it be made a cloak under which fraud can find shelter.

The case before us is unique in many features. As an illustration of an attempt of certain creditors to secure payment by preference, with a reasonable belief that enough would remain out of which to pay the remaining creditors, the transaction was not unnatural nor strained. But as a transaction importing an absolute transfer of title, as vendor and vendee ordinarily regard title, or as the law considers it, it seems to me the essential elements are wholly wanting. I do not think the fact alone that Stanton took possession within two weeks after the sale necessarily imports fraud, or that the possession was not continued; neither does it imply a right to repurchase or take back the property. At most, it is but a circumstance in the case. No rule can possibly be laid down as to the length of the interim during which the vendor is out of possession before he can repurchase or become repossessed. It all rests with the intent and conduct of the parties in making the sale, and upon the circumstances surrounding the parties while the vendor is out of possession. Stevens v. Irwin, 15 Cal. 503. I have already attempted to summarize the salient facts from which the trial court apparently drew its conclusions. There were still other facts of more or less significance. It is true, the evidence was not without conflict, but there was evidence tending to show the facts to be as already stated, and we cannot say that the court took the wrong view in these conflicts. This court, 37 years ago, in Stevens v. Irwin, supra, gave an interpretation to the statute which has stood unassailed ever since. Perhaps no better general interpretation of the law has since been given. It was there said: "The delivery must be made of the property. The vendee must take actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial." In the case before us I think there was immediate delivery, followed by actual possession. As to length of time possession was held, that alone would not, in my judgment, change the fact of possession. But it was the character of the sale and the character of the possession that gave the true color to the transaction. Immediate delivery and actual possession alone are not enough. Actual and immediate delivery, followed by possession and continued change of possession, are not enough, although these are literally all the law requires. The possession must be open and unequivocal, carrying with it the usual marks and indications of ownership of the vendee. It must be such as to proclaim to the world the new ownership. It must have carried with it evidence of the usual relationship between property and its owner. It must be taken to be retained, and not with a purpose to return it to the vendor. Levy v. Scott (Cal.) 46 Pac. 892. Tested by this rule, I cannot say that the court erred in applying the facts found, nor that it erred in finding the facts as it did.

Appellant submitted much testimony tending to show that the suit of Simms against Stanton, under which defendant justifies, was collusive, and that Simms knew of the sale by Stanton to plaintiff. The court below, in its opinion (found in the record), stated that Simms knew of the sale to plaintiff, but the court held that at the time of the attachment the property was in Stanton's possession, with every apparent evidence of ownership in him, and all evidences of plaintiff's ownership obliterated, and was therefore subject to attachment by Stanton's creditors; and I cannot say the court erred in this conclusion. If plaintiff had alleged and proved a fraudulent collusion between Simms and Stanton to get possession, followed up by proof of a collusive attachment, the case would have been quite different. But it nowhere appears that Simms and other creditors, who were not provided for in plaintiff's purchase, had anything to do with the surrender of possession to Stanton by Mauldin. As to the powers of plaintiff and Mauldin, as agents of the creditors, I think the evidence warrants the conclusion of the trial court that plaintiff had full authority to act for the creditors. He went to Riverside upon the written invitation of Stanton, in which he said to his creditors in San Francisco: "Now, if you feel that you would be more secure, I will give you a bill of sale of stock and fixtures, as I do not want to do anything that is not satisfactory to all my creditors." There was believed to be sufficient to pay all. The evidence tended to show that plaintiff went into possession with the understanding that it was not an absolute and unconditional sale, but a temporary possession for the purposes of a forced and limited sale, and that Stanton was again to have possession. Plaintiff turned the property over to Mauldin, to conduct the sale, and the evidence tended to show with such powers as he himself had. Plaintiff returned to San Francisco, and we must presume reported the facts as they existed. If he did not, the creditors ought not to be heard to complain. They trusted him to take the title, and to conduct the business, and I think should be bound by the acts of plaintiff. The evidence tended to show that Mauldin succeeded to the power of plaintiff. Stanton testified that there was a mutual understanding between plaintiff, Mauldin, and himself that the store was to be returned to him when the amount due the San Francisco creditors was realized; that Mauldin stated that he had realized different amounts; at one time he stated it at $1,500, and at another $3,000 or $4,000, and that, when the stock was turned over to him (Stanton), he did not know but that the claims were paid in full, and he stated he supposed they were paid, or the stock would not have been turned over to him; that he did not then know, nor did he know when he testified, whether they had been paid in full as a fact. After plaintiff left, the creditors corresponded with Mauldin, and gave him instructions. This correspondence, so far as printed, seems to me to corroborate the view of the case taken by the trial court.

The objection made to Stanton's testimony as to the purpose of the bill of sale, noted in the summary of facts, I do not think well taken. It did not relate alone to conversation after the sale, but, as I understand it, related to the understanding both before and after the paper was signed, and was while he was in possession. I think it was competent for defendant to show just what was said and done by the principals to the sale at the time it was made, and what they both understood was its intention. The rule of law as to impeachment of deed by the grantor after its execution does not here apply. The facts both before and since the making of the bill of sale tend to show that it was not intended to work an absolute sale. Nor was the objection well taken that plaintiff had no authority to make such an agreement. As already observed, Stanton had a right to assume that plaintiff had full authority; and, this being so, he could show what was done by plaintiff. For like reasons, the statements of Mauldin at the time he turned over the property to Stanton were admissible. The evidence tended to show that Stanton understood from both plaintiff and Mauldin that he (Mauldin) was clothed with all of plaintiff's authority, and, in turning over the property, he seemed to be doing no more than what the evidence tended to show was originally contemplated. Other errors of law are assigned by plaintiff as occurring at the trial. Several questions were asked plaintiff on cross-examination as to what was said or done when the bill of sale was signed, intended to draw from plaintiff an acknowledgment as to the purpose of the instrument. I see no error here. If it was true that the bill of sale did not in fact express its true meaning, and that it had a purpose different from what it disclosed, I see no error in having asked plaintiff about it. I find no prejudicial error in any of the other specifications.

My conclusion upon the whole case is that the record discloses no reversible error, and it is recommended that the order be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

117 Cal. 77

## REILLEY v. WRIGHT et al. (Sac. 161.)

(Supreme Court of California. May 22, 1897.)

QUIETING TITLE — EVIDENCE—EXECUTION SALE — TITLE OF PURCHASER—PRIORITIES.

1. In a suit to quiet title by a purchaser of land sold on execution under a judgment in an attachment suit, the production of the judgment, execution, and sheriff's deed makes a prima facie case, as against the judgment debtor, without showing that the latter had an interest in the land at the date of the attachment or of the sale.

2. The title of a purchaser at execution sale under a judgment in an attachment suit relates

back to the levy of attachment, and is therefore superior to a mortgage lien acquired by a third person between the date of said levy and the execution sale.

Department 1. Appeal from superior court, Nevada county; John Caldwell, Judge.

Suit by Cornelius Reilley against Whitaker Wright and others to quiet title. From a judgment for plaintiff, and from an order denying a new trial, defendants Wright and Johnson appeal. Affirmed.

E. M. Gibson and Welles Whitmore, for appellants. Chas. W. Kitts and Fred Searls, for respondent.

VAN FLEET, J. Appeal by defendants Wright and Johnson from a judgment quieting plaintiff's title to a piece of mining ground in Nevada county, and from an order denying said defendants a new trial. The complaint was in the usual form, alleging title and possession and right of possession in plaintiff, and that defendants made some claim adverse to the plaintiff in the premises, which was without right. Appellants answered jointly, denying plaintiff's title, and averring legal title in fee in Wright, and a mortgage lien on the property by Johnson under a mortgage from Wright. At the trial, plaintiff deraigned title to the premises in dispute under a judgment and execution sale in an attachment suit theretofore brought by him against the defendant Wright in the superior court of Nevada county. After showing that the complaint was filed and attachment issued in that action October 16, 1889; that the attachment was levied on the property October 17, 1889; that judgment was entered therein in favor of Reilley for $15,000 and costs May 1, 1893; the issuance and levy of execution thereon against the property May 5, 1893; a sale of the property by the sheriff, under the execution, June 5, 1893, to one L. Gilson; sheriff's deed to the purchaser December 11, 1893; and a deed from Gilson to plaintiff March 3, 1894,—plaintiff rested. Thereupon appellants moved for a nonsuit upon the ground that the evidence did not show "whether, at the time of the levy of the writ of attachment, or the execution admitted in evidence, the defendant Wright had any interest in the property." The motion was denied, and the only material question in the case is the correctness of this ruling. The contention of appellants, in keeping with the ground of their motion, is that plaintiff made no case, because he offered no evidence "showing or tending to show that Whitaker Wright had any interest in the property" either at the date of the attachment or of the levy of the execution, and, consequently, that there was nothing to show that plaintiff acquired any interest through his deed from Gilson. There is no merit in the contention. The plaintiff was claiming under an execution sale based upon a judgment against Wright as the judgment debtor, and in such case, in an action of this character, it was only necessary for plaintiff, in making out a prima facie right to recover as against Wright, to show the judgment of a court of competent jurisdiction, the execution thereon and sale thereunder, and transmission of the title to the plaintiff. Bank v. Raynor, 61 Cal. 145. "As against the judgment debtor, the production of the judgment, execution, and sheriff's deed is prima facie evidence of the plaintiff's right to recover; but, if the action is against a stranger to the judgment, the plaintiff must also show that the judgment debtor had the title or possession of the land at the date of the lien or of the sale." Robinson v. Thornton, 102 Cal. 675, 681, 34 Pac. 120, and cases there cited. The same is true as to defendant Johnson. His mortgage interest or lien was acquired intermediate the levy of the attachment and the execution sale in the attachment suit of Reilley v. Wright, and was therefore subordinate to the lien of the attachment; and, as the title acquired through the sheriff's deed related back to the levy of the attachment (Porter v. Pico, 55 Cal. 165), his rights under the mortgage were as effectually concluded thereby as were those of his mortgagor. Robinson v. Thornton, supra.

The other questions presented all grow out of an attempt on the part of the defendants to show an equitable title in defendant Wright, which was not pleaded. The whole matter was entirely without the issues raised by the pleadings, and, while the court admitted evidence upon the question, it eventually, and we think properly, entirely ignored such evidence in making its findings, and confined itself to the issues made by the pleadings. The errors assigned thereon have no material bearing upon the case, and the judgment and order must be affirmed. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.

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5 Cal. Unrep. 664

## RHOADS et al. v. GRAY et al. (Sac. 312.)

(Supreme Court of California. May 13, 1897.)

APPEAL FROM JUDGMENT AND ORDER—UNDERTAKING—SUFFICIENCY—EVIDENCE—REVIEW.

1. Where an appeal is taken from the judgment, and also from the order denying a new trial, an undertaking which recites only that it was in consideration of the appeal from the judgment is ineffectual as to the appeal from the order.

2. Under Code Civ. Proc. § 939, providing that an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed unless the appeal from the judgment is taken within 60 days after its rendition, the judgment must be affirmed where the only ground urged on an appeal not taken within 60 days is that the evidence was insufficient to sustain certain findings of fact.

Department 1. Appeal from superior court, King county; Justin Jacobs, Judge.

Action by one Rhoads and others against one Gray and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Horace L. Smith, for appellants. J. A. Hannah and M. L. Short, for respondents.

PER CURIAM. At the hearing of this cause the appeal from the order denying a new trial was dismissed for want of an undertaking upon such appeal, the $300 undertaking for costs which was filed herein reciting only that it was in consideration of the appeal from the judgment. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147. The only ground urged by the appellants in support of the appeal from the judgment is that the evidence was insufficient to sustain certain findings of fact; but, as the appeal was taken more than 60 days after the rendition of the judgment, we are precluded from the examination of that question. Code Civ. Proc. § 939. The judgment appealed from was rendered February 14, 1896, and the appeal therefrom was taken November 5, 1896. The judgment is affirmed.

117 Cal. 29

## PEOPLE v. WONG SAM. (Cr. 231.)

(Supreme Court of California. May 17, 1897.)

FORGERY—WHAT CONSTITUTES.

A false letter purporting to have been written by another with intent to influence the collector of customs to reject the application of a Chinese subject to land is not an instrument which could defraud, within Pen. Code, § 470, defining forgery.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Wong Sam, alias Wong Ng Tai, was indicted for forgery. From an order sustaining a demurrer, the people appeal. Affirmed.

W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, Dep. Atty. Gen., for the People. Henry C. Dibble and Barclay Henley, for respondent.

VAN FLEET, J. Appeal by the people from an order sustaining a demurrer to an amended information attempting to charge defendant with forgery in writing and sending to John H. Wise, as United States collector of customs, at the port of San Francisco, a certain alleged false, forged, and fraudulent letter, purporting to have been written and signed by one Chin Qu Sing, the interpreter of the police court of the city of Los Angeles, the intent and purpose of which letter was "to influence the judgment of said collector adversely" to the application of one Lu Goon, a Chinese subject, then seeking the permission of said collector to land at said port under the terms of the Chinese exclusion act, and thereby "defraud said Lu Goon." Of the reasons suggested in support of the demurrer, one is sufficient to sustain the order: that the paper is not one of which forgery may be competently predicated. The letter purports to be nothing more than an unwarranted assault upon the veracity, reputation, and business standing of the person against whom it was aimed; and, while it might constitute the basis of a prosecution for criminal libel, it is not an instrument which, upon its face, could have the effect to defraud, within the meaning of section 470 of our Penal Code, defining forgery, according to any interpretation of that or any similar statutory provision which has been called to our attention. See People v. Munroe, 100 Cal. 666, 35 Pac. 326; Foulke's Case, 2 Rob. (Va.) 836; Jackson v. Weisiger, 2 B. Mon. 214; Shannon v. State, 109 Ind. 407, 10 N. E. 87. Order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

117 Cal. 42

## ADAMS et al. v. WEAVER (two cases. Sac. 163).

(Supreme Court of California. May 20, 1897.)

SALE—FRAUD—EVIDENCE—DEPOSITIOSN—APPEAL.

1. The fact that the lessee of a ranch, after surrender of his lease and the sale and delivery of chattels thereon to his lessors, was employed on the ranch for a few days as foreman, does not conclusively show fraud against his creditors, his changed position being well known in the neighborhood.

2. Code Civ. Proc. § 2032, excluding certain depositions when deponent is present in court, does not apply to the deposition of a party taken on behalf of the adverse party under section 2021, subd. 1.

3. The exclusion of a deposition cannot be presumed erroneous when the deposition is not in the record.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Actions of replevin by Elizabeth Adams against N. M. Weaver, and by Elizabeth Adams and I. O. Stephens, executors of D. O. Adams, deceased, against the same defendant. The two cases were tried together, and from an order in each case denying defendant's motion for new trial he appeals. Affirmed.

Philip S. Driver and Albert M. Johnson, for appellant. F. E. Baker and R. L. Simpson, for respondents.

PER CURIAM. These are two actions of replevin, brought by the respondents respectively, and, by stipulation of counsel, tried together. The appeal is from an order in each case denying defendant's motion for a new trial, and the two cases come up on the same record. The question involved in each case (aside from a proposition involving the exclusion of a deposition offered by defendant as testimony) relates to the validity of certain conveyances of the property in dispute made by one J. R. Williams to the plaintiffs in the actions. The property transferred to plaintiff Elizabeth Adams is a combined steam harvester and engine, and that transferred to Elizabeth Adams and L. O. Stephens, executrix and executor of D. O. Adams, deceased, consists of horses, mules, sheep, farming implements, hay, grain, etc., all of which was situate on the D. O. Adams ranch, in the county of Yolo. The defendant, N. M. Weaver, is sheriff of the county of Yolo, and as such levied upon the property in dispute under an execution upon a judgment in favor of Stanton, Thomson & Co., and against J. R. Williams, for $2,375.78 and costs, entered October 4. 1892. The execution was levied October 4, 1892, and defendant's claim is that the property at the date of the levy was the property of said J. R. Williams, the judgment debtor, and subject to the payment of his debts. The findings of the court were in favor of the plaintiffs in each case upon all the material issues.

The attack of defendant upon the transfers of the property by J. R. Williams to the plaintiffs, respectively, is predicated upon the theory that such transfers were void under the statute of frauds. There is really but little conflict in the evidence. It tended to show that about September 1, 1890, Elizabeth Adams and L. O. Stephens, as executrix and executor, etc., of D. O. Adams, deceased, executed to J. R. Williams a lease of the Adams ranch for a term of five years; the lessors to place a flock of sheep upon the ranch, and to receive in lieu of rent one-third of the hay, grain, etc., produced thereon, and one-half of the product of the sheep. At the same time Williams purchased from the executors of the estate a large amount of personal property, including therein most of the property involved in these actions. Williams did not pay for the personal property so purchased, but gave his promissory notes therefor, as follows: One to Mrs. Adams for $7,111.11, and two notes to the estate, aggregating about $13,434.73. These notes were secured by a mortgage on all of Williams' share of the crops raised. At the date of the transactions of 1892, hereafter mentioned, a large portion of the wheat crop, subject to the lien of the crop mortgage, was stored in warehouses at Madison and Esparto in the name of the executors, as by the mortgage provided. A small portion was on the ranch, piled in a barn. In August, 1892, Williams found that he could not carry on the place, under his lease, and meet his ranch bills. He proposed to surrender up the ranch, and sell the personal property to the executors for the payment of his debts to them, and to work for the estate as foreman on the ranch. On or about the 25th of August, Mrs. Adams, her attorney, and Williams met and agreed upon a surrender of the ranch, and purchase by the executors of all the personal property. For the purpose of ascertaining the value of the property, except the grain, sheep, and a few other things, having a well-known market value, they each selected an appraiser, and they were to select a third, and the parties were to abide by their valuation of the property. The appraisers were selected, and on the 29th day of August valued the property, making duplicate lists thereof, which they turned over to Williams and the executors. For a day or two thereafter the parties were engaged in fixing the value of the wheat and other property not submitted to the appraisers for valuation, and upon a final footing it was found the aggregate value of the whole was $25,450.35, and the aggregate of indebtedness on the part of Williams to Mrs. Adams and the executors was $20,545.84, and the excess of the purchase price over the indebtedness was $4,904.51. The combined harvester was valued at $5,000, and Mrs. Adams took it in payment of her note upon which that amount was due. A part of the same agreement was that Williams should furnish to the executors a list of his creditors, and the amount due to them, which debts were to be paid out of the balance going to him after satisfying the demands of the executors and of Mrs. Adams. This list was furnished, and Williams declared it was all he owed in the world. It turned out that his indebtedness to the ranch hands was in excess of his statement; but the executors paid them, and the accounts of others presented by him, although the amount was in excess of the sum due on the sale. On the 1st day of September, 1892, according to the testimony, the executors "took formal possession of everything. Mr. Williams surrendered the lease to us, and delivered possession of the leased land. We called up the men, and told them that Mr. Williams' possession of the ranch was terminated; that he surrendered the same to us, and that the men would thereafter remain in our employ; and that the estate would pay them for their services subsequent to the 1st of September." The combined steam harvester had belonged to plaintiff Elizabeth Adams prior to September, 1890, was sold by her to Williams, and she held a chattel mortgage thereon to secure the purchase price, which was represented by her note against Williams. This mortgage was of record. The sale was conducted openly. Notice thereof was published in a newspaper during its progress, and creditors were notified to exhibit their accounts, and plaintiffs knew nothing of any debts owing by Williams except those settled. After turning over the property to the plaintiffs on the 1st of September, Williams returned to the ranch, and under an agreement with Mrs. Adams, acted as foreman until the 12th of September, when he left, and, it is claimed, absconded, and, it would appear from the record, is in Mexico. There was no written bill of sale of the personal property, and no written surrender of the leasehold estate. Defendant levied his execution on the property October 4, 1892.

The first point made by appellant for reversal is that the contract was invalid because not in writing. The argument is based largely upon the fact that the transaction involved the surrender of the leasehold estate of Williams in the ranch, and compensation to him for plowing a portion of the land, etc. Under our statute of frauds, the surrender of the estate of a lessee can only be by the consent of the parties in writing, or by operation of law. Welcome v. Hess, 90 Cal. 507, 27 Pac. 369. Whether the acts of the parties in this case amounted to a surrender by operation of law need not concern us, as neither the land nor the leasehold interest of Williams therein is involved in the action. The question relates solely to the personal property seized by defendant under the execution. The leasehold interest of William in the ranch was not, so far as appears, levied upon; and, had it been, it would not be the subject of inquiry in this action, which is replevin. The property involved in this action was subject to be sold by a verbal agreement, provided the purchase money, or some portion thereof, was paid or possession taken as provided by section 1973 of the Code of Civil Procedure. We think the evidence shows that the entire purchase price was paid, and possession of the property taken under the sale.

It is next urged that the sale was void because not accompanied by an immediate delivery, etc., as required by section 3440 of the Civil Code. That section is in part as follows: "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession. * * *" Appellant cites Edwards v. Bank, 59 Cal. 148, and Watson v. Rodgers, 53 Cal. 401. In each of those cases the trial court found that there was not an immediate delivery or continued change of possession, and thereupon the supreme court held the transfers void as against creditors of the vendor who were such while he remained in possession. In these cases the finding is that the purchase was open, notorious, and for a valuable consideration, and was accompanied by immediate delivery and continued change of possession. We cannot say that these findings are not supported by the evidence. The only thing militating against the conclusion reached by the court is the circumstance that, after the sale and delivery of the property, the vendor was employed as a foreman on the ranch, and filled that office for some 10 days, more or less; but his changed position from that of an owner to a servant was open and notorious, not only to the men on the ranch, but to the neighbors, and, while his employment was some evidence of fraud, it was not conclusive. Godchaux v. Mulford, 26 Cal. 316; Etchepare v. Aguirre, 91 Cal. 295, 27 Pac. 668. We are not often called upon to investigate a case of alleged fraud, either actual or constructive, in which the evidence of upright conduct and fair dealing is more apparent than that of the vendees and plaintiffs in this action. The contention of appellant that the wheat in the warehouse was never delivered is not sustained by the record. In the first place, it was deposited or stored in the name of the executors as mortgagees. Again, Williams and the agent of the executors counted the sacks, estimated the weights, and figured the value at market rates.

It is also urged that the court erred in excluding the deposition of the plaintiff Elizabeth Adams. This deposition had been taken on motion and on behalf of appellant. The said Elizabeth was present at the trial, was a witness on her own behalf, testified at length, was cross-examined by appellant's counsel, and was present when the deposition was offered. It was not offered for impeachment, and no foundation was laid for offering it for that purpose. All that appears is that defendant offered the deposition; that respondents objected to it as incompetent, and that it did not appear that the witness was absent, but it did appear that she was present in court, and had fully testified, and been cross-examined by appellant; and that "the court sustained the objection, and the defendant then and there duly excepted." The witness was a party to the action, and her deposition was taken evidently under subdivision 1 of section 2021 of the Code of Civil Procedure; and, of course, her deposition could not have been rightfully rejected on the sole ground that she was present in court, for the provision to that effect to be found in section 2032 does not apply to subdivision 1 of said section 2021. Newell v. Desmond, 74 Cal. 46, 15 Pac. 369; Johnson v. McDuffee, 83 Cal. 30, 23 Pac. 214. But the deposition is not in the record, and there is nothing there which gives the slightest intimation of its contents, except only "that it was duly and legally taken." Therefore it does not, of course, appear that appellant was prejudiced by the ruling; but, if this be a case where the rule that injury is presumed from abstract error can be successfully invoked, still it does not appear that the exclusion of the deposition was error. The judgment of a trial court will not be reversed for the exclusion of evidence unless it appears that there was no sufficient ground for such exclusion. But in the case at bar the contents of the deposition may have been utterly immaterial or inadmissible as evidence, and therefore the conclusion that the court erred in excluding the deposition does not follow from the mere fact of its exclusion, the deposition itself not being before us. The orders appealed from are affirmed.

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(5 Cal. Unrep. 665)

## MURPHY v. CITY OF SAN LUIS OBISPO et al. (L. A. 273.)[1]

(Supreme Court of California. May 20, 1897.)

MUNICIPAL BONDS—FORM—SUBMISSION TO VOTERS—METHOD OF VOTING—VALIDITY.

1. A city has no power to issue bonds payable in "gold coin of the United States" (in conformity

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[1] Rehearing granted.

with the ordinance submitting the matter to the voters, and the notice of election), instead of in "gold coin or lawful money of the United States," as required by Act March 1, 1893 (St. 1893, p. 61).

2. The term "five per cent. per annum," in a municipal bond, means that the interest is payable annually.

3. Under St. 1889, p. 399, § 2, authorizing a city to prescribe by ordinance the manner of holding a special election for the issuance of municipal bonds, an ordinance directing each voter to indicate his wish by "writing or causing to be written or printed 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote," is mandatory, and is not satisfied by stamping a cross opposite the word "Yes" or "No" printed after the proposition, as provided by the general election law, which the ordinance declares shall only be followed when not in conflict with said ordinance.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Suit by P. W. Murphy against the city of San Luis Obispo and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

Graves & Graves, for appellant. W. H. Spencer, for respondents.

CHIPMAN, C. This is an action brought to enjoin the defendants from selling or disposing of certain bonds issued, but not yet sold, by the city of San Luis Obispo (one of the defendants), and to restrain defendants from levying the taxes mentioned in the complaint, and from enforcing a certain ordinance of the said city. The cause was tried by the court, and judgment given for the defendants. The appeal is from the judgment, and also from the order of the court denying plaintiff's motion for a new trial.

Appellant presents three grounds of attack upon the bonds in question: First, that the bonds are made payable in "gold coin of the United States" instead of "gold coin or lawful money of the United States"; second, that the question as to whether the interest on the bonds would be payable annually or semiannually was not submitted to the voters; and, third, that the voters voting for said bonds voted by stamping a cross opposite the propositions submitted to them, instead of indicating their wish by writing "Yes" or "No" opposite the proposition they desired to vote for. The regularity of the proceedings of the city authorities is not drawn in question, except as these may relate to appellant's second and third points. By the act of March 1, 1893 (St. 1893, p. 61), it is required that the bonds and interest "shall be payable in gold coin or lawful money of the United States." The ordinance provided that both principal and interest shall be payable "in gold coin of the United States," and the notice of election was in that form. The contention of appellant is that the bonds should have been made payable "in gold coin or lawful money of the United States," and not in "gold coin" only. The argument is that, because the previous statutes authorizing the issuance of bonds (Act March 19, 1889, —St. 1889, p. 399; and Act March 11, 1891,—St. 1891, p. 94) were silent as to the kind of money in which the bonds might be made payable, and there was no restriction in this regard; therefore the amendment introducing a restriction was intended to limit the power and to compel the proper authorities to insert the precise language of the statute, and all of it, to wit, "gold coin or lawful money of the United States"; and, not having done so, the bonds were void. Appellant relies upon Skinner v. City of Santa Rosa, 107 Cal. 464, 40 Pac. 742. The respondents reply that the intention of the statute was to leave with the municipality the option of making the bonds payable in either "gold coin" or in "lawful money of the United States." In the case of Skinner v. City of Santa Rosa the ordinance calling a special election to vote upon the bonds described them as serials, "payable in gold coin or lawful money of the United States," following the language of the statute. The notice of the election contained the same description of the bonds proposed to be issued. There were some features introduced about which other questions arose, not involved in this case. After the election, at which the vote was favorable to the issue, bonds were prepared in exact conformity to all the particulars stated in the notice; i. e. the bond was "payable in gold coin or lawful money of the United States." Steps were taken to sell the bonds, but, failing to find a purchaser in their then form, the city council passed another ordinance rescinding the former ordinance, prescribing the form of the bond, and changed the form in three particulars: (1) They were made payable at the Chemical Bank in New York City, instead of the place named in the notice. (2) They were made payable "in gold coin of the United States of America of the present standard of weight and fineness," instead of the statutory form, and as stated in the notice. (3) Interest was made payable semiannually in like gold coin, instead of annually, as stated in the notice. The question presented and decided was, has the assent of the voters been given to the proposed bond? One of the changes made was to make the bond "payable in gold coin of the United States of the present weight and fineness," whereas the voters had voted upon a bond "payable in gold coin or lawful money of the United States"; and the court said: "The kind of money in which payment must be made would influence any business man in determining whether he will favor his municipality incurring a debt for the payment of which, in common with others, his property is liable to taxation." The decision is based largely upon the proposition that the city council could not change the terms of the submission after the vote was taken, but it also points strongly to the further proposition that the council must submit to the voters a bond in strict conformity to the statute, for it is said in the opinion that "the logical inference from the case above cited [referring to Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014] is that, as to all matters required to be submitted, such submission measures the authority of the common council." The opinion then calls attention to the fact that the law prior to 1893 was silent as to the kind of money in which payment should be made, but that by that latter act an amendment required that the bonds and interest "shall be payable in gold coin or lawful money of the United States; that before this amendment there was no restriction as to the kind of coin or currency; that the power to determine that question was as ample as that of a natural person to stipulate in what his personal obligations should be paid." The opinion then says: "The amendment must, therefore, have been intended to restrict that power, and this was done by expressly stating the kind of money in which alone they 'shall be' made payable." And it is added: "Whether the increased value of the bonds caused by the stipulation that they [referring to the Santa Rosa bonds] shall be paid in gold coin of the present standard of weight and fineness would equal or exceed any probable appreciation of gold cannot control the express provisions of the statute in that regard." The court holds, in conclusion, that, where the case arises before the bonds have been delivered, the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had.

In the case at bar the bonds are in conformity with the ordinance and with the notice of election, but they are not in the terms of the statute as to the kind of money made payable, and the question is, do they substantially comply with the statute? It seems to me that to hold that they do would violate the reasoning upon which Skinner v. City of Santa Rosa rests. Respondent, with much force and reason, suggests: "That the plain grammatical and common-sense construction is that the city should choose between the two kinds of currency. It must adopt one or the other, but the wisdom as well as the expediency and responsibility of the choice was left to the people themselves or their representatives. That they might deem it more advantageous to themselves, in seeking a market for their bonds, to pay in gold; and the legislature did not intend to deprive them of this advantage, or to substitute its judgment for theirs." This, it seems to me, is as strong a view as it is possible to present, and covers concisely the whole argument. But this is precisely what the legislature did when it passed the act in 1889, and later, when it was amended, in 1891, the municipality was left without restriction. If, then, the legislature so intended the law to remain, why did it amend the act in this very particular? We had the same kind of money in 1889 and 1891 as in 1893. In fact all our money was of equal value, and no conceivable motive occurring to my mind could have actuated the legislature to introduce this amendment unless it was to provide against a possibility that the time might come when "gold coin" would have a different value from that of some other "lawful money of the United States." If "gold coin" and "lawful money of the United States" were terms importing money of equal, fixed, and unchangeable value, there would have been no occasion for a change in the law. But, as this is not true, I can see a motive in so providing that the maker of the bonds should always have the option to pay in that money declared by the United States to be lawful money.

2. It is further contended that the question as to whether the interest on the bonds would be payable annually or semiannually was not submitted to the voters, but should have been. I think the law was fully complied with in this particular. The term "five per cent. per annum" means interest payable annually, and this is the form prescribed in the bond. There is no merit in this point.

3. Appellant objects further that the ballot used was a violation of the directions in the notice of election; that the notice required the voter to write the word "Yes" or "No" opposite the proposition he desired to vote for, whereas by the ballot voted he was directed in fact to stamp a cross. It was found by the court that two-thirds of the voters who voted at said special election voted said ticket by stamping a cross opposite the word "Yes" or "No," which was printed after the proposition on said ticket, and in no other way. Appellant says that this method of voting may be good under the Australian ballot system, but, as that system applies to general elections only, not having been made applicable to a special election for the issuance of bonds, but, on the contrary, the city having by ordinance required the voters to indicate their wish by writing or causing to be written or printed "Yes" or "No," the election must be held to be void. Section 6 of Ordinance No. 76 prescribed the manner of holding the election, which was: "(1) As provided by law for holding elections in said city; (2) as provided by the general election laws of this state, except where such general laws may conflict with the state law for elections of the kind hereby called, or with this ordinance; and (3) as provided in this ordinance." The mode of voting for or against the indebtedness was prescribed in several particulars, size of paper, heading of ticket, etc., and, among other things, it was provided as follows: "Each proposition set forth in section 2 of this ordinance shall be voted on separately, and must be printed on such tickets as follows: '(1) Bonding for city waterworks, $90,000. Bonding for sewer improvements, $34,500.' Each voter shall indicate his wish by writing or causing to be written or printed 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire

to vote." It will be observed that the election was to be held as provided by law for holding elections in the city of San Luis Obispo, and as provided in the ordinance, and the general election law of the state was to be resorted to only (1) where not in conflict with the mode pointed out in the ordinance, or (2) where the general law did not conflict with the state law for elections of the kind called. Section 2, p. 399, St. 1889, prescribes the manner of procedure to call an election for the purposes named. It provides that the legislative branch of the city shall by ordinance "fix the day on which such special election shall be held, the manner of holding such election and the voting for or against incurring such indebtedness; such election shall be held as provided by law for holding such elections in such city, town or municipal corporation." The act of 1891, supra, made no change in this regard, nor did the act of 1893, supra. Appellant does not challenge the regularity of the proceedings, except in the single fact that the voter made known his wish by stamping a cross after the proposition, instead of writing his wish. The question presented is certainly one involving a clear departure from the provisions of the ordinance. It was plainly stated therein that "each voter shall indicate his wish by writing, or causing to be written or printed, 'Yes' or 'No' on the right-hand margin on his ticket opposite the proposition on which he may desire to vote." The general election law was to be applicable only when not in conflict with the ordinance. It seems to me that the board had no authority for changing the form of the ballot in the feature under consideration. I do not think that, in view of the ordinance, we are at liberty to fall back upon the Australian system, now embodied in our general law, for in the particular mentioned it is in direct conflict with the mandate of the ordinance.

The question, then, is, was the ballot prescribed and voted such compliance with the ordinance as should be upheld by this court? It is true, as respondents suggest, that the words "Yes" and "No" were printed on the ballot opposite the proposition in separate lines, but can it be said that the voter printed them, or caused it to be done? It is true, the ballot is so formed that placing a cross opposite the "Yes" or "No" would convey the wish of the voter, because the ballot informs him that he is to so express his wish, and the operation is easy and simple. The question must, it seems to me, resolve itself into the one proposition: Was the method directed by the ordinance mandatory? In the case of Lay v. Parsons, 104 Cal. 661, 38 Pac. 447, the provisions of the so-called "Australian Ballot Law" were under review. Mr. Justice Van Fleet, speaking for the court, said: "The law requires the voter to mark his ballot by means of a stamp, by putting a cross opposite the name of each candidate thereon for whom he intends to vote. This provision of the law is, we think, mandatory, and no other method will satisfy it." In the case of People v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937, where the same law was before the court, Mr. Justice McFarland said: "Appellant also contends that ballot 'F' should have been counted against incorporation; but it had no mark of any kind, except at the bottom, entirely below all the printed matter, it had the words 'Against Incorporation' written with a pencil, and was properly excluded. There is no provision for that method of voting except when one desires to vote for a candidate for office whose name is not on the printed list on the ballot. Under our present election laws it is not enough to find out generally the intention of the voter (as it was under a former and simpler system). That intention must be expressed in the manner prescribed by the law, which has also other purposes, as the preservation of absolute secrecy," etc. In the case of Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, the general election law again came under review. Mr. Justice Henshaw, speaking for the court, said: "It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected thereby. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed." Mr. Paine, in his work on Elections, says (section 497): "The disregard of directory requirements of law by voters or by officers of registration or election is not, in the absence of fraud, a sufficient ground for rejecting the entire poll of a precinct. But a violation by electors or officers of a mandatory requirement of law which changes or materially affects the result is, even in the absence of fraud, a sufficient ground for rejecting an entire poll when it cannot be purged. Statutes prescribing in affirmative language specific directions for electors or officers of registration or election are directory, unless the acts prescribed are in their nature essential to the validity of the election. Statutes expressly declaring specified acts or omissions fatal to the validity of an election, or expressly prohibiting the performance or omission of specified acts, are mandatory;" and he adds: "The most unimportant requirements may be made mandatory by a clear expression of the legislative will." In the case here it can hardly be said that the manner of indicating the voters' wish was unimportant, but, whether so or not, the ordinance did very clearly declare that "each voter shall indicate his wish in writing, or causing to be written or printed, 'Yes' or 'No' on the right-hand margin on his ticket opposite the proposition on which he may desire to vote." And how can we say that this is not mandatory? or how can we say that an election board could disregard this plain mandate, and change the method so radically? or how can we say that ballots marked with a cross opposite a printed "Yes" or "No" are the equivalent of ballots which the ordinance declared should have written or printed, or caused to be written or printed, on them by the voter himself the word "Yes" or "No"? Respondents cite several cases where official signatures made by the use of a fac simile stamp were held to be good, and like cases, but they do not seem to me to involve the same principle as here. A case is cited also where the form of ballot prescribed was "For the Bonds" or "Against the Bonds," and a ballot was cast with the printed words upon it, "For the Bonds," with a line running through the word "for," and the word "against" written under it, and it was held a valid vote against the bonds; citing Clark v. Commissioners, 6 Pac. 311, 33 Kan. 202. This case is in harmony with others where the question alone is as to the intention of the voter, and where he scratches out a name and writes another in lieu of it, but it does not meet the case where an entirely different method than that prescribed by the statute is adopted for an entire ballot. I think the directions of the ordinance as to the manner of voting were mandatory, and should have been followed. In this view of the case a new trial could avail nothing, and it is therefore recommended that the judgment of the court below be reversed, and judgment be entered for plaintiff as prayed for in the complaint.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below is directed to enter judgment for the plaintiff as prayed for in the complaint.

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(117 Cal. 37)

### HOWE et al. v. JOHNSON. (Sac. 248.)[1]

(Supreme Court of California. May 20, 1897.)

SALES — IMMEDIATE DELIVERY — CHANGE OF POSSESSION—CONVERSION—TITLE BEFORE JUDGMENT.

1. W. was indebted to his barkeeper, K., and proposed that if K. would pay him the difference between the debt and value of the stock in the saloon, he would sell them to him. K. had left the employ of W., and another barkeeper had been employed. W.'s offer was accepted, and K. received a bill of sale. The property was delivered to K., the barkeeper was discharged, and the place was locked up by K., who had no license, and who kept the key, and was the only person who thereafter entered the place. The property was subsequently attached by creditors of W. *Held*, that there was an immediate delivery to K., followed by actual and continued change of possession, as required by Civ. Code, § 3440.

2. The conversion of chattels does not pass the title to the wrongdoer, and before judgment obtained for their value the owner may pass the title to a third person.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by S. Luke Howe and Charles M. Beckwith against F. T. Johnson. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

L. T. Hatfield, for appellant. S. Luke Howe and Chas. M. Beckwith, pro se.

SEARLS, C. This action is brought to recover $500 damages for the unlawful taking and conversion of a stock of liquors, bar fixtures, and furniture, the property of one L. Koch, and by him assigned to the plaintiffs herein December 31, 1895. Defendant denied the allegations of the complaint. For a further answer he justified the taking by showing that he was and is the sheriff of the county of Sacramento; that in an action in which Thomas B. Hall was plaintiff and L. J. Wells was defendant in the justice court of Sacramento township, county of Sacramento, a writ of attachment duly issued, and was placed in his hands for execution; that under and by virtue of said writ he, as sheriff, levied upon and took into his possession the property in question as the property of said L. J. Wells, the defendant in said action. The answer shows that a judgment was subsequently obtained in said action against said Wells, and that an execution issued thereon, under which defendant, as such sheriff, sold the property. The cause was tried by the court, and written findings were filed, in which the court found all the allegations of the complaint were true, except that the value of the property taken was $313 instead of $500, as alleged in the complaint, and except that the articles taken by defendant were those described in his answer. Thereupon judgment was rendered in favor of the plaintiffs. Defendant appeals from the judgment.

The record contains a bill of exceptions or statement of the testimony. The testimony tended to show that L. J. Wells kept a saloon known as the "Yosemite Saloon," at No. 228 J street, Sacramento, in the year 1895, and owned the stock of liquors, cigars, bar fixtures, furniture, etc., therein. L. Koch was a bartender for Wells from October 13 to December 23, 1895, at $65 per month. The latter was indebted to the former in December in the sum of $240, viz. $140 for wages and $100 for money loaned, in evidence of which Koch held the promissory note of said Wells. Koch desired payment, and Wells, having no money, proposed to Koch that if he would pay him another $100 in cash, give up the note, and receipt his demand for wages, he (Wells) would sell to him the stock, fixtures, etc., in the saloon. Koch accepted the offer, and on the 26th day of December, 1895, the sale was consummated, a bill of sale was given to Koch by Wells, the money paid, note given up, claim canceled, etc. Koch received possession of the property, and, having no license to sell liquor, locked up the saloon, and carried the key. Koch was negotiating a sale of some of the fixtures in the saloon, but had not effected a sale, when, on the 30th day of December, 1895, the defendant, sheriff of the county of Sacramento, levied upon and took into his possession said property as the property of said L. J. Wells, under a writ of attachment in favor of T. B. Hall and against said Wells. On December 31, 1895, Koch, in consideration of legal services thereafter to be rendered him by plaintiffs, assigned and transferred to the plaintiffs herein, by bill of sale, all of said property. On January 6, 1896, the plaintiffs made a demand in writing, duly verified, as provided by sections 549 and 689 of the Code of Civil Procedure, upon defendant, requiring him to deliver to them said property, which was refused. There was no evidence tending to show the sale from Wells to Koch to have been fraudulent, unless it be that Wells had no property subject to attachment other than the property in question, and that the sign, "Yosemite Saloon. L. J. Wells, Proprietor," remained upon the place until the property was attached. Defendant denies that Koch was the owner of the property, or that he transferred it to the plaintiffs.

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[1] Rehearing denied.

Appellant contends that the sale from Wells to Koch was void, under section 3440 of the Civil Code, for want of "an immediate delivery, and followed by an actual and continued change of possession." We think this contention is not supported by the evidence. Koch had ceased to be in the employ of Wells before the sale, and another bartender had been employed. When the sale was made, the property was delivered to Koch, the bartender discharged, and the place locked up by Koch, who kept the key, and was the only person who thereafter entered the place, except such friends as he took in and treated to cigars, etc. There is no evidence that Wells was ever in or about the place after the sale. The consideration paid by Koch seems to have been more than the property was worth, and there is nothing in the evidence showing an intent on the part of Wells to hinder, delay, or defraud his creditors. It is apparent from the testimony that Wells was making no profits from the saloon, and was willing to sell to pay his indebtedness to Koch. Under these circumstances we think the evidence warranted the court below in finding in favor of the plaintiff.

2. Appellant contends further that the conversion of the property took place on the 30th day of December, 1895, when the defendant took possession thereof, and that thereafter Koch only had a cause of action against defendant, and that his bill of sale of the property eo nomine made December 31st, or the next day, transferred no interest in the property to plaintiffs upon which they can maintain an action. Title to personal property may pass by act of law. Examples of such change occur in cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy. "On a recovery by law in an action of trespass or trover of the value of a specific chattel, of which the possession had been acquired by tort, the title of the goods is altered by the recovery, and is transferred to the defendant; and the damages recovered are the price of the chattel so transferred by operation of law." 2 Kent, Comm. 388. There is a conflict in the adjudged cases whether the title passes in such cases to the tort feasor upon the recovery of judgment, or only upon its satisfaction. The clear weight of authority is in favor of the latter branch of the proposition, but the question is of no practical importance in the case at bar, and we need not pursue it, as all the authorities agree that in such cases the title does not pass to the wrongdoer upon conversion, and not until judgment obtained for the value of the chattel. Koch, then, if his purchase of the goods was a valid one, had title thereto at the time of his sale to plaintiffs, and the latter, after acquiring such title, might lawfully make demand for their return as provided by statute, and upon a failure or refusal by defendant to yield up possession could maintain an action for conversion. The error of appellant's argument consists in confounding conversion with change of title, which are two very different things, and not at all synonymous. After an unlawful conversion, the owner may, by virtue of his title, maintain replevin to recover possession of the chattels; and, if possession cannot be had, may recover their value, or he may maintain trover for their value as damages. The labor of examining the transcript has been enhanced by the want of an index thereto as required by rule 8 of this court. We find in the cause as presented no cause for reversal, and recommend that the judgment be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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117 Cal. 50

## BOWERS et al. v. MODOC LAND & LIVE-STOCK CO. (Sac. 145.)

(Supreme Court of California. May 20, 1897.)

CHANGE OF VENUE—CONFLICTING AFFIDAVITS.

A refusal of a change of venue on conflicting affidavits as to where the contract sued on was to be performed will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; C. L. Claflin, Judge.

Action by John H. Bowers and others against the Modoc Land & Live-Stock Company, a corporation. Defendant's motion for a change of venue was denied, and it appeals. Affirmed.

Spencer & Raker and Clarence A. Raker, for appellant. G. F. Harris and H. L. Spargur, for respondents.

BELCHER, C. This action was commenced in the superior court of Modoc county to recover the sum of $425, alleged to be the balance due and unpaid for 30 head of cattle sold and delivered by plaintiffs to defendant on or about November 7, 1892, at the agreed price of $22.50 per head. The complaint, which was verified, alleged that defendant paid to plaintiffs, on account of said purchase price, the sum of $250 at the time of the sale and delivery of said cattle, and agreed to pay the balance thereof, $425, on or about April 1, 1893. It also alleged "that the aforesaid sale of said cattle was made, and the obligation from defendant to plaintiffs hereinbefore set out arose and is payable, within the county of Modoc, state of California." After being served with summons, defendant appeared, and filed a demurrer to the complaint, an affidavit of merits, and a demand in writing that the place of trial of the action be changed to the city and county of San Francisco. The demand was based upon the grounds that, for many years prior to the commencement of the action, defendant's principal place of business was, and ever since had been, situated in the city and county of San Francisco; that no sale of cattle, as alleged in the complaint, was ever made by plaintiffs to defendant in Modoc county or elsewhere; and that no obligation on the part of defendant to pay plaintiffs for cattle sold ever arose or was payable in Modoc county or elsewhere. The notice served and filed stated that the motion would be "based and heard on affidavits and oral and documentary evidence to be introduced at the hearing thereof, and on the records and files in said above-entitled court and cause." The motion was subsequently heard and denied, and, from the order entered, this appeal is prosecuted.

The defendant was organized as a corporation under the laws of this state in 1886, and its articles of incorporation stated that the purposes for which it was formed were "the dealing in, buying, and selling, management, and disposition of land and live stock, and everything pertaining thereto in all respects," and also named the city and county of San Francisco as its principal place of business. Section 16 of article 12 of the constitution provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The action was properly brought in Modoc county if the averments in the complaint as to the facts constituting the alleged cause of action were true. The defendant, however, without filing any answer or raising any issue of fact as to these averments, sought at the hearing to prove by affidavits that they were not true, and that plaintiffs had no cause of action whatever against it; and hence it was claimed then, and is claimed here, that the place of trial should be changed. Lakeshore Cattle Co. v. Modoc Land & Livestock Co., 108 Cal. 261, 41 Pac. 472, was a case very similar to this. The action was commenced in Modoc county, and the facts alleged in the complaint showed that the obligation of the defendant to the plaintiff arose in that county. The defendant moved the court to change the place of trial to San Francisco, and, at the hearing of the motion, attempted to controvert the averments of the complaint by the affidavit of one Bayley, its president. The court said: "Without determining whether a court would be authorized in any case to determine that the affidavits presented to it upon a motion of this nature were sufficient to overcome the allegations of the complaint, or to permit these allegations to be determined by affidavits, it is sufficient to say that there is a direct conflict between the affidavit of Bayley and the complaint in the present action, and that we cannot set aside the decision of the court thereon." So, here it is enough to say that, upon the hearing of the motion in this case, there was not only a direct conflict between the affidavits read by defendant and the complaint, but counter affidavits were introduced and read by plaintiffs, which supported the averments of the complaint, and were in direct conflict with the affidavits of defendant. Under these circumstances, the decision of the court cannot be disturbed, and we therefore advise that the order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(117 Cal. 31)

## McGOWAN v. KRELING. (S. F. 720.)[1]

(Supreme Court of California. May 20, 1897.)

VACATING DEFAULT JUDGMENT.

Before time to answer, defendant procured an order to take the deposition of the plaintiff, to enable him to draw the answer. By written stipulation, several continuances as to the deposition were entered into, and, by final stipulation, the taking of the deposition was continued indefinitely. Defendant meantime had not filed any answer. *Held*, that a judgment by default after the last continuance, for failure to answer, was properly set aside, it being apparent that defendant intended to make a defense, and relied on the action of plaintiff in agreeing to the continuances aforesaid.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Thomas A. McGowan against Ernestine Kreling. From an order setting aside a judgment by default, plaintiff appeals. Affirmed.

Van R. Paterson and F. H. Smithson (Reel B. Terry, of counsel), for appellant. H. H.

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[1] Rehearing denied.

Lowenthal (D. J. Murphy, of counsel), for respondent.

McFARLAND, J. This is an appeal by plaintiff from an order of the court below opening the default of the defendant, and setting aside a judgment which had been entered upon said default, in favor of plaintiff, and against the defendant. The action is brought against the respondent, as administratrix of the estate of William Kreling, deceased, to recover quite a large sum of money alleged to be due plaintiff for certain services averred to have been rendered by plaintiff to said Kreling, deceased, in his lifetime. The respondent filed a demurrer to the complaint, which was overruled on April 26, 1895, with leave to the respondent to answer within 10 days thereafter. Before the expiration of the 10 days, the respondent, upon an affidavit that she desired to take the deposition of the plaintiff as a witness before trial, "with a view of preparing her answer to the plaintiff's complaint herein, and also prepare for the trial of said action," had procured an order of the court that the deposition of the plaintiff be taken before a certain notary public on the 24th day of April, 1895. By written stipulation of the parties, the taking of the deposition was continued until the 8th of May, when the taking of it was commenced, and afterwards continued by stipulation to the 11th of May. It was further continued from time to time until May 25th; and, the deposition not having been completed, it was stipulated by the parties that the taking of the deposition be continued indefinitely, "to be reopened upon a notice of three days by either party." The respondent had not filed any answer at the expiration of the 10 days above mentioned, and the appellant had not taken any default, but had entered into a stipulation relative to the taking of said deposition, as above mentioned, while the respondent was in default for want of an answer; but on June 7, 1895, the clerk of the court entered the default, in which it was recited that the demurrer was overruled, and "notice thereof having been given and served upon the defendant." A few days afterwards, the respondent gave notice of a motion to set aside the default, which was accompanied by an affidavit of merits, made by respondent, and also by a verified answer, setting up a defense upon the merits, and an affidavit of her attorney. The affidavit of her attorney stated, among other things, that the attorney for the appellant agreed orally to serve upon the attorney for the respondent the notice of the overruling of the demurrer, and not to take any further steps in the action until the taking of the deposition of the plaintiff had been completed; and that he relied upon said promise of plaintiff's attorney, and upon his conduct in proceeding to take the deposition, and the consent to continuances thereof, etc.

Counsel for appellant relies mainly upon the proposition that under section 283, Code Civ. Proc., and a certain rule of the court below, a mere verbal agreement between counsel, not entered in the minutes of the court, cannot be enforced if it be disputed or denied, which was done in the case at bar. But the question here is whether or not the court below, under all the circumstances of the case, abused its discretion in setting aside the default. "Applications to set aside defaults are addressed to the sound legal discretion of the trial court, and, if granted, the orders are never disturbed by this court, except in cases of gross abuse." Chamberlin v. Del Norte Co., 77 Cal. 151, 19 Pac. 271. The case of Woodward v. Backus, 20 Cal. 138, was very similar to the case at bar. In that case the defendant had failed to file an answer in time, because he relied upon the verbal agreement of the attorneys for plaintiff that he might have further time, and the affidavit of defendant's attorney to the agreement was denied by the attorney for the plaintiff; and the court said: "In making the order, the court below was only required to exercise proper discretion, and the order must have been so plainly erroneous as to amount to an abuse of discretion to justify interference on our part. We think it cannot reasonably be held that the discretion of the court has been abused; and, whatever may be our opinion of the strict propriety of the relief granted, we see nothing in the objection taken to authorize a reversal." The point as to the agreement being verbal is not mentioned in the opinion of the court, but that point was presented and argued in the brief of counsel, and must necessarily have been considered by the court. In Huart v. Goyeneche, 56 Cal. 429, this court reversed an order refusing to open a default in a case very similar in principle to the one at bar. In Underwood v. Underwood, 87 Cal. 525, 25 Pac. 1065, the court said: "The showing made on motion to set aside the judgment is a very weak one, but we are always unwilling to interfere with the decisions of the court below in matters of this kind." In the case at bar the action was founded upon transactions apparently not based upon any written contract which occurred during the lifetime of deceased, and about which the administratrix may be supposed to have had but little knowledge; and it was quite proper and prudent for her to endeavor to get some knowledge of the facts from the deposition of the plaintiff before she filed her answer. The court below no doubt considered the fact that the appellant united in taking the deposition of the plaintiff, and stipulated for various continuances after the defendant had been in default, and that this conduct naturally deceived the respondent. It was quite apparent that the respondent intended to make a defense to the action, and that the furtherance of justice required the opening of the default. No doubt, counsel for respondent, under the circumstances which appear in the affidavit of appellant's counsel, was unwise in subjecting himself to the danger of suffering a default; and the court imposed a penalty of

$125 as a condition of the permission to answer. A trial judge is generally acquainted with the attorneys and parties who come before him, and is much better qualified to do justice in a case like this than is an appellate court dealing only with the printed record; and, under all the circumstances of this case, we do not feel warranted in saying that the court below abused its discretion in opening the default. Order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(5 Cal. Unrep. 674)

## PERKINS v. WEST COAST LUMBER CO.

(L. A. 160.)[1]

(Supreme Court of California. May 21, 1897.)

COUNTERCLAIM — FAILURE TO PLEAD — AMENDED ANSWER—LIMITATIONS—FINDINGS — HARMLESS ERROR.

1. An attorney sued for services under a contract. Defendant claimed damages from negligent advice given by plaintiff before the contract was made, and not given in the performance of the services sued for. *Held*, that defendant's claim, being for unliquidated damages, should be pleaded, to be available, even though treated as a cross demand, within Code Civ. Proc. § 440, providing that "when cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

2. Not having been pleaded in the original answer, limitations ran against defendant's claim, till set up in an amended answer.

3. The trial court's failure to find on issues presented by a counterclaim against which limitations have run is immaterial, where findings upon such issues could not have defeated the bar of limitations.

4. A concluding finding that "all other averments in the pleadings herein and in issue, not comprised and passed upon in these findings, are not true," is improper, but is not reversible error, where the preceding findings are so full and specific, and so clearly cover all the material issues, as to rebut the suggestion of uncertainty.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John C. Campbell, Judge.

Action by C. J. Perkins against the West Coast Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. W. Gregg, for appellant. Rolfe & Rolfe and Paris & Allison, for respondent.

HAYNES, C. This action is prosecuted by the plaintiff, an attorney at law, to recover for professional services rendered to the defendant under a special contract made June 4, 1888, and for moneys paid out for the defendant at its request. Said contract fixed a monthly salary as a retainer, and for advice, etc., and provided that for his services in litigated cases he should have a reasonable compensation. This contract was terminated March 1, 1890. After deducting payments, and an account against the plaintiff for lumber, the court found there was due the plaintiff $1,879.75, with interest thereon from the commencement of the action; and from the judgment entered thereon the defendant appeals upon the judgment roll.

The principal question arises out of a counterclaim for damages pleaded by the defendant, wherein it was alleged, in substance, that in 1887 J. W. Newman, as contractor, agreed to erect for A. P. Clubine 12 frame dwelling houses, for which Newman was to be paid, upon completion, $8,200; that the buildings were completed on April 19, 1888; that the contract was not recorded until long after the work was commenced; that defendant furnished the contractor lumber to be used in the erection of said houses, and which was used therein, of the value of $3,408.77; that on May 18, 1888, the plaintiff, as the attorney of defendant, advised it not to file a lien against said buildings for the material so furnished, as defendant would obtain the amount due it out of the foreclosure suit and lien judgment Newman would obtain in the foreclosure of his lien; that, at the time he so advised defendant, he knew that the contract was not filed for record in the recorder's office until long after the work was commenced; that Newman obtained judgment against Clubine May 16, 1888, but acquired no lien, because of the failure to file the contract in time, and that said judgment has not been paid, because of the insolvency of Clubine; and that Newman is insolvent. This action was commenced by the plaintiff on April 24, 1890, and this counterclaim was first pleaded July 21, 1894. And for the purpose of avoiding the statute of limitations the defendant further alleged that its cause of action for said damages arose out of the transactions set forth in the complaint; that, at the time said advice was given, defendant had no other legal adviser; and that it was agreed and understood at the time the contract of June 4th was entered into that it included the counsel and advice above mentioned, and that at the time the advice was so given a formal agreement as to compensation should be made, and should include the advice so given. To this counterclaim the plaintiff pleaded that it was barred by the provisions of subdivision 1 of section 339, Code Civ. Proc. The court found that said advice was given, and that defendant was damaged thereby as alleged, but that no fee was charged by the plaintiff therefor, and that its cause of action was barred by the statute, which requires such actions to be brought within two years. Appellant contends that its counterclaim for damages is not barred by the statute; that said advice was given on April 17, 1888, two years and seven days before plaintiff brought suit, but that the advice was not legally injurious until the time expired within which the defendant might have filed his notice of lien, viz. May 20, 1888; and that this action was commenced by the plaintiff on April 24, 1890.

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[1] Reversed in banc. See 52 Pac. 115, 120 Cal. 27.

Upon the first trial of this case the defendant was permitted by the court to give evidence of its said claim for damages without having pleaded it, and recovered therefor, but on appeal by the plaintiff it was held that the finding of damages in favor of the defendant should be disregarded because not responsive to any issue in the case; "that even if it were conceded that the claim for such damage by defendant is a cross demand, within the meaning of section 440 of the Code of Civil Procedure, it would still be necessary to plead it, under the circumstances of this case. It cannot be considered the debit side of the account sued on. It is an unliquidated demand for damages." 33 Pac. 1118. That it was necessary to plead defendant's claim for damages is conclusively settled by the former appeal, and, that being true, it follows that, not having been pleaded within the time limited by the statute, it was barred; such pleading, though made by the defendant in the action by way of counterclaim or cross demand, being the commencement of an action therefor. We see no distinction between an amended answer which sets up a cross demand against the plaintiff, and an amended complaint setting up a new cause of action against the defendant, so far as the statute of limitations is concerned; and as to the latter the bar is determined by the date of the amendment, and not by the date of the commencement of the action. Anderson v. Mayers, 50 Cal. 525; Atkinson v. Canal Co., 53 Cal. 102. It is argued by appellant, however, that plaintiff upon the former appeal made the point that said damages were barred, and that, if this court had been of that opinon, it would have said so. But that question was not before the court upon the record, and its silence cannot be construed as a decision of the question.

Appellant's further contention that the court failed to find upon material issues presented by said counterclaim cannot be sustained. As was held upon the former appeal, it was necessary to plead defendant's demand for damages, even if such cross demand were within the meaning of section 440, Code Civ. Proc.; and, as the bar of the statute must be determined by the date at which such demand is pleaded, it is obvious that, if all the allegations of the sixth paragraph of said counterclaim had been specifically found by the court to be true, it would not avail to defeat the finding that its claim for damages was barred, and in view of that finding it is immaterial whether the wrong advice which caused the damage was given under, or was embraced within, the special contract of June 4, 1888, or not.

It is also contended that the judgment must be reversed because of the sixteenth finding, which is as follows: "That all other averments in the pleadings herein and in issue, not comprised and passed upon in these findings, are not true." We do not see why this so-called finding was made. We have discovered no material issue which is not covered by the specific findings, nor are we pointed to any supposed omissions to find, except those already noticed. This, however, is not a finding upon any issue, but it finds that "all averments in the pleadings" not covered by the preceding findings, whether made by the plaintiff or defendant, are not true; and, if not true, they could not be the basis of any specific finding in favor of either party against the other which could affect the judgment. Such statements, however, are suggestive of uncertainty, and are therefore mischievous, and should not be encouraged. We do not think this finding will justify a reversal of the judgment. The preceding findings are so full and specific, and so clearly cover all the material issues, as to rebut the suggestion of uncertainty; and in this respect we think this case may be distinguished from Harlan v. Ely, 55 Cal. 344, Bank v. Treadwell, Id. 380, and other cases cited by appellant. We advise that the judgment be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

117 Cal. 53

## WILSON et al. v. CARTER. (L. A. 208.)

(Supreme Court of California. May 21, 1897.)

QUIETING TITLE—PARTIES—PLEADING.

Where a complaint alleges that, after defendant ceased to be collector of an irrigation district, he sold plaintiffs' land as such, and issued certificates of sale, and asks that such certificates be set aside as a cloud on title, but fails to allege that defendant holds any of the certificates, or has any interest in the land, or to join the irrigation district or the certificate holders, such failure is not a mere nonjoinder of parties, but a failure to plead a cause of action against the party sued.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by James W. Wilson and others against Henry W. Carter. There was a judgment on demurrer sustained to the complaint, and plaintiffs appeal. Affirmed.

Mulford & Pollard, for appellants. Frank A. Cattern, for respondent.

BRITT, C. In this case a demurrer to plaintiffs' amended complaint was sustained without leave to amend further, and judgment final was rendered for defendant. It is alleged in said complaint, among numerous other matters, that plaintiffs are the owners of lands situated within a certain irrigation district in Los Angeles county; that defendant was prior to March 6, 1895, the duly elected and qualified collector of said district; that on February 15, 1895, he offered the lands of plaintiffs for sale to enforce an unpaid assessment levied thereon by the district for the year 1894, and that plaintiffs "bid in" the same. in order to prevent the purchase thereof by strangers; that on March 6, 1895, defendant ceased to be the collector of said district, and his successor was installed in office; that, nevertheless, on March 24, 1895, defendant resold to divers persons at public auction the said lands of plaintiffs, and issued certificates of sale thereof, which certificates are of record in the county recorder's office, and are a cloud on plaintiffs' title. There is no averment that defendant has any interest in the land, or in the said certificates of sale. It is prayed that the sale and said certificates be adjudged null and void; that such certificates be delivered up and canceled; and that plaintiffs be declared the owners of said lands, discharged of the lien of said assessment.

If judgment had passed as prayed by plaintiffs, it would have determined nothing, for the obvious reason that no person to be affected thereby is before the court as a party defendant. The complaint shows that the only defendant named was, but is no longer, an officer of the irrigation district. The district itself is not joined, and no purchaser of plaintiffs' lands or holder of a certificate of sale is made a party. Here is not a mere nonjoinder of interested parties, where failure to plead the fact is a waiver of the objection, but a proceeding against one person, when, for all purposes of the suit, the cause of action, if any exists, is wholly against others. It seems, from the argument of counsel, that the demurrer was sustained by the superior court on grounds different from those we have suggested; but, as the view here indicated is conclusive of the case, it is unnecessary to consider other questions made regarding the effect of various transactions, set out in the complaint, between plaintiffs and the irrigation district. The judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(117 Cal. 65)

## PEOPLE v. McCARTY. (Cr. 283.)

(Supreme Court of California. May 21, 1897.)

CRIMINAL LAW—EXCLUSION OF WITNESSES—EVIDENCE.

1. The exclusion of witnesses while the evidence is being taken is largely in the discretion of the trial court.

2. On trial for burglary the evidence showed that defendant, by means of a tunnel leading from a cellar, entered and robbed a certain bank; that defendant and his confederates entered the cellar during the afternoon, and came out at 12 o'clock at night. *Held*, that the question whether the robbery was committed at night so as to constitute burglary in the first degree was for the jury.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

J. J. McCarty was convicted of burglary, and appeals. Affirmed.

A. B. Hotchkiss, Davis & Mott, and Angus Roy Shannon, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.

GAROUTTE, J. The defendant was convicted of the crime of burglary of the first degree, and appeals from the order denying his motion for a new trial.

There was no error committed by the court in allowing the witness Auble to remain in the court room during the examination of witnesses. The exclusion of witnesses during the time in which the evidence is being placed before the jury is a matter largely in the discretion of the trial court. No abuse of that discretion is disclosed here. People v. Hong Ah Duck, 61 Cal. 387. It is contended that the evidence is insufficient to support the verdict of burglary in the first degree, the claim being that, if a burglary was committed the act was done in the daytime, and therefore it was burglary of the second degree. The defendant and others constructed a tunnel some 120 feet in length from the cellar of a certain saloon to a point immediately beneath the floor of a certain bank building in the city of Los Angeles, for the purpose of committing larceny. Upon the day set for the actual entry through the floor into the building the defendant and his confederates some time during the afternoon entered the cellar, one of them emerging therefrom at 7 o'clock p. m., for the purpose, he stated, of securing fresh air. The others came out of the cellar at 12 o'clock that night. The burglary was committed by these men at some time during these hours. The finding of the jury on this question was a matter peculiarly within their province, and upon this evidence the court will not disturb the verdict in this regard. Again, it is contended that there is not sufficient evidence corroborating the testimony of the accomplice Jones. Without reciting the corroborating evidence disclosed by the record, it is sufficient to say we are entirely satisfied with it. It is ample to satisfy the demands of the statute, and, taking all the evidence together, defendant's guilt is plainly apparent. There is no merit in the remaining points made in defendant's brief. For the foregoing reasons the order appealed from is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(117 Cal. 67)

## McDOWELL v. HYMAN et al. (S. F. 594.) [1]

(Supreme Court of California. May 21, 1897.)

APPEAL—REVIEW OF EVIDENCE—LANDLORD AND TENANT—QUIET ENJOYMENT.

1. Where there is a substantial conflict in the evidence, the verdict will not be disturbed on the ground that it is contrary to the evidence.

2. A tenant of the third and fourth floors of a building, whose water supply is cut off, furni-

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[1] Rehearing denied.

ture injured by dust and lime, ingress and egress interfered with, causing damage, by the landlord's repairing the second floor, may recover from the landlord for breach of covenant of quiet enjoyment, irrespective of his negligence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Delia McDowell against Henry W. Hyman and others for damages sustained as tenant. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellants. Smith & Murasky, for respondent.

SEARLS, C. This is an action to recover damages sustained by the plaintiff as a tenant of the defendants of the third and fourth floors of the building 105 Stockton street, San Francisco, by reason of repairs and alterations made by defendants upon the second floor of said building, whereby the business of the plaintiff as the keeper of a lodging house was injured, her water supply cut off, her furniture damaged by dust and lime, her ingress and egress interfered with by débris in the halls and on the stairs, in consequence of which her lodgers forsook their rooms, etc. The answer denies that plaintiff was at any time an occupant of the third floor of said building as a tenant of the defendants or otherwise; admits that they made repairs on the second floor, and that plaintiff was their tenant of the fourth floor of the house up to April 1, 1889; and denies most of the other allegations of the amended complaint. Plaintiff had a verdict for $900, upon which judgment was entered. Defendants appeal from the judgment and from an order denying their motion for a new trial.

The first point made by appellants for reversal is that the evidence was not sufficient to warrant the jury in finding that plaintiff was the tenant of the third floor of the building. It would appear that the original complaint averred that plaintiff was the tenant of the fourth or upper floor of the building. At the trial, plaintiff, who was a witness in her own behalf, had testified that she "was engaged in the lodging-house business in the years 1888 and 1889 at No. 105 Stockton street; had been engaged in that business since 1880; had the third and fourth floors of the building, which were used as a lodging house," etc. Thereupon the court, on motion of plaintiff, permitted her to amend her complaint by inserting the words "third floor," so as to read "plaintiff carried on the lodging business on the third and fourth floors." Subsequently plaintiff testified that she used both floors as a lodging house; that when Hyman became owner of the house she entered into an arrangement with him concerning the rent of the third and fourth floors, and told him she had both floors; that she had her sister, Miss Johnston, manage the third floor, and that plaintiff managed the top floor. She also told Madison & Burke's agent, who collected the rent, the same thing. She paid her sister $30 per month to manage the third floor, and that the latter always paid the rent of the third floor. On the other hand, Catherine Johnston, the sister of plaintiff, on cross-examination said: "When the supreme court moved out, I took the third floor. Paid $150 per month for it. After Mr. Hyman became the owner, I paid the rent each month to Madison & Burke's collector in my own name, and took the receipts in my own name. My sister at the same time paid the rent for the floor which she occupied. The rents were not paid at the same time. I paid the rent for the floor which I occupied, and my sister paid the rent for the floor which she occupied." It further appeared that defendants served two notices upon plaintiff in reference to the upper or fourth floor, one raising the rent thereof from $150 per month to $450, and the other requiring her to vacate said floor within three days; and that they wanted Miss Johnston to take both floors, and let her sister go, giving as a reason therefor that plaintiff gambled in stocks, and was never home. H. W. Hyman, one of the defendants, testified that they (Hyman Bros.) bought the property May 1, 1888; that he was introduced to the tenants by Columbus Bartlett, the attorney for the estate from which he purchased. Plaintiff occupied the fourth floor, and Miss Johnston the third. Plaintiff never claimed to be the tenant of the third floor. "The first time I heard that she claimed to be a tenant of the third and fourth floors was in this court yesterday." I. H. Hahns, a member of the firm of Madison & Burke, and head collector for the firm, testified that he collected the rents; called with Mr. Hyman, and was introduced by him to the tenants on May 1, 1888, as follows: "This is Mrs. McDowell [plaintiff], who occupies the upper floor, and this is Miss Johnston, on the third floor. And he said, 'in future pay the rent to Madison & Burke.'" He afterwards collected the rent from them severally for the third and fourth floors,—from plaintiff for fourth, and from Miss Johnston for third,—and gave them separate receipts therefor. We have stated the evidence, or its substance, on this point, at length, out of respect to the apparent sincerity with which counsel have urged the point. There can be but one result, however, in the end, and that is voiced by the oft-repeated statement that there is a substantial conflict in the evidence, and in such cases the verdict will not be disturbed upon the ground that it is contrary to the evidence. If the jury believed the testimony of the plaintiff, they were justified in finding in her behalf on the question under consideration. Again, the court instructed the jury very clearly that the question of the tenancy of plaintiff of the third floor was one of fact for their determination, and that, if they found on that question in favor of defendants, and found further that plaintiff was entitled to recover, then, and in that case, it could only be for such damages as she sustained in the use and enjoyment of and to the property in and on the fourth floor. Non constat but that the jury may have found plaintiff was not the tenant of the third floor, but at the same time found her entitled to recover $900 on account of the disturbance to her use and enjoyment of the fourth floor, and the consequential destruction of her business by the loss of her lodgers, which business, as she testified, yielded her a profit of several hundred dollars per month, coupled with injury to her furniture, etc. In this state of the case we are not prepared to say that the verdict is, in the light of the evidence, so excessive as to warrant the inference that it was given under the influence of prejudice or passion.

2. The second point made by appellants is that the complaint does not state facts sufficient to constitute a cause of action. The sufficiency of the complaint, and the propriety of the action of the court in giving and refusing instructions to the jury, depend mainly upon the same general principle. The complaint does not count upon the negligence of the defendants in making repairs upon the second floor of the building, but is founded upon the theory that plaintiff was the tenant of defendants of the two upper floors of the building; that defendants, as owners of the building, conducted certain alterations and improvements on the second floor by tearing out partitions and walls, putting in new partitions, plastering, removing the front doors, etc., whereby plaintiff was damaged, and her quiet enjoyment of the premises as a tenant was interfered with. The contention of appellants is that the law relating to landlord and tenant, where lodgings or apartments or floors are rented, is different from what it is where an entire building is rented. That in the latter case the premises pass into the exclusive possession and control of the tenant; but that in the former case—that is to say, where a portion only of a building is let, and the tenant has rights in common with the landlord and other tenants—the landlord retains all the rights and is subject to all the responsibilities of a general owner to all persons, including the tenant or tenants of his building. That in such cases the principle is deducible that only that which is reasonably essential to the enjoyment of the premises leased passes to the tenant, and that, as to the portions of a building retained by the landlord, he has all the rights of an owner, and is only liable for a negligent exercise of those rights. Put more tersely, the contention is that, in the case at bar the defendants are only liable for negligence, and, as negligence is not charged in the complaint, the pleading was insufficient, and the instructions, which proceeded upon the theory that plaintiff could recover without an allegation and proof of negligence, are erroneous. "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." Civ. Code, § 1927. The principal covenant on the part of a landlord, which, if not expressed, is implied, is that his tenant shall have the quiet enjoyment and possession of the premises during the continuance of the term. "This covenant, whether expressed or implied, means that the tenant shall not be evicted or disturbed by the lessor, or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers. It is equivalent to a stipulation that the lessee shall not be rightfully disturbed in his possession during the term, not that he shall not be disturbed at all." 1 Tayl. Landl. & Ten. § 305. If the tenant is evicted, or his possession disturbed by another tenant of a portion of the same premises, or by any other stranger to the title, the covenant is not broken, and his redress is not against the landlord, but against the wrongdoer. "Flats are as much separate dwellings as ordinary adjoining houses are. The difference is that flats are under one roof, and are divided one from another by a horizontal plane, but ordinary adjoining houses by a perpendicular or vertical plane." Stamper v. Sunderland, L. R. 3 C. P., at page 400. "Where these flats are separate tenements, though under one roof, yet, if the owner does not reside as such on the premises, or retain control of the whole, a letting will create a tenancy and interest in real estate, though there is an outer door or gate in charge of a porter, as the tenants have an equal control thereof or easement therein." Tayl. Landl. & Ten. § 66. A mere lodger is one who occupies a room or portion of a tenement, which is under the control or in the occupancy of another, and he has no interest in real estate.

Counsel for appellants have discussed at some length the relative rights of separate tenants in the same tenement or building. Ordinarily, they occupy no contractual relation to one another, and their rights and liabilities depend upon different principles. We are here concerned with the question of the rights between landlord and tenant, upon the former of whom rests the implied agreement for the quiet enjoyment and possession by the latter of the premises she occupied. The landlords, as the owners of the second floor, had an undoubted right to repair, alter, and improve that portion of their premises, but in so doing they were bound by their implied agreement to so conduct their operations as not to dispossess or render uninhabitable the portion of the building they had demised to others, and, if they failed in this duty, they were liable to their tenant, irrespective of the question of negligence. As against third parties, they could take down the outer or inner walls of the building at will, subject only to such negligence and consequent injury as might render them liable to parties injured thereby, but as against their tenant they could not do the same thing, even in the most careful manner, if the result destroyed the quiet enjoyment of such tenant. This was the distinction taken by the learned judge in overruling the demurrer to plaintiff's complaint and in giving and refusing instructions to the jury, in all of which we think he was correct. We would gladly examine the several instructions seriatim, but their length and the space already occupied forbids our so doing. A careful analysis of those instructions convinces us that, within the theory we have enunciated, no reversible error was committed at the trial, and we recommend that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(117 Cal. 56)

**BARNEY et al. v. PFORR. (S. F. 482.)** [1]

(Supreme Court of California. May 21, 1897.)

CORPORATIONS—DEEDS—VALIDITY.

One claiming under the deed of a corporation executed without the corporate seal by persons signing as trustees must show affirmatively that it was authorized by a resolution of the directors entered on the records of the corporation, or that it was ratified by such a resolution.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Ejectment by Mary E. Barney and another against John Pforr. A nonsuit was granted, and from an order denying a new trial plaintiffs appeal. Affirmed.

Blake & Harrison, for appellants. Pringle, Hayne & Boyd, for respondent.

SEARLS, C. This is an action of ejectment to recover possession of a parcel of land in the southerly part of the city and county of San Francisco. Defendant denied the title of plaintiffs, and pleaded the bar of the statute of limitations, as provided by sections 318, 319, Code Civ. Proc. At the trial a nonsuit was granted on motion of defendant, and plaintiffs appeal from an order of the court denying their motion for a new trial.

The question involved turns upon the propriety of a ruling of the court excluding a deed of conveyance of the property in question by the Islais and Salinas Water Company (a corporation) to Henry B. Potter and Abel Wade, dated January 2, 1861. Plaintiffs claimed under said Potter and Wade. A like deed from the same grantor to Charles Mayne was the subject of a like ruling, but, as the deed first indicated presents the question fully, further mention of the Mayne deed is unnecessary. The deed to Potter and Wade describes the grantor as follows: "The Islais and Salinas Water Company, a corporation duly formed under the laws of the state of California, having its principal place of business in the city and county of San Francisco, of the first part," etc. The deed continues in the usual form, and, after the habendum clause, closes as follows: "In witness whereof, the said party of the first part hath caused these presents to be signed with its corporate name by Francis L. A. Pioche, Henry A. Cobb, and Cornelius De Boom, the trustees of said corporation, and to be sealed by said trustees with their respective private seals (said corporation having no common seal), at the city and county of San Francisco, the day and year first above written. [Signed] The Islais and Salinas Water Company, by F. L. A. Pioche [Seal], H. A. Cobb [Seal], C. De Boom [Seal], Trustees." Proof was made that the corporation grantor had three trustees, but there was no proof that the parties signing the deed were such trustees, nor was there any authority shown from the corporation to any one to make the sale or to convey the land; nor was there any resolution ratifying such conveyance. To support the deed of a corporation, which, as in this case, is without a corporate seal, "it is incumbent on the party relying on it to show affirmatively that it was executed by authority of a resolution of the board of directors, entered on the records of the corporation, or that it was ratified by such a resolution." Fudickar v. Irrigation Dist., 109 Cal. 29, 41 Pac. 1024; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Salfield v. Reclamation Co., 94 Cal. 546, 29 Pac. 1105; Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373; Association v. Bustamente, 52 Cal. 192; Gashwiler v. Willis, 33 Cal. 11. These cases establish the doctrine enunciated in the above quotation so firmly that further elaboration is deemed unnecessary.

Appellant claims that, conceding there was not sufficient authority shown from the corporation to the persons who executed the deed to convey, there was a ratification, as is shown by the delivery of the deed by the trustees, receipt of the consideration, and placing the vendees in possession. The infirmity of this argument is: (1) There is no proof that the persons who executed the instrument were trustees of the corporation. (2) There is no proof that any consideration was ever received by the corporation except as recited in the deed, and, as that was not executed by the corporation, no presumption arises that it received any consideration. (3) Wade and Potter are shown to have been squatters as early as 1853 upon the land in dispute, with a large area in addition, amounting probably to 30 acres, and there is no evidence that any possession of any of the land was delivered to or accepted by them from the corporation, grantor in the disputed deed. The case falls fa short of showing a ratification by the corporation of the conveyance to Wade and Potter. Aside from the deeds which were properly excluded, the evidence failed to show a possession in plaintiffs sufficient to support ejectment. We recommend that the order appealed from be affirmed.

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[1] Rehearing denied.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

117 Cal. 106

## CARDOZA et al. v. CALKINS et al. (Sac. 200.)

(Supreme Court of California. May 25, 1897.)

WATER RIGHTS—TITLE—APPROPRIATION.

1. Plaintiff's actual and peaceable enjoyment and possession of waters is sufficient title as against one who diverts them during such possession, and shows no better title.

2. One who files notice of appropriation of waters, but does not construct a ditch to divert them, and never takes any of the water till eight or ten years after, when in two or three instances he diverts it in a fugitive manner by tapping the ditch of another, makes no valid appropriation.

3. Efforts of persons having water rights to amicably adjust the claim of another to the use of the waters give no validity to his claim.

Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Manuel P. Cardoza and others against James W. Calkins and others. Judgment for defendants. Plaintiffs appeal. Reversed.

James F. Farraher, for appellants. Warren & Taylor, for respondents.

VAN FLEET, J. The action involves the right to the use of the waters of two gulches known respectively as "Heybrook Gulch" and "Barker Gulch," tributary to Greenhorn creek, in Siskiyou county. The complaint alleges the ownership in plaintiffs and their predecessors for upwards of 40 years of a ditch known as the "Cornish & Co. Ditch," which taps said Greenhorn creek, and in its course along the bank of said creek crosses the two gulches named, and takes the waters therefrom; that the carrying capacity of said ditch is 300 inches, measured under a 4-inch pressure, and that by means thereof plaintiffs and their predecessors have, during said period, and down to the interference of the defendants, appropriated from said creek and said gulches, and devoted to a beneficial use, that quantity of water, which ordinarily included all of the waters of said two gulches; that the plaintiffs' right includes the use of the waters of said creek every day between the hours of 6 o'clock p. m. and 6 o'clock a. m. and the waters of said gulches all of the time, both day and night; that in January, 1895, within 30 days prior to the bringing of the action, and at a time when there was less than 300 inches of water available to plaintiffs from said source, defendants, without right, by means of flumes, etc., diverted the waters of said gulches from plaintiffs' ditch to their own use, and have since continued so to do, and refuse to permit plaintiffs to restore said waters to said ditch. In a separate count the complaint sets up a prescriptive right in plaintiffs to the use of said waters. The prayer is for an injunction. The answers deny plaintiffs' right, by appropriation or otherwise, to the waters of said gulches, and set up in defendants Smith and Harrison a right to the waters of Heybrook gulch, and in the defendants Calkins and Plummer the right to the waters of Barker gulch. The court found in plaintiffs the ownership of the ditch as alleged, and an exclusive right to the waters of Greenhorn creek and the said gulches "from the hour of 6 o'clock p. m. of each day to 6 o'clock a. m. of the following day," but found "that the use of the waters of Heybrook and Barker gulches has never been appropriated, held, or used by plaintiffs or their predecessors in interest, to wit, Morris, Renner, Trustee, and Thomas Orr, as a right during the daytime; that is, between the hours of 6 o'clock a. m. and 6 o'clock p. m., since the construction of said Cornish & Co. ditch. But the waters of said gulches have been used by the miners in main Greenhorn creek and said gulches during the day for many years last past." It further found that the defendant Smith had, during the month of January, 1895, diverted the waters of Heybrook gulch as alleged, and that during said month defendants Calkins, Plummer, and Harrison had diverted the waters of Barker gulch, but that such diversion was only during the daytime, and was not wrongful as against plaintiffs. It also found against any prescriptive right in plaintiffs. Judgment was entered for the defendants. Plaintiffs appeal from the judgment and from an order denying them a new trial, contending mainly that the findings are against the evidence.

The evidence as presented in the record is not as specific and satisfactory on behalf of either party as might be wished. On behalf of plaintiff it shows that one Burgess built the Cornish & Co. ditch in 1852, and by means thereof took and appropriated to a beneficial use all the waters of main Greenhorn creek and its tributaries, including the two gulches in dispute, when the ditch would hold them, which it would at all ordinary times, and when not he took all that the ditch would carry, which was about 300 miner's inches; and during the time Burgess owned the property he kept the waters of the creek and these gulches running in the ditch all the time, both day and night. Burgess sold out in 1856, but to whom does not appear, and the subsequent ownership of the ditch and water right, and the extent of the use of these waters during 1856 and down to about 1879 or 1880, is not definitely disclosed, although the evidence indicates that it was in continuous use during the mining season throughout all these years. Cornish, after whom apparently the ditch came to be known, is the next owner mentioned in the record, but when he became such is not shown. One Thomas Orr bought from Cornish, but the date of the latter's purchase is not given, and the evidence indicates that Orr did not acquire by his purchase the full extent of water right appropriated and exercised by Burgess, at least so far as the waters of Greenhorn creek are concerned; that as to the latter it was limited to the night waters. But the evidence shows without substantial conflict that during all the time Orr owned the property—which was at least from 1879 or 1880 down to 1892—the waters of these gulches were diverted by and ran into the Cornish ditch, and were appropriated by Orr and his lessees, both day and night, without objection or material interruption by any one. In March, 1892, Orr conveyed his interest in the ditch and water right to one Charles Bohnert, the property being described in the deed as "that certain ditch taking in the waters from the main Greenhorn creek and the gulches adjacent thereto, and conducting the same to the north fork of Greenhorn creek, together with the flumes, taps, and reservoirs connected therewith, and formerly known as the 'Cornish & Co. Ditch,' together with the right to all the water in main Greenhorn creek naturally flowing therein from six o'clock p. m. to six o'clock a. m. of each and every day throughout the year. * * * Also all the waters flowing down all the gulches across which the said ditch is built." In January, 1893, Bohnert made a contract of sale and deed in escrow of the ditch and water right to the plaintiffs, wherein the property is described substantially as in the deed from Orr to Bohnert, and under this contract the plaintiffs have since been in possession of and were holding the property at the commencement of the suit. During the ownership of both Bohnert and plaintiffs the disputed waters have been, as theretofore, taken and diverted through the Cornish ditch, both day and night, until January, 1895, when the defendants diverted the same therefrom in the manner alleged.

The evidence on the part of the defendants was to the effect that in June, 1882, one Austin Hawkins filed and recorded a notice stating that he appropriated the waters of Heybrook and Barker gulches "for mining purposes, and to mine the claim situated on said Greenhorn creek, known as the 'Clark and Comstock Placer Mine.'" The notice stated that he intended to divert said waters by means of a ditch (describing it) to be constructed, and giving the point of his intended diversion. No ditch, however, was ever built, nor did it appear that the notice of appropriation was ever posted. Hawkins testified: "I am the Austin Hawkins named in the water notice which you have read. * * * I have used the waters some myself from those gulches, and others through me have used it at different times since the location. A year ago last fall I worked there myself. I have also given other parties consent to go and work there. They used the waters from these gulches through the Cornish & Co. ditch; that is, we took it from that ditch. I could not tell the amount of work that has been done there. I know that my sons Rob and Nort worked there one season. I used the water out of that Cornish & Co. ditch when I worked there. We did not use the water very much any one year,—not to exceed two months in the year,—and I can't say the number of years the water was used. * * * The use of the waters from this Cornish & Co. ditch through me by the other persons whom I have named was without consideration. My familiarity with the Cornish & Co. ditch and my mining claim commenced about 1881, when I located the claim. The ground had previously been occupied by Chinese. This Cornish & Co. ditch runs across a portion of my claim, and it was there when I located the claim. The waters from Heybrook and Barker gulches ran into this Cornish & Co. ditch, and from there we took it onto our ground." He also testified that one Tryon, while attending the Cornish ditch under Thomas Orr, applied to him at different times to get "the exclusive privilege of the day water of those gulches," which he declined to grant him; and that the winter before the suit was brought, while his boys were working on his claim, plaintiffs came to him, and wanted to "make arrangements with me to allow the boys to use the night water, and let them use the day water. * * * At that time the main ditch ran from Greenhorn creek, and the waters from these gulches ran into it. They wanted me to make arrangements for the boys to take the night water, and to allow them to use the day water. I was claiming the right to the use of the waters of main Greenhorn creek during the daytime. They wanted to bring the thing around so they could get the day water. * * * I only claimed the day water from these gulches." Norton Hawkins, a son of Austin Hawkins, testified: "I am not very familiar with the Heybrook gulch, but am pretty familiar with the Barker gulch. I think that during the last three years I have performed some mining work on Greenhorn. I worked there two springs on my father's claim. I used the waters from both of these gulches for mining purposes. I used it through the old Cornish & Co. ditch. The first spring I worked there two or three months, and the next spring two or three weeks, I think. The first spring I used all the water I wanted,—all I could get in the ditch in the daytime. In the nighttime the water went to waste." Robert Hawkins, another son, testified: "During the spring of 1895 two railroad boys and myself worked a while on my father's claim on Greenhorn creek. We took the water that we used from plaintiffs' ditch." Defendant Smith testified, in substance: "I am one of the defendants herein. In the spring of 1895 I conveyed the waters of Heybrook gulch in a flume across plaintiffs' ditch, and used it down below their ditch. I had permission from Mr. Hawkins to use the waters from this gulch." The testimony of defendant Calkins was: "Defendant J. W. Plummer and myself placed a flume in plaintiffs' ditch across Barker gulch, and took the waters of said gulch under said flume, and used them during the spring of 1895. We used them until the injunction stopped us. We used also a portion of the waters of Heybrook gulch by running them in an old ditch from Heybrook gulch to Barker gulch, and running them under plaintiffs' ditch. The defendant Al Smith gave us the permission to use these waters from Heybrook gulch. No one gave us permission to use the waters of Barker gulch. We simply took them."

The foregoing is substantially all the evidence from the record, and we think it quite manifest that it does not support the finding of the court, above quoted, to the effect that the day waters of these gulches had never been appropriated by plaintiffs or their predecessors in interest; that is, between 6 o'clock in the morning and 6 in the evening. To our minds, the evidence shows without any substantial conflict that this water had been so appropriated and was being so used long before and at the time of the interference therewith by defendants. Whether the evidence establishes a perfect title in plaintiffs to the use of the waters as against all the world need not be determined, since it unquestionably shows that plaintiffs were in the actual and peaceable enjoyment and possession of these waters at the date of defendant's diversion. Such possession was sufficient as against any one having no better right (Utt v. Frey, 106 Cal. 395, 39 Pac. 807); and defendants show no such right. The entire basis of their claim is the right supposed to have been acquired to the water of these gulches through the attempted appropriation by Austin Hawkins in 1882. But, even if the water was open to Hawkins' appropriation at that time,—which does not appear,—the acts of Hawkins never amounted to a valid appropriation thereof. He failed to follow up the filing of his notice by any actual appropriation of the waters. His contemplated ditch by which to divert the water was never constructed, nor did he ever in fact take any of the water except in two or three instances, when it was diverted in a fugitive manner by tapping plaintiffs' ditch. Even these attempts do not appear to have been made until some eight or ten years after the filing of his notice. He says: "I have used the waters some myself from these gulches, and others through me have used it at different times since the location." But when he undertakes to give the dates of such use, either by himself or others by his authority, it all appears to have occurred within one or two years prior to the commencement of the action, and at no time was the water diverted other than by taking it from plaintiffs' ditch until the diversion made by the defendants in January, 1895. The fact that Tryon, while holding under Orr, and that the plaintiffs after their purchase, made efforts to amicably adjust the claim of Hawkins to the use of the waters of these gulches does not in itself establish any right in the latter, nor impart any validity to his claim which it did not otherwise possess. The diversion of the water by the defendants, being based solely upon their supposed license from Hawkins, was wholly without right, and they were, therefore, in undertaking to interfere with the possession of the waters by plaintiffs, mere trespassers; and the finding that their acts were not wrongful as against plaintiffs is without support.

The other points made require no special notice. It sufficiently appears from what has been said in discussing the evidence that the court, as the evidence stood, should have granted plaintiffs' motion to strike out the notice of appropriation made by Hawkins. The other ruling complained of was not material. Judgment and order reversed.

We concur: HARRISON, J.; BEATTY, C. J.

117 Cal. 83

## FATJO et al. v. PFISTER. (S. F. 378.)

(Supreme Court of California. May 22, 1897.)

TAXATION — CONSTITUTIONAL LAW — STATUTES — SUBJECT EXPRESSED IN TITLE.

1. St. 1895, p. 267, § 1, requiring, on filing the appraisement of the estate of any decedent, infant, or incompetent with the clerk of the superior court, a deposit of $1 for each $1,000 of the appraised valuation in excess of $3,000, imposes a property tax, and hence, since it provides an extraordinary tax on certain property, is in conflict with Const. art. 13, § 1, providing that

all property shall be taxed in proportion to its value.

2. Such statute, requiring the deposit provided for to be paid into the county treasury, violates Const. art. 11, § 12, forbidding the legislature to impose taxes for county purposes.

3. The title of St. 1895, p. 267, "An act to establish the fees of county, township and other officers, * * *" does not express the subject of section 1, imposing a graduated tax on estates of decedents, infants, and incompetents, and hence such section is in conflict with Const. art. 4, § 24.

In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Petition by Louis Fatjo and Mariana F. Roca, executors of the will of Mariano Malarin, deceased, for a writ of mandamus commanding Henry A. Pfister, clerk of the superior court of Santa Clara county, to file the inventory and appraisement of the estate of said decedent. There was a judgment denying the writ, and plaintiffs appeal. Reversed.

Luis Arques (H. V. Morehouse, of counsel), for appellants. B. A. Herrington, for respondent.

BEATTY, C. J. Plaintiffs are the executors of the will of Mariano Malarin, deceased, and the defendant is the clerk of the superior court of Santa Clara county. On June 18, 1895, said executors presented to said clerk the inventory and appraisement of the estate of said decedent, and requested him to file the same, and tendered as fees for said and other services rendered prior thereto the sum of $20. The value of said estate, as shown by said inventory and appraisement, is $243,504.70; and the clerk demanded as fees for said filing $240, and refused to file said inventory and appraisement unless said sum should be paid. Plaintiffs thereupon petitioned said superior court for a writ of mandate requiring said clerk to file said inventory and appraisement. The clerk answered said petition, and upon the hearing the court denied the prayer of the petitioners, and from that judgment they appeal.

The only question involved in the case is the constitutionality of the act of March 28, 1895, entitled "An act to establish the fees of county, township and other officers and of jurors and witnesses in this state." St. 1895, p. 267. Said act, so far as it is necessary to quote it, is as follows: "Section 1. The following county, township, and other officers shall charge and collect the following fees: County Clerk. On the commencement of any action or proceeding in the superior court, except probate proceedings, or on appeal thereto, to be paid by the party commencing such action or proceeding, or taking such appeal, five dollars. On the filing of a petition for letters of administration, testamentary, or guardianship, five dollars, to be paid by the petitioner; provided, that at the time of filing the inventory and appraisement in any such proceeding there shall be an additional deposit of one dollar for each additional thousand dollars of the appraised valuation in excess of three thousand dollars." The act proceeds to fix the fees for filing a petition to contest a will or codicil, and the fees to be paid by defendants in civil cases, and for copies, certificates, and other enumerated services, and in like manner fixes the fees of sheriffs, recorders, and other officers. It is conceded that, if the provision above quoted relating to the filing of the inventory and appraisement of the estates of deceased persons in cases where the valuation exceeds $3,000 is constitutional, the fee demanded by the clerk was the proper legal fee; but, if said provision is unconstitutional, that the fee tendered by the petitioners was sufficient. The constitutionality of the act is assailed upon various grounds, of which it will be necessary to notice but one or two. It is perfectly plain that the legislature has attempted by that portion of section 1 above quoted to levy a property tax upon all estates of decedents, infants, and incompetents. The ad valorem charge for filing the inventory is in no sense a fee or compensation for the services of the officer, which are the same, as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion. And it is not merely an inheritance tax, or at all analogous to an inheritance tax, as counsel would contend; for, in the first place, it applies not only to the estates of decedents, but also to the estates of minors and incompetents under guardianship; and, as to the estates of decedents, it applies not to the distributable residue after payment of debts and expenses of administration, but to the whole body of the estate, and would be collectible, if the law were valid, from an insolvent estate as well as from one of equal appraised value and with no liabilities. As an attempt to levy a property tax, the act is in this particular invalid for several reasons: First. It violates section 1 of article 13 of the constitution, in imposing an extraordinary tax upon the property to which it applies, in addition to the equal and uniform tax to which alone all property in the state is liable. Second. The subject of the act is not expressed in its title, and is in no wise germane thereto, and is a violation of section 24 of article 4 of the constitution, which requires that every act shall embrace but one subject, which subject shall be expressed in its title. Third. The act requires the tax for which it provides to be paid into the county treasury for county purposes, and violates section 12 of article 11 of the constitution, which forbids the legislature to impose taxes for county purposes. The judgment of the superior court is reversed, and the cause remanded, with directions to grant the peremptory writ of mandate as prayed by the petitioners.

We concur: TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.; GAROUTTE, J.

(117 Cal. 81)

## PEOPLE v. ALLENDER. (Cr. 242.)

(Supreme Court of California. May 22, 1897.)

HOMICIDE — INSANITY — BURDEN OF PROOF—CAUTIONARY INSTRUCTIONS.

1. Insanity as a defense to crime must be proved by a preponderance of evidence.

2. It is not error to instruct, on a trial for homicide, where defendant's insanity is claimed, that insanity is a defense sometimes resorted to where proof of the overt act is so complete as to exclude other defenses, and that therefore, while the defense is to be justly weighed, it is to be examined with care, lest an ingenious counterfeit of mental disorder furnish immunity for guilt.

In bank. Appeal from superior court, Santa Clara county; William G. Lorigan, Judge.

Harvey Allender was convicted of murder in the first degree, and appeals. Affirmed.

H. V. Morehouse and J. B. Kerwin, for appellant. W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, Dep. Atty. Gen., for the State.

GAROUTTE, J. The defendant has been convicted of the crime of murder in the first degree, and the penalty of death affixed. He appeals from the judgment upon the single ground that the court committed error in instructing the jury as to the law in two certain particulars.

The most serious objection of defendant is taken to the action of the trial judge in giving an instruction bearing upon the question of insanity. As to insanity the jury were told that the burden rested upon the defendant of proving his insanity by a preponderance of evidence. The principle of law thus declared is in full accord with the law of this state. For a period of 35 years this court has repeatedly and uniformly so declared the law to be. The cases to that effect are numbered by the score. We find the doctrine first announced in People v. Meyers, 20 Cal. 518, and we find this court in the recent case of People v. Bemmerly, 98 Cal. 299, 33 Pac. 263, saying that the question is no longer an open one in this state. The law here declared by the trial court is also in line with the decisions of the courts of England, and also in accord with the views of the highest courts of more than one-half the states of this Union. The defendant cites for our consideration Davis v. U. S., 160 U. S. 471, 16 Sup. Ct. 353. In that case the supreme court of the United States holds to views upon this question contrary to those we have so often declared; but it is only necessary to say that upon a principle of law like the one here presented we are not bound by the views of that tribunal.

The trial judge instructed the jury: "The defense of insanity is one which may be, and sometimes is, resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and, when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of such a mental disorder should furnish immunity for guilt." There is no substantial legal objection to this instruction. In effect it has been given by trial courts and approved by this court in many cases. People v. Dennis, 39 Cal. 637; People v. Bumberger, 45 Cal. 650; People v. Pico, 62 Cal. 51.

The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.

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(117 Cal. 60)

## HARVEY v. MEYER et al. (L. A. 205.)[1]

(Supreme Court of California. May 21, 1897.)

TAXATION—DESCRIPTION OF PROPERTY—EVIDENCE.

1. A description on an assessment roll of land as "lot fronting 78 feet east side of S. street, between Third and Fourth streets, bounded north by H., south by M.," renders the assessment and a sale thereunder void for indefiniteness of description.

2. Parol evidence is inadmissible to ascertain what particular lot an assessor had in mind in making the assessment roll.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by J. Downey Harvey, administrator, against Samuel Meyer and others. Judgment for plaintiff, and defendants appeal. Reversed.

Max Lowenthal, for appellants. White & Monroe, for respondent.

GAROUTTE, J. The plaintiff, claiming title to certain real property, and out of possession, brought this action under section 738, Code Civ. Proc., to quiet his title and secure possession. Judgment went against defendant, and he appeals therefrom, and also from the order denying a motion for a new trial.

The title to the parcel in dispute was originally in plaintiff's intestate, John G. Downey, and now rests in his heirs, represented in this action by the above-named administrator, unless a new title has been created in defendant by adverse possession for the statutory period. Defendant's title is dependent solely upon the question of the payment of taxes upon the land in controversy, he having been in exclusive possession of the same under a claim of right for a term longer than that required by the statute. In the year 1876 defendant became the owner of a tract of land fronting 78 feet, more or less, upon Main street, in the city of Los Angeles, and extending in depth to the center of the block about 165 feet. J. G. Downey, plaintiff's intestate, at the same time was the owner of a tract of land fronting 78 feet, more or less, upon Spring street, and extending in depth to the center of the aforesaid block. These two streets are parallel to each other, and form the eastern and western boundary lines, respectively, of the block. The two lots of these respective owners abutted on each other at the rear. When defendant entered into possession under his deed, in the year 1876, he took actual possession of some 30 feet in depth of the rear portion of Downey's lot, and this small tract constitutes the land in dispute. It is conceded that defendant has title if he has complied with the statute of 1878 as to the payment of taxes. In this regard he claims that he has paid all the taxes assessed and levied against this tract since the year 1878; and further insists that, if he has not paid such taxes, the reason is found in the fact that none were assessed and levied. This contention brings us directly to a consideration of the evidence upon that question. The taxes assessed and levied in the years 1879, 1880, and 1881 are the first to become material, and at that time the tract in dispute, marked "A," and its immediate surroundings, are substantially pictured as follows:

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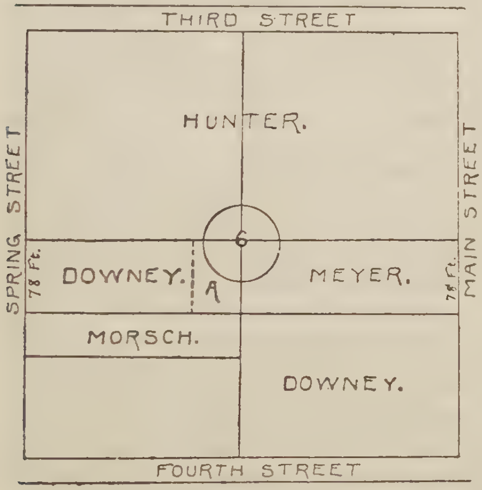
[1] Rehearing denied.



Defendant entered into possession in October, 1876. His title by adverse possession would have become perfected in October, 1881, if all taxes assessed and levied in the interim had been paid by him. It is not shown that he paid the taxes upon this land during any of the five years between 1876 and 1881. But it does affirmatively appear that in the year 1881, at least, he only paid the taxes which were assessed and levied upon the following described tract, and by such description it is evident that the tract in litigation was not included therein. This tract is described as follows: "Lot fronting seventy-eight by one hundred and sixty-five feet, west side of Main street, bounded north by K. Hunter, south and west by J. G. Downey." By reason of his failure to pay the taxes upon the tract in dispute for the year 1881, he acquired no title prior to that date, if taxes were assessed and levied upon it at any time during that period. If taxes were assessed and levied upon this tract during the years 1879, 1880, and 1881, they were assessed and levied upon an assessment to J. G. Downey. The state and county assessment and also the city assessment to Downey were practically the same during these years, and the land so assessed was described upon the assessment roll as follows: "Lot fronting seventy-eight feet, east side of Spring street, between Third and Fourth streets, bounded north by Hunter, south by Morsch." If the land in controversy is included in this description, then the defendant fails in his claim of title, for the taxes levied and assessed upon such assessment were paid by Downey. But defendant now insists that this assessment to Downey is void upon its face, and therefore no assessment, by reason of the description therein set forth being so vague and indefinite as to be meaningless. We agree with this contention and hold the assessment to Downey absolutely void. Upon its face the description found upon the assessment roll describes nothing. It only attempts to give three boundary lines. It is impossible to determine either the form or area of the tract covered by the description. Neither could expert persons go upon the ground and locate the tract. The lot has a frontage of 78 feet upon Spring street, between Third and Fourth streets, and is more definitely described as being situate between the lands of Hunter on the north and Morsch upon the south. All these matters but serve to locate the particular frontage upon Spring street. They do nothing more. There is no way of determining the depth of the lot. If a definite boundary line of some kind were fixed upon the east side of the tract, the description would be complete; but there is none. Conceding, for present purposes only, that the boundary upon the south by Morsch's land is sufficient to establish that the Downey tract extended east upon its south side the full length of the Morsch tract, still such cannot be held with reference to the north line, for there we find the Hunter tract extending the entire width of the block. It is therefore impossible to say at what point upon Hunter's south line the Downey tract ends. There is no way of ascertaining from the assessment, even when taken in connection with the lay of the land as disclosed by the plat, whether Downey's north line is 5, 10, or 50 feet in length. Hence the boundary by "Hunter" upon the north wholly fails to serve the purpose of creating a boundary line. At the most, we then have but two sides of the tract described, to wit, the west and the south. Such a description is fatally defective, and an assessment based thereon wholly void. It is claimed by respondent that in the absence of evidence to the contrary Downey's "lot" is presumed to extend to the center of the block. It is clear that the word "lot" as used in the assessment is synonymous with "tract," "piece," or "parcel"; and certainly there is no presumption of fact whatever as to the depth of such a lot. Neither are we justified in seeking by parol evidence to ascertain what particular tract or lot the assessor had in mind when making the assessment. It becomes unnecessary to pass upon the remaining questions raised by appellant. Judgment and order reversed.

We concur: HARRISON, J.; VAN FLEET, J.

117 Cal. 114

## PEOPLE ex rel. VAN LOBEN SELS v. RECLAMATION DIST. NO. 551. (Sac. 156.)

(Supreme Court of California. May 25, 1897.)

RECLAMATION DISTRICTS—DISSOLUTION—CREATION—CONSTITUTIONAL LAW.

1. Reclamation districts created by the act of 1861 were not municipal corporations, neither did they belong to any class of corporations defined in the Civil Code, but were special organizations, to which the state had given certain discretion in making improvements contemplated, and ceased to exist as public agencies when the policy of the state was changed.

2. Where the evidence showed that no reclamation district was organized under St. 1878, p. 911, a repeal of such act by the legislature in 1880 destroyed any rights which might have been acquired under the original statute.

3. That the law creating reclamation districts provides that those who are interested in the land, and who must pay for the improvements, shall determine by an election whether the improvements shall be made, does not constitute an exercise of the election franchise, so as to render it void because requiring a property qualification.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Quo warranto by the people, on the relation of P. J. Van Loben Sels, against reclamation district No. 551. Judgment for defendant, and plaintiff appeals. Affirmed.

W. F. Fitzgerald, Atty. Gen., Johnson & Johnson, and Warren Olney, for appellant. W. A. Gett, Jr., for respondent.

TEMPLE, J. This is an action of quo warranto, in which the only defendant is the corporation whose right to be a corporation is called in question. Whether such an action can be maintained is questionable. People v. Stanford, 77 Cal. 360, 18 Pac. 85, and 19 Pac. 693. But as no objection is made for lack of the proper parties, and the question is of public interest, we will not raise the question ourselves. The defendant claims to be a reclamation district organized under the provisions of the Political Code. It does not claim to have been organized under section 3481 of that Code, but by presenting to the board of supervisors the petition required by section 3446, and by a compliance with the provisions applicable to the conditions shown in such a petition. The relator contends that the lands included within the defendant's district were, at the time of its alleged organization, included within another valid and subsisting reclamation district, and, since the provisions of the Code applicable to an organization which includes lands already within a reclamation district were not followed, defendant was not legally organized. It is averred in the complaint that the lands included in the defendant reclamation district were included in swamp-land district No. 2, and that the latter then was a valid existing public corporation for reclamation purposes.

1. The first reply to this is that the act of 1861 is unconstitutional and void because the district was organized upon the application of the owners of one-third of the land without notice to the owners of other lands. If the board was authorized or required to organize a public corporation upon such an application, which could subject the lands to taxation, there would be great force in this suggestion. The case would be within the decision reached in Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562. Whether the same rule would apply, although the power to expend money and levy assessments was not given to a public corporation, but was reposed in a state board of commissioners, it is not necessary here to inquire. This naturally brings us to the next proposition made on behalf of the defendant.

2. The districts marked out under the act of 1861 were not public corporations. They were merely tracts of land susceptible of one mode of reclamation, for which, because of this fact, specific work was to be done by the state board, who were, under certain contingencies, to assess the cost upon the lands of the district. They had no more resemblance to public corporations than benefited districts, which are assessed under our laws for local improvements, such as opening, widening, and grading streets. Section 3481 of the Political Code provides a mode in which owners of land in reclamation or swamp-land districts may reorganize portions of such districts. Nothing is said about public corporations. If there were swamp-land districts which were not corporations, the act would apply to them as well as to those which had some kind of autonomy and were corporations. The point seems to be that the act of 1861 has been repealed, and there is no agency now provided by which the work contemplated under the original organization can be carried on, and, if it was not a corporation, it has ceased to exist. The act of 1861 created a state board for the reclamation of swamp and overflowed lands. Such board was required, upon the petition of the owners of one-third in acreage of any tract of swamp and overflowed land susceptible of one mode of reclamation, to cause surveys to be made, and a plan of the proposed work made. Upon their approval of the plan they advertised for bids, and a contract for the work might be let,—the work to be done under the supervision of an engineer to be appointed by the board. The copies of all surveys, field notes, plats, plans, specifications, profiles, charts, and all other papers made by the engineer, were declared to be the property of the state. When any work was done the account therefor was first to be approved by the commissioners, and then submitted to the state board of examiners, and, when paid, was so paid out of the state swamp-land fund. The commissioners had jurisdiction throughout

the state, and were state officers. The district had no autonomy whatever, and nothing was done in its name, or by any board or officer, as officers of the district. No one could act for it or bind it in any way. The charges were paid by the state from the proceeds of the sale of swamp lands within the district, or, if the cost exceeded that amount, it was made a charge against the land within the district. No powers whatever were conferred upon the district or upon any officer thereof, nor was any duty imposed upon any one which implied that a corporation had been created. The district was not organized, in any sense of the word. There was nothing to which corporate powers could be attributed. It had no board, no agency, and no managers. The legislature, through its creative power, might have called into existence some agency for the district, and endowed it with corporate powers, but it never did so. None of the numerous acts referred to attempt to do anything of the kind.

Counsel say district No. 2 cannot, in the respects material here, be discriminated from district No. 5, which was considered in Dean v. Davis, 51 Cal. 410. It is not important now to consider the statute under which that case arose. It is asserted in the opinion there that the district was organized, which would not be true as to this district; that it was endowed with many of the powers of a natural person,—this had no such powers; that it could make contracts, incur debts, issue bonds, levy and collect assessments, and have perpetual succession. Whether these things could properly be said of district No. 5 or not, they are not true of the district now under consideration. That district was not organized under the same statute, but under one which differed in many respects from this. I think this district had no attribute or quality whatever of a corporation of any kind. But if it should be considered a quasi corporation or a public corporation for municipal purposes, as reclamation districts have been said to be, it would make no difference. If these districts can be said to be corporations at all, I think they are properly called "public corporations for municipal purposes." That phrase means no more than that they are state organizations for state purposes. They certainly are not municipal corporations, in the strict sense. Dillon defines a municipal corporation to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them, in their corporate capacity, to exercise subordinate specified powers of legislation and regulation with respect to their local concerns. He says, "This power of local government is the distinctive purpose and distinguishing feature of a municipal corporation proper." Many other definitions have been given, but all include, as essential, a territory which is a portion of the state, and the inhabitants thereof, and the purpose to furnish local government for such inhabitants and such territory. The law does not require inhabitants in a swamp-land district, nor in fact to constitute a reclamation district, under the Code. I have no doubt many districts have been formed in which there were no residents, and, if there are residents within a district, the organization in no way affects them as residents. Those who own no land within the district are not affected by the organization at all. The owners, and the only ones affected by the formation of a district, may be nonresident aliens. Residents, as such, have no voice in the management of the supposed corporation. There is no local government beyond that exercised over a specific district whenever street work is done, and property owners are charged with the cost thereof. There is the specified work, its superintendence, and the assessment for the cost in each. Certainly these districts were not "municipal corporations," as that term is used in the constitution, and I think it equally clear that they do not belong to any class of corporations defined in the Civil Code. Section 284 reads: "Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the state. All other corporations are private." These districts, in my opinion, belong to neither of these classes. They are special organizations formed to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. They are described by Dillon in his work on Municipal Corporations (sections 24–26). He calls them "quasi corporations." Perhaps it would have been more accurate to say that they are not corporations at all, but are so classed because many of the presumptions and rules which apply to corporations have been made applicable to them. They are public agencies which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform. And there is nothing in the constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them out of existence. Swamp-land district No. 2 did not, therefore, continue to exist as a corporation, conceding that it had ever been one, after the policy which called it into being had changed so that there was no longer any place for it in the policy of the state.

We come now to reclamation district No. 205. Both parties admit that the act of the legislature specifically forming this district was valid. It was passed in 1878, and included all the land that is now included in the defendant corporation. It was repealed in 1880, if the legislature could then repeal it. If the foregoing discussion as to the nature of these corporations be correct, then certainly counsel have not pointed out the limitation in the constitution which would prevent it. The statute creating the district (St. 1878, p. 911) declares that it shall be "a body politic and corporate, under the name of 'Reclamation District Two Hundred and Five,' under which name they shall hereafter make contracts and shall sue and be sued; and they shall also possess all the powers that are now possessed, or which may hereafter be possessed, by any reclamation district formed under the laws of this state." The statute further provides that the owners of land shall elect a board of trustees, and that the board of supervisors shall designate the place where the election shall take place. The answer denies that the alleged corporation had ever been a valid and subsisting corporation. The findings either contain no finding upon the issue, or find against the plaintiff. The bill of exceptions contains no evidence which tends to show that the reclamation district authorized by the act was ever, in fact, organized. No existing organization was recognized in the act, and thereby made a corporation. No person or body was named who should exercise corporate powers. No entity was brought into existence by the act, but an organization was provided for, and the owners of the land were declared to be a body politic and corporate. Whether, under such circumstances, the land described could be said to be within an existing reclamation district, may be questioned. I think, however, the repeal was effectual. There is certainly no express limitation to be found in the constitution, and the legislative power is plenary, except as limited in that instrument. Evidently it is not a case in which a general law can be made applicable. A general law providing a method in which those interested may cause a corporation to be dissolved would not meet the case. It was a public agency called into existence to construct a public work,—to do something which the general policy of the state required to be done. The state changes its policy, revokes the agency, and thereby ends the corporation which existed only for that purpose. There is no express limitation to be found in the constitution upon the power of the legislature to dissolve a municipal corporation, if we were to concede this to be one. It has been held that an express prohibition against the formation of such corporations by special laws is not a limitation upon the power of the legislature to dissolve them by such laws. Luehrman v. Shelby Co. Taxing Dist., 2 Lea, 425. The provisions which may possibly imply such a limitation refer, expressly, not to municipal corporations, but to cities and towns.

The attorney general also contends that the entire law in regard to reclamation districts is void, because it requires a property qualification for voters. Const. art. 2, § 1; also, article 1, § 24. If these quasi corporations are municipal corporations, designed to provide for local self-government, I see no answer to this suggestion. The point seems to be sustained by the decision in Re Madera Irr. Dist., 92 Cal. 320, 28 Pac. 272, 675. There is a difference, however, between an irrigation district under the Wright act and the reclamation districts. In my opinion, these latter districts are not municipal corporations, and no one is a voter in the sense of the constitutional provisions. Certainly there can be no electors when there are no residents within the district. The district, as already said, was part of a scheme for conducting a public work, and not for self-government. In regard to street work and other local improvements, it has often been provided that the work shall only be done upon the application of the owners of a majority of frontage, or of a certain proportion of the owners of land; and, if the law had provided that the owners could elect a committee of their number to superintend the work, I do not see how it could change the principle. This could not constitute an exercise of the elective franchise, which is the matter to which the constitutional provisions have reference. The general public has an interest in the reclamation of swamp and overflowed land. Nevertheless, it is one of those public enterprises which result in a benefit to private lands, and therefore the cost is made a charge upon such land. That those who are specially interested, and who must pay for the improvement, are heard upon the question as to whether it shall be done, and are permitted to appoint those who shall superintend it, is not unusual, nor would it constitute an exercise of the elective franchise. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

117 Cal. 134

## FERGUSON v. MURPHY et al. (Sac. 154.)

(Supreme Court of California. May 25, 1897.)

LANDLORD'S LIEN ON CROPS.

Where a lease of farm lands provides that the rent shall be paid in gold coin, and that the crops shall not be removed from the leased premises, without the lessor's consent, until the rent is paid, it gives the lessor no prior lien as against one making advances to the lessee to be secured by a mortgage on the crops, where the lease is not recorded.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by Mary A. Ferguson against J. E. Murphy and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jas. A. Louttit, for appellant. Nicol & Orr, for respondents.

BELCHER, C. This is an action to recover possession of 1,400 sacks of wheat and 760 sacks of barley, or the sum of $2,300, the value thereof, and $250 damages for detention. The case was tried by the court without a jury, and the judgment was in favor of the defendants, from which, and from an order denying a new trial, the plaintiff appeals.

The facts of the case, as disclosed by the record, are, in substance, as follows: In September, 1892, one James Caven, being then the owner of the lands described in the complaint, leased the same by written lease to one White for the term of three years from the 15th day of that month at the yearly rental of $1,100, "payable only in gold coin of the United States of America on or before the 15th day of September of each year during this lease." The lease further stated that it is "understood and agreed by the parties hereto that all the crop of wheat, barley, or hay, or other crops that may be raised on said land, shall be and is the property of the first party until the said yearly rental of $1,100 is fully paid; and that no crops shall be removed from said land until said yearly payment of $1,100 is paid, without the written consent of said first party." In October, 1893, the parties agreed in writing that the rent for the year ending September 15, 1894, should be $1,650 instead of $1,100. The lease was not recorded until February 9, 1894, but at the date thereof White entered into possession of the leased premises, and thereafter occupied and farmed the same as tenant. In the fall of 1893 defendants Murphy and Frankenheimer furnished to White wheat and barley with which to seed the leased lands, and on December 6, 1893, to secure payment of such advances, and such other advances as should thereafter be made by them to him, he executed to them a crop mortgage upon "all the right, title, and interest of said party of the first part of, in, and to all the crops of wheat and barley now growing or to be grown during the season of 1893 and 1894" on said leased lands and other lands farmed by him. This mortgage was duly verified and acknowledged, and on January 24, 1894, was duly recorded. After the said mortgage was recorded, an agent of Caven called upon Mr. Frankenheimer, and informed him of the Caven lease, and that Caven claimed a lien on the crops raised on said land for the rent thereof, and subsequently two or three conversations were had between the parties in reference to the said claim and the disposition of said crop. It was finally understood and agreed that Murphy and Frankenheimer should attend to the harvesting of the crop, and that, when harvested, it should be hauled to them in the city of Stockton, and be disposed of by them. Subsequently Murphy and Frankenheimer, under the provisions of their said mortgage, advanced money for the insurance of said crop, for harvesting and sacking the same, and for hauling the same to Stockton; and all of the crop raised on said leased premises, consisting of 1,200 sacks of wheat and 760 sacks of barley, of the value of $1,800, was, with the consent of Caven, and in accordance with the agreement between him and Murphy and Frankenheimer, hauled to Stockton, and delivered to them, and the same has ever since been in their possession.

As to the fact that the crops were to be harvested by defendants, and, when harvested, were to be hauled to the city of Stockton, and disposed of by them, there is no conflict in the evidence, but as to what was to be done with the money received from the sale thereof there was a sharp conflict in the evidence. Plaintiff claimed that the understanding was that Murphy and Frankenheimer were to attend to the collection of the $1,650 due for rent, and were to pay the same without regard to the satisfaction of their own claim. Defendants, on the other hand, claimed that the understanding was that, after they had received payment of the amount which should be due them under the provisions of their crop mortgage, the balance was to be paid to Caven. On June 20, 1894, Caven and his wife assigned the said lease, "together with all advantages to be derived therefrom," to the plaintiff, and on August 31st thereafter she demanded of defendants in writing that they immediately surrender and deliver to her the wheat and barley raised on said leased premises, stating that the said wheat and barley was her property, and she was entitled to take and retain possession of the whole thereof "until the rental of the said premises, amounting to the sum of $1,650 for the current year, has been paid." The defendants refused to comply with this demand, and thereupon this action was commenced.

The court below found upon all the disputed questions in favor of the defendants, and we think the findings were justified by the evidence, and must be sustained. Appellant contends that under the terms of the lease she was the owner of the crop until the rent reserved should be paid, and that it was not necessary that the lease be recorded in order to protect her rights thereunder as against the said crop mortgage. The lease expressly provided that the rent should be paid only in gold coin, and the evident purpose of the provision that the crop should be the property of the lessor, and should not be removed from the leased premises without his written consent until the rent should be fully paid, was to create a lien on the crop to secure payment of the rent. The lessee had a right to control the crop, and no right to the possession of any part thereof was given to the lessor. The question, then, is, did the lease vest in the lessor title to the crop raised as against the mortgagees? The lease was not recorded, and the defendants had no knowledge of its terms and conditions when they took the crop mortgage. "A landlord, in this state, has no lien for rent reserved, or for the value of the use and occupation of property" (Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228), and "it must be remembered, in general, that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or incumbrancers for value" (Palmer v. Howard, 72 Cal. 293, 13 Pac. 858). This case, in our opinion, is in all material respects like that of Society v. Purvis, 112 Cal. 236, 44 Pac. 561. In that case the plaintiff, being the owner of a tract of land, leased the same to one Dallas for the term of one year upon the oral understanding and agreement that Dallas should farm the land, and pay a cash rental of $2,140; and it was agreed between the parties that the title to the crops raised thereon during the term was to remain in the plaintiff, and that the crop, when harvested, was to be hauled to the nearest warehouse, and stored in the name of plaintiff; and, when sold, plaintiff was to receive from the proceeds its rent, and the overplus, if any, was to go to and be the property of Dallas. Under this agreement Dallas entered upon the land, and planted a crop of wheat thereon. Before the wheat was harvested, a creditor attached the growing crop as the property of Dallas, and the action was brought against the attaching officer for conversion, plaintiff claiming to be the owner of the entire crop. It was held, in effect, that the lease and accompanying agreement must be construed as intended to give security to the landlord for payment of the cash rental, and to create a lien upon the growing crop, as such security, without complying with the chattel mortgage law, but that they were ineffectual for that purpose, and the plaintiff could not recover. It is objected that that case differs from this, because there the agreement was in parol, while here it is in writing. We see no material difference between the two agreements in this respect. An oral lease of real property for a term not exceeding one year is just as operative and binding as a written lease, and in such case an oral agreement, like that in controversy, would be as effective as it would be if in writing. In each case the invalidity of the lien which the plaintiff claimed to have acquired and to have a right to enforce arose from the fact that the agreement relied upon was simply an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon that subject. Our conclusion is that the plaintiff had no such interest in the property sued for as entitled her to maintain the action, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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117 Cal. 73

## THRESHER et al. v. ATCHISON et al.

(Sac. 176.)

(Supreme Court of California. May 22, 1897.)

MORTGAGES—REDEMPTION—RATE OF INTEREST—AMENDMENT OF STATUTE AFTER SALE.

A statute decreasing the rate of interest to be paid to redeem land sold on execution is inoperative on a sale made prior to the passage of the act.

Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Thresher and others against Atchison and another to recover part of the money paid to redeem from sale on judgment foreclosing mortgage. Judgment for plaintiffs. Defendants appeal. Reversed.

A. F. Jones, for appellants. John Gale, for respondents.

HARRISON, J. By virtue of an order of sale issued upon a judgment entered in the superior court for Butte county for the foreclosure of a mortgage upon certain lands, and their sale in satisfaction of the mortgage debt, the defendant Atchison, who had been appointed by the court a commissioner therefor, sold the land March 23, 1895, to his co-defendant, Green, for the sum of $8,000, and issued to him a certificate therefor. September 22, 1895, the plaintiffs herein, who were entitled to redeem the lands from said sale, tendered to the commissioner for that purpose the sum of $8,474.67. The commissioner refused to receive that amount in redemption thereof, and threatened to execute a conveyance of the lands to the purchaser, unless they should be redeemed from the sale by the payment to him of $8,949.35 before the time for redemption should expire. The plaintiffs thereupon paid to the commissioner the sum demanded by him, under their protest that the amount was illegal and excessive to the extent of $474.68. The present action was brought to recover the last-named amount, upon the ground that it was in excess of what the commissioner was authorized to demand. Judgment was rendered in favor of the plaintiffs for the sum of $296.95, from which the defendants appeal.

At the date of the sale it was provided by section 702, Code Civ. Proc., that a redemption from the sale might be made within six months by paying to the purchaser "the amount of his purchase, with two per cent. per month thereon in addition up to the time of redemption," with any taxes or assessments that he might have paid after his purchase. By an amendment of this section passed March 27, 1895 (St. 1895, p. 225), and which went into effect 60 days thereafter, it was provided that the redemption might be effected by paying the amount of the purchase, "with one per cent. per month thereon in addition up to the time of redemption," with whatever taxes and assessments might have been paid by the purchaser; and the question presented upon this appeal is the effect to be given to this amendment. The theory of the plaintiffs, as shown by their complaint, is that the provisions of the amended section alone are to be considered, while the defendants contend that the section as it stood at the date of the sale determined the rights of the parties. The court held that the provisions of the original section prevailed until the amendatory section took effect, and that thereafter the amended section alone was to be considered.

It has been frequently held that a law extending the time within which a redemption may be made from a sale under a judgment will be inoperative upon a sale made prior to the passage of the act; that the purchaser at the sale acquires rights thereby of which he cannot be divested by subsequent legislation. Cooley, in his treatise on Constitutional Limitations (page 353), says: "A law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for payment of a promissory note." Mr. Freeman, in his treatise on Executions (section 315), in discussing the effect upon the rights of the judgment debtor of a statute authorizing a redemption from a sale passed after the sale has been made, says: "But the right of the purchaser to a conveyance, or to repayment at the termination of the period allowed for redemption, is deemed to rest upon a contract which the legislature will not be permitted to impair. Hence, while the time for redemption may probably be shortened, it certainly cannot be prolonged by any law enacted after the sale." The same principles which render void an act extending the time for redemption after the sale has been made will render void an act reducing the amount of money required for a redemption from such sale. The sale by the sheriff is regarded as a sale by the judgment debtor (Blood v. Light, 38 Cal. 658), and the purchaser is entitled to rely upon the statutory provisions for redemption existing at the time of the sale to the same extent and in the same manner as if they were incorporated into a contract of sale executed by the debtor.

Section 700, Code Civ. Proc., declares that, "upon a sale of real property, the purchaser is substituted to, and acquires all the right, title, interest, and claim of the judgment debtor thereto," subject to redemption, as provided in the succeeding sections. Section 701 provides that property sold subsequent to redemption may be redeemed "in the manner hereinafter provided." At the time of the sale in question it was provided by section 702 that, in order to effect a redemption, the purchaser should be paid the amount of his purchase, with 2 per cent. per month until the time of redemption. This provision in the section formed an element in the purchase at the sale, and constituted a term in the contract under which the purchaser paid his money to the officer. At the time he made his purchase the statute provided that at the expiration of six months thereafter he should receive a conveyance of the land, unless it should before that time be redeemed from the sale by the payment to him of the amount of his purchase, with 2 per cent. per month until the time of such payment. The legislature was as powerless to diminish the amount which he should receive as a redemption from the sale as it was to extend the time at which he should be entitled to a conveyance and take possession of the land. It could with as much right authorize a redemption without requiring any payment beyond the amount of the purchase as it could reduce the amount then required to be paid. By his purchase the defendant Green became vested with an interest in the land, of which he could be deprived only in the mode then fixed by the statute, and the plaintiffs were entitled to redeem the land from the sale only upon paying the amount of his purchase, with 2 per cent. per month from the date of the sale until the time of redemption. As it appears from the complaint that that is the amount which the commissioner demanded, and which they paid for the purposes of redemption, the demurrer to the complaint should have been sustained. The judgment is reversed, with directions to the superior court to sustain the demurrer to the complaint.

We concur: GAROUTTE, J.; VAN FLEET, J.

117 Cal. 87

## McDOUGALD v. ARGONAUT LAND & DEVELOPMENT CO. et al. (Sac. 153.)[1]

(Supreme Court of California. May 24, 1897.)

GUARANTY—CONSIDERATION—EXTENT OF LIABILITY—PLEADING—AMENDMENT—JUDGMENTS.

1. A proposed purchaser of land having refused to buy unless the vendor would furnish a tenant, and a guaranty that the tenant would pay a specified rent, plaintiff, at the request of the vendor, executed the guaranty, and as a result a sale was effected. *Held* that, though plaintiff received no benefit from the guaranty, it was based on a sufficient consideration.

2. The fact that the vendor furnished a tenant in name only, and intended to continue in possession himself, did not affect the guarantor's liability, whether or not the purchaser knew of such fact.

3. Other persons having subsequently agreed to indemnify the guarantor from loss he might sustain by reason of the guaranty, the purchaser was not bound, on the tenant's failure to pay rent, to proceed against such persons before proceeding against the guarantor.

4. Nor did the purchaser have any right of action for rent against the vendor.

5. The guarantor sued the vendor, the purchaser, and his indemnitors to obtain a decree determining how much was due as rent, and declaring that he was merely surety for defendants other than vendor and purchaser. *Held*, the purchaser not having filed a pleading showing the amount due him, and not having demanded judgment, he was not entitled to judgment for the rent due.

6. Where an amendment made after trial for the purpose of conforming the complaint with the proof went beyond the proof as to the existence of a certain fact, such fact was not admitted by the adverse party's failure to deny it by answer.

Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by J. D. McDougald against the Argonaut Land & Development Company and others. There was a judgment for costs against defendant John Boggs, and from an order denying a new trial he appeals. Reversed.

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[1] Rehearing denied.

James A. Louttit, for appellant. J. G. Swinnerton, Baldwin & Thompson, Dudley & Buck, and Geo. D. Dudley, for respondents.

TEMPLE, J. This action is sui generis. The complaint, as it was originally drawn, and as it was at the trial, and until the close thereof, among other things, averred, in substance, that the corporate defendant, the Argonaut Land & Development Company, on the 1st day of May, 1890, owned a certain tract of land, which it was endeavoring to sell for $140,000, and that certain of the defendants were the directors of the corporation, and were authorized to make such sale, and, as such directors and agents for the purpose of making the sale, were empowered to enter into any and all contracts, agreements, and guaranties, etc., necessary. Pursuant to such authority, they contracted with defendant Boggs to exchange said land for a tract of 12,000 acres owned by said Boggs, and $44,000 in gold coin. Further, that Boggs agreed to the purchase on condition that the corporation would furnish a tenant for the land he was acquiring by said trade, acceptable to said Boggs, who would rent said land for five years at an annual rental of $12,000, and would obtain the guaranty by suitable persons of performance on the part of such tenant. It is averred that the defendant corporation accepted the terms and entered into the contract, and did in fact convey the tract of land to Boggs, and procured one McLaren to enter into such lease; that Boggs received the conveyance, and paid the said sum of $44,000 to the corporation, and conveyed to it the said tract of 12,000 acres of land in Colusa county. Said Boggs also, as part of the same transaction, leased the tract acquired by him from the corporation to said McLaren; and the plaintiff, at the request of the corporation and of the defendants other than Boggs, agents of the corporation, and to enable them to effect the sale or exchange of their said lands, in writing, guarantied to Boggs the payment of the rent reserved in the lease. Hulet, who was president of the corporation, subsequently signed the guaranty. Plaintiff avers that he received no consideration for the guaranty from the corporation, but entered into the same solely at the request of the corporate defendant; also, that, but for such guaranty, Boggs would not have made the said exchange of land, and this fact was well known to the corporate defendant. It is further alleged that on the said 20th day of May, 1890, defendants Fairbrother, Spect, Wilhoit and Foss, in writing, promised plaintiff to indemnify and save plaintiff harmless from all risk, damage, liability, cost, and expense that he might incur or sustain by reason of, or growing out of, his said guaranty. It is then charged that McLaren failed to pay the rent which accrued during the first and second years of the term, but that a stated portion of such rent had been paid by the corporate defendant. It is then averred that Boggs is insisting that plaintiff and Hulet shall pay such rent, and is threatening to bring suit against them therefor, and refuses to sue "any of the other parties hereto." It is charged that the corporation, in violation of its agreement, has failed and refused to hold plaintiff harmless upon his contract of guaranty, and now wrongfully claims and asserts that it is in no wise liable to plaintiff or to Boggs. The other individual defendants who contracted in writing to hold plaintiff harmless upon the guaranty have also made similar default, and all of said defendants are now endeavoring to burden plaintiff with all of such obligations, and to compel him to pay the rent out of his own resources. He asks for a judgment determining how much is due Boggs on the lease, and decreeing that plaintiff is surety for the other defendants, who are bound to pay the rent due said Boggs upon the lease. He asks that such defendants be required to pay all sums found due Boggs, and that plaintiff be exonerated; also, to adjudge that plaintiff is a surety, and entitled to be reimbursed for any sums he may be required to pay upon such guaranty. To this complaint Boggs filed an answer, in which he made no effectual denials of any matters stated, but simply asserted that McLaren was a necessary party to the suit, and asked that he be brought in. The other defendants answered the complaint, denying their liability to plaintiff or to Boggs. No cross complaint was interposed by any of the defendants, and it does not appear that the answers of the other defendants were served upon Boggs; and, as it was not necessary that they should be so served, we must presume that they were not. After the evidence was all in, at the close of the trial, the plaintiff was allowed to amend his complaint for the purpose of making it conform to the proofs. The amendment was made, and consisted in adding an averment to the effect that McLaren was only nominally the tenant of Boggs; that the Argonaut Land & Development Company was the real tenant, and after the execution of the lease the said Argonaut Land & Development Company, with the consent of McLaren and of Boggs, entered upon the land, and sublet portions thereof to McLaren and others, and received certain rents from such subtenants, which were paid to Boggs.

The court found the facts with reference to the sale or exchange of lands about as averred, and that McLaren was not furnished by the corporation as a tenant; that McLaren never took possession as the tenant of Boggs, and never paid any rent; and that, prior to the commencement of this action, plaintiff requested Boggs to bring suit against McLaren as principal, and the other defendants as co-sureties and co-guarantors of McDougald, and that Boggs refused to bring the suit. As conclusions of law, it is found that McLaren was never the tenant of Boggs; that neither McDougald nor any one else ever guarantied the performance of McLaren under any lease; that no rent is due to Boggs from any one, and neither plaintiff nor any of the defendants became or were sureties for Boggs; and that plaintiff is not surety for any of the defendants. Plaintiff's costs were assessed against Boggs. The appeal is from an order denying a new trial.

In the motion the findings of fact are attacked as not sustained by the evidence. Whatever may be said as to the other defendants, it is perfectly certain that the findings I have epitomized are not justified by anything in the pleadings as to Boggs. The complaint not only admits the lease, and liability of plaintiff as guarantor for the tenant, but the fact of the lease and the liability of plaintiff is the foundation of his cause of action. He does not aver that Boggs wrongfully claims that he is liable, and demands an adjudication to the effect that he is not liable, but he avers the liability, and that he assumed it at the request and in the interest of the other defendants, who agreed to indemnify him against loss on account thereof. The suit was brought to establish the liability of the other defendants, and to have it adjudged that, as between himself and them, they are principals, and he a surety only. If Boggs was satisfied with the responsibility of plaintiff, I see no reason why he should concern himself about this controversy. The only allegations in the complaint which he was called upon to deny were the statements as to the sums which had already been paid him on account of rents; and, if those statements were correct, he was not called upon to deny them. Upon the pleadings, it was not competent for the court to find the above facts against the averments and admissions of the complaint. There were no issues to be tried between Boggs and the other defendants, and in fact none as between Boggs and the plaintiff, unless it was as to whether McLaren was a necessary party to the action; for, according to the copy of the transcript before me, there was no denial of the allegations in regard to the partial payment of rent. Respondents contend that there are certain admissions resulting from a failure of Boggs to deny the allegations of the complaint which justify the judgment appealed from. Although I think it obvious that the complaint tendered no issue to Boggs, and contained no averments which would justify any judgment aginst him, except that he had received certain sums as rent, I will notice these contentions separately.

The claim is that Boggs admitted, by failing to deny:

(1) That plaintiff signed as surety without consideration. The complaint avers that plaintiff became surety for the other defendants to enable them to perform their contract with Boggs; that nothing was paid to him for guarantying the payment of the rent, but he executed the guaranty solely at the request of the corporation, to enable it to effect the sale. The complaint also shows that Boggs would not have made the purchase but for this guaranty. Instead of an averment that the contract of guaranty was without consideration, the complaint several times, and by full statement of the facts, avers a consideration for the contract of guaranty sufficient and ample.

(2) That the corporation was substituted as tenant instead of McLaren. This proposition is sustained neither by allegation, finding, nor proof. The contention is also made that McLaren did not enter as tenant of Boggs, and there is a finding to this effect. This finding is contrary to the allegations in the complaint, is not in response to any issue tendered by the complaint, and not sustained by any evidence whatever. There is no evidence which tends to show that Boggs consented to the possession of the Argonaut Land & Development Company, or to any special use of the property other than as stipulated in the lease. The complaint, even as amended, shows that McLaren did enter into possession under the lease. That he was a tenant is essential to plaintiff's cause of action, and necessitated by the theory of the complaint. As to Boggs, the averment that McLaren was only nominally tenant, but that the real tenant was the corporation, is meaningless. Plaintiff avers that the corporation was to furnish a tenant, and that it did furnish McLaren, whose performance plaintiff guarantied. If the corporation did this with the expectation of continuing in possession, and McLaren assented to this, plaintiff cannot complain. This would conclusively prove that the tenant entered under the lease. If Boggs knew of the expectation, it would not matter. An individual was furnished who undertook as tenant, and plaintiff guarantied his performance. If such arrangement did exist, it is not averred, proven, or found that plaintiff was ignorant of it. There is no evidence tending to show that Boggs released McLaren, or accepted another tenant.

(3) It is contended that plaintiff asked Boggs to sue the other defendants, and, since he did not, this releases plaintiff. Upon this subject the allegation is, in effect, that Boggs neglects and refuses to sue any of the other parties hereto, although plaintiff has demanded that he do so. McLaren was not a party to the suit. The finding is to the effect that Boggs was asked to sue McLaren as principal, and the other defendants, save Boggs, as co-sureties and co-guarantors of plaintiff. The only evidence upon the subject to be found in the record is that plaintiff asked Boggs to sue the corporation, and that he did not do so. In the finding, the other defendants are called "co-sureties and co-guarantors of plaintiff." If so, I do not know why Boggs should sue, or why his failure to do so would constitute a defense. In the complaint nothing is said which would give Boggs an action at law against any of them. It is said that some of them had agreed to indemnify plaintiff on his guaranty. He has never paid anything on account of his guaranty, and, if he did pay, that certainly would not authorize Boggs to sue. The corporation, accord-

ing to the allegations of the complaint, had fully performed its contract with Boggs. Furnishing plaintiff as guarantor on the lease was part performance of the contract. Having furnished this security, which was acceptable to Boggs, it was no further liable to Boggs on account of the contract to furnish a tenant with satisfactory security, if it be conceded that it did contract to do so.

Respondents also contend that, inasmuch as the appellant did not answer the complaint as amended after the trial for the purpose of making it conform to the proof, all its allegations are admitted by him, and neither proof nor findings are required; and it is contended further that the amended complaint shows that Boggs accepted the corporation as tenant instead of McLaren. I think no such fact as this is alleged in the complaint, but, if such allegation were put into the complaint by the amendment, failure to reply would not constitute an admission. Amendments made to the complaint after trial, and for the purpose of making it conform to the proof, must rest upon such proof, and cannot go beyond it. They are not made for the purpose of framing issues for the trial, but to supply some technical defect, or perhaps upon the supposition that certain issues have been tried which are different from those framed by the pleadings. The supposition is that they have been tried as though such issue had been made. I do not find in the record any evidence upon the subject, and, as no such issue was tried, the allegation, if it can be so construed, is an idle one.

Appellant contends that he is entitled to judgment upon the pleadings against plaintiff for the amount due him upon the lease. He is in that respect, however, in the same position as the plaintiff is in respect to the judgment rendered. He had no pleadings which would sustain any such judgment. He has no cross complaint. He quotes on this point decisions which hold that sometimes defects in the complaint may be supplied by allegations in the answer, and claims the benefit of the allegations showing the liability of the plaintiff which are contained in the complaint. But, before the defective allegations can be helped by the allegations of an answer, there must be some sort of a pleading, defective or otherwise. Boggs put in no pleading showing the amount due him, and demanded no judgment. He tendered no issue upon the subject to plaintiff. The judgment is reversed and the cause is remanded.

We concur: McFARLAND, J.; HENSHAW, J.

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117 Cal. 124

## PEOPLE v. LUNDIN. (Cr. 251.)

(Supreme Court of California. May 25, 1897.)

FORGERY—EVIDENCE.

Conviction of forgery can be had only on proof that the person who signed another's name did so without authority.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

John Lundin was convicted of forgery, and appeals. Reversed.

Chas. G. Nagle, for appellant. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, for the People.

SEARLS, C. Defendant was charged by information with the crime of forgery, alleged to have been committed at the city and county of San Francisco on or about December 18, 1895. To the information defendant pleaded: (1) Not guilty. (2) Once in jeopardy. (3) Former acquittal. Upon the trial the defendant was found guilty as charged. The jury also found for the "people on former pleas" of once in jeopardy and former acquittal. Thereupon judgment was entered that defendant be punished by imprisonment in the state prison of the state of California at San Quentin for the term of four years. Defendant appeals from the judgment, from an order denying his motion for arrest of judgment, and from an order denying his motion for a new trial.

The determination of a single question is conclusive of the appeal. The defendant was charged with the forgery and uttering as genuine a certain check or instrument in writing, of which the following is a copy: "San Francisco, Dec. 16, '95. No. 1,245. Pacific Coast Savings Society of San Francisco, Cal.: Pay to John Nelson, or bearer, ($600) six hundred dollars. Clearing House No. 14. John F. Johnson." Indorsed: "John Nelson." At the trial there was evidence tending to show that about 7 o'clock p. m. of December 18, 1895, the defendant, John Lundin, who passed under the name of Thompson, in company with one Albrecht and a man named Nelson, who professed to be the indorser and payee of the foregoing check, called at the saloon and lunch house of Emma Schoenemann (now Dorn), on Spear street, San Francisco, where they negotiated and agreed to purchase, for and in the name of Nelson, from Mrs. Dorn, a one-half interest in her saloon for $400, from which sum Mrs. Dorn was to pay Albrecht a commission of $60, and also a couple of dollars to defendant for his trouble. Defendant produced and passed to Nelson a check, of which the foregoing is a copy, and the latter gave it to Mrs. Dorn. Upon her inquiry the parties all declared the check was good. It being late, Mrs. Dorn declined to make a bill of sale of the property until the check could be cashed the next morning. Mrs. Dorn then gave Nelson a receipt for the check, and it was agreed that he would come the next morning, go with Mrs. Dorn to the bank, where they would get the cash on the check for $600, whereupon Nelson would receive the $200 in excess of the purchase price of one-half of the saloon, the other parties would receive their commissions, etc. After this was arranged Albrecht wanted Mrs. Dorn to pay him his commission, which she refused until the check was cashed. He, or some of them, then sought to obtain $40, $20, and finally $10, but Mrs. Dorn was suspicious, and refused to pay anything. Nelson did not appear the next morning, and has not since appeared. Payment of the check was refused at the bank, no such person as the drawer having any funds there. There was testimony tending to show that the name "John F. Johnson" signed to the check, and the name "John Nelson," indorsed thereon, were both in the handwriting of defendant. Two witnesses named John F. Johnson were called by the prosecution. The first knew nothing of the defendant. The second testified that he had known defendant some seven or eight years, that he (said Johnson) did not sign the check, that the signature was not his handwriting, and that he had no account at the bank upon which it was drawn. No question was asked, and no testimony introduced tending to show, whether or not defendant was authorized to sign the name of "John F. Johnson" to the check.

Under the previous rulings of this court we are compelled to say the evidence was insufficient to warrant a conviction. In People v. Whiteman, 114 Cal. 338, 46 Pac. 99, a case involving a like question, the court, speaking through Temple, J., said: "There was no evidence that the persons by whom the checks purported to be drawn were real persons, and none that, if they were real persons, defendant was not authorized to use their names. * * * To prove that an accused person signed the name of another to an instrument, and that he passed such instrument as genuine, does not prove the commission of a crime. It must still be shown that it was a false instrument, and this is not proven until it is shown that the person who signed another's name did so without authority. Until this proof is made it is not shown to be a false instrument, and the defendant is not put to his proof at all." People v. Mitchell, 92 Cal. 590, 28 Pac. 597, is to like effect. There was some evidence in the case at bar from which the jury might have inferred that the second John F. Johnson, called as a witness, was the person whose name was intended to be signed to the check, but there is no evidence whatever that defendant was not authorized to sign the same. The instructions of the court contained a clear exposition of the law as enunciated in People v. Whiteman, supra, but the jury failed to be governed by those instructions in the rendition of their verdict. We recommend that the judgment and order denying a new trial be reversed, and a new trial ordered.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed, and a new trial ordered.

117 Cal. 140

## COOK v. COCKINS. (L. A. 176.)

(Supreme Court of California. May 25, 1897.)

STATUTES—WHEN RETROACTIVE—FRAUDULENT CONVEYANCES—DELIVERY OF DEED—SUFFICIENCY OF EVIDENCE.

1. Prior to 1895, Civ. Code, § 3442, provided that the question of fraudulent intent in the transfer of property was one of fact, and that no transfer should be adjudged fraudulent solely because not made for a valuable consideration. Laws 1895, p. 154, amended such section by adding the proviso that any transfer made without a valuable consideration by a party while insolvent, or in contemplation of insolvency, should be fraudulent and void as to existing creditors. *Held*, that the section as amended is a rule of property as well as a rule of evidence, and does not apply to prior transfers.

2. A deed of land in California, made to plaintiff by her husband June 1, 1891, was acknowledged November 17, 1892, and recorded November 26, 1892, 21 days after the land was attached by defendant, a creditor of the husband when the deed was made. Plaintiff did not know of her husband's indebtedness at the time of the transfer, nor of the attachment till after the deed was recorded. There was nothing to suggest insolvency of the husband, and the wife was an innocent vendee, without notice of any infirmity in the title. The deed recited a consideration of $1. She testified that he owned a house in New York, where they resided, the proceeds of which he had always said she should have; that he had got $5,000 out of it, and put it in the California property in question; and that he said he would deed the latter to her when he got title to it. He testified that he told her long prior to making the deed that he would make it as soon as he got title. When it was made, both understood that it was to carry out such promise. The value of the land did not exceed his indebtedness to defendant. *Held*, that the deed was not fraudulent as to defendant, even on the theory that the husband's property outside of California could not be considered on the question of insolvency, and on that theory he was technically insolvent; and this though the facts did not import a valuable consideration, since when the deed was made Civ. Code, § 3442, provided that no transfer, etc., could be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Caroline M. Cook against W. W. Cockins for partition. Pending the action, plaintiff died, and Joseph A. Cook, executor of her estate, was substituted as plaintiff. There was an interlocutory decree in favor of plaintiff, directing partition and appointing referees for that purpose. From an order denying a motion for a new trial, defendant appeals. Affirmed.

Collier & Evans (Francis J. Heney, of counsel), for appellant. J. F. Conkey, for respondent.

CHIPMAN, C. On February 13, 1894, Caroline M. Cook, now deceased (referred to herein as plaintiff), wife of Joseph A. Cook, filed her verified complaint in the superior court of Riverside county, alleging ownership of certain land situated therein, and claiming an undivided one-fourth interest in the land, and an ownership of an undivided three-fourths interest in the same land in the defendant, and praying for partition of their several interests. The defendant filed a verified answer denying that the plaintiff was the owner of any interest in said land. For a separate answer to the complaint, the defendant alleged that defendant and said Joseph A. Cook on January 31, 1891, became the owners, as tenants in common, of the land, by virtue of certain legal proceedings, in the proportion, to wit, the defendant an undivided three-fourths interest, and the said Joseph A. Cook an undivided one-fourth interest, and that they were such owners in fact at the commencement of the action; that the interest of said Joseph A. Cook was subject to the lien and claim of defendant by virtue of proceedings in attachment commenced by him against the said Joseph A. Cook in the superior court of Los Angeles county; that a writ duly issued October 22, 1892, and was served by levy on the interest of said Joseph A. Cook in said land November 5, 1892; that defendant recovered judgment in said action December 13, 1893, against the said Joseph A. Cook for $1,906.92, and $126.20 costs; that said judgment became a lien on the interest of said Joseph A. Cook in said land on and after November 5, 1892, and has not been paid, but is still due, and that said lien was in full force when this action was begun; that defendant had caused execution to issue on said judgment, and to be placed in the hands of the sheriff of Riverside county, and had caused a transcript of the judgment to be filed in the county of Riverside as required by law, and was proceeding to sell said property. Further answering, the defendant alleged that on January 31, 1891, the said Joseph A. Cook was and continued to be a resident of the state of New York, and was at that time indebted to defendant, and continued to be indebted to the date of this action; that the said Joseph A. Cook on January 31, 1891, and prior thereto, was insolvent, and, aside from his interest in said property, had no assets or property with which to pay defendant's said claim; that on November 26, 1892, there was filed for record in the office of the recorder of San Diego county (from which Riverside county was in part afterwards taken) a paper purporting to be a conveyance from said Joseph A. Cook to his wife, Caroline M. Cook, plaintiff in this action; that said conveyance purported to be acknowledged November 17, 1892; that, as to defendant, it was and is void, in that it was without consideration and voluntary; that said conveyance was made with the purpose on the part of said Joseph A. Cook to hinder, delay, and defraud the defendant in the collection of his said claim, and that the said conveyance was accepted and received by the said plaintiff with full knowledge on her part that the same was made with intent to hinder, delay, and defraud the creditors of said Joseph A. Cook, and particularly defendant; that, at the date of said pretended conveyance, plaintiff well knew that the said Joseph A. Cook was insolvent; that at the date of said conveyance, for a long time prior thereto, and ever since said date, the said Joseph A. Cook was indebted to defendant in the sum of about $2,000. By a supplemental answer, defendant avers that since the filing of his answer in the action the execution issued upon the judgment above referred to has been served, the property duly sold, and that, more than six months having elapsed since said sale, the sheriff of said Riverside county executed his deed to defendant of all the interest of the said Joseph A. Cook in the property described in the complaint. The cause was tried by the court without a jury, and its decision was for the plaintiff. Findings of fact and conclusions of law were filed, and an interlocutory decree entered directing partition to be made, and appointing three referees for that purpose. A motion for a new trial was overruled, and this appeal is from the order of the court denying a new trial.

Certain facts are not disputed, to wit: That in January, 1891, the property in question was acquired through judicial proceedings, by Joseph A. Cook an undivided one-fourth, and by defendant an undivided three-fourths interest, as tenants in common; that subsequently, by deed dated June 1, 1891, said Joseph A. Cook conveyed his interest in the land to his wife, the plaintiff; that this deed was acknowledged November 17, 1892, and recorded November 26, 1892; that at the date of the deed said Joseph A. Cook was indebted to defendant about the sum of $2,000; that in 1891, and prior thereto, and until about 1894 or 1895, plaintiff and her husband resided in the state of New York; that, about as stated in the answer, defendant became the owner in 1895 of whatever interest Joseph A. Cook had in the land, through a proceeding in attachment by which levy was made on said interest November 5, 1892.

The ninth finding attacked by defendant is as follows: "That on the 1st day of June, 1891, said Joseph A. Cook, being the owner in fee of an undivided one-fourth interest in the premises described in the complaint, and of all the appurtenances thereto, by deed dated, executed, and delivered that day, duly transferred and conveyed all of his right, title, and interest in said premises to the plaintiff in this action, who thereupon became, ever since has been, and still is the owner of said Joseph A. Cook's interest in said premises." The objection to this finding is that it is against the evidence, for that the evidence shows without conflict: (1) That the conveyance so made June 1, 1891, by Joseph A. Cook to his wife, Caroline M. Cook, was fraudulent and void as to defendant; (2) that at said date, and before, defendant was, and ever since he has been, an existing creditor of said Joseph A. Cook; (3) that at said date said Joseph A. Cook had no other property in the state of California than the property in question, and that the only other property he owned was in the state of New York, incumbered to the extent of $3,000; (4) that the indebtedness of said Joseph A. Cook at the date of said conveyance arose out of a transaction in the state of California, at which time defendant resided and still resides in the state of California, and that the said Joseph A. Cook, until a short time before the commencement of this action, resided in the state of New York; (5) that said conveyance was voluntary, and without valuable consideration. The appellant does not urge in his brief that actual fraud was shown. The alleged fraud upon which he apparently relies is constructive, and results, if at all, from his view of what is a just application of the facts to what he deems to be a proper application of section 3442, Civ. Code, to the case. When this action was brought this section read as follows: "In all cases arising under section 1227, or under the provision of this title, except as otherwise provided in section 3440, the question of fraudulent intent is one of fact and not of law; nor can any transfer or change be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." Before the action was tried, and nearly four years after the transfer, the legislature amended this section by adding the following: "Provided, however, that any transfer or incumbrance of property, made or given voluntarily or without a valuable consideration, by a party while insolvent, or in contemplation of insolvency, shall be fraudulent and void as to existing creditors." Laws 1895, p. 154. Appellant urges with much earnestness that section 3442 of the Civil Code, as thus amended, should be considered in determining the rights of the parties at the time of the trial; that the amendment merely establishes a rule of evidence, and goes strictly to the remedy and in no sense to the right; that no retroactive effect is necessary to be given, so as to make it obnoxious to the rule relating to retroactive legislation; and that, thus considered, a conclusive presumption of intent to defraud must flow from the facts in this case. On the other hand, the plaintiff contends that this section is something more than a rule of evidence; that it is a rule of property as well, and cannot, as amended, destroy vested property rights by being given retroactive effect. It seems to me that this latter is the true view. The transfer was dated June 1, 1891. The husband testified that it was delivered the same day to the wife. She testified that she thought it was delivered in the following September or October. The trial court found that the deed was executed and delivered on June 1, 1891. As there was no other testimony on this point, we are not at liberty to say that the court erred in accepting that of the husband. Without now considering the effect of the change in the statute upon this case, appellant's point deserves more than dogmatic negation. The section as it stood at the time of the transfer made the question of fraudulent intent one of fact, and not of law, in all cases arising under the title of the Code in which the section occurs, and this case arises under that title. It was incumbent upon defendant to allege and prove the fraudulent intent. Under the section before the amendment, this court has frequently held that a voluntary conveyance is not prima facie fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law. Emmons v. Barton, 109 Cal. 662, 42 Pac. 303. The section also originally provided that a transfer could not be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. In Emmons v. Barton, supra, the conveyance was a gift from husband to wife, and it was there held that such conveyance "is valid as against creditors, although the consideration was love and affection alone, unless it was made with intent to defraud creditors. * * * But the intent is a question of fact, and must be averred and proved. A voluntary conveyance is not prima facie fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law. Therefore, in a case like the one at bar there must be evidence upon which the jury or court can base a finding of the fact that the intent of the grantor at the time of the grant was to defraud his creditors. * * * Pronounced insolvency at the time of the grant would no doubt be a strong circumstance tending to show fraudulent intent, and, in the absence of other controlling facts, it would be sufficient to justify a finding of such intent."

By the amended act a voluntary conveyance, or a conveyance without a valuable consideration, is declared to be fraudulent and void as to existing creditors if the grantor is insolvent at the time of the grant, or in contemplation of insolvency. The intent is no longer, in such case, a question of fact, to be alleged and proved. Indeed, there need be no intent alleged or proved. The law declares the conveyance to be fraudulent and void, and produces the same result without proof of actual fraud being shown. Under the former law insolvency was only a circumstance tending to show fraudulent intent; and while insolvency, if "pronounced at the time of the grant, would be a strong circumstance tending to show fraudulent intent," there might be "other controlling facts" which would relieve the act from any fraudulent intent, and in such case the grant would stand. But not so now. No other conceivable facts would control when the fact of insolvency is shown and the conveyance is voluntary, or without valuable consideration. Section 3439, Civ. Code, under which this case arises, provides: "Every transfer of property * * * made * * * with intent to delay or defraud any creditor * * * is void against all creditors of the debtor. * * *" But section 3442 formerly said that this fraudulent intent is in all cases a question of fact, and not of law. Now, however, the fraudulent intent in certain cases is a question of law, and not of fact. When Joseph A. Cook conveyed to his wife, the law said that the deed should not be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. There must be intent to defraud, and insolvency did not alone, and of necessity, establish that intent. As the law now is, a deed without valuable consideration by a party insolvent is, as to existing creditors, fraudulent and void. Under the old law the plaintiff's deed might have been good, and the title pass to her; and, if so, can that title be disturbed by any law subsequently passed, whether it be a new rule of evidence relating to a remedy, or some other form of law more directly rendering the title void? If plaintiff owned the land in 1891, whether she got it by gift or however else, can the legislature subsequently make a new rule of evidence, in any case where her title may be drawn in question, that will have the effect to destroy the title with which she had been previously invested by law? It seems to me that the proposition of appellant has neither justice, reason, nor authority to support it. Prior to April 1, 1878, the Code of Civil Procedure (section 325) laid down certain elements constituting adverse possession where claim of title is claimed, not founded on a written instrument, etc. On the day above named a new element was introduced by the legislature, to wit, that the claimant, his predecessors and grantors, must have paid all the taxes levied and assessed upon the land. This court has frequently held that this new element of adverse possession had no retroactive effect, and could in no wise affect a title that had ripened under the former law. Sharp v. Blankenship, 59 Cal. 288, and cases there cited. No part of the Code is retroactive unless expressly so declared. Code Civ. Proc. § 3. The principle decided in Sharp v. Blankenship seems to me to be so closely analogous to the question here presented as to make it decisive and conclusive.

In view of the facts in this case, under the law in force when the conveyance was made, did title pass to plaintiff beyond the reach of defendant as a creditor of the grantor? Was the transfer by said Cook made with intent to defraud defendant? Appellant's brief is constructed upon the theory that the law of the case is found in section 3442, Civ. Code, as amended in 1895, and we therefore have not the full benefit of counsel's views upon the case as judged by the section before amended. He claims under the amended section alone. I will endeavor, however, to meet every possible question presented by the evidence. It is urged that the deed was not delivered on the day of its date as found by the court. The husband testified that he delivered the deed to plaintiff on the day of its date, June 1, 1891. She testified that she thought it was not delivered until the following September or October. The trial court took the date of delivery given by the husband, and as there was no evidence to dispute this fact, except that of the wife, and she differing only as to the date, but not as to the fact of delivery, I think the finding should stand. Besides, the delivery assumed as of date September or October, 1891, would not change the result. The attachment was not served until November 5, 1892.

The facts that may be urged by appellant as badges of fraud are (1) that the deed was not acknowledged until November 17, 1892, nor recorded until November 26, 1892, 21 days after the writ of attachment was levied; (2) that defendant was at the time an existing creditor of the grantor; (3) that the deed was without valuable consideration; (4) that the grantor was insolvent when he made the deed.

As to the acknowledgment and recordation of the deed there is no evidence as to whether said Joseph A. Cook had been served with summons in the attachment suit before the deed was acknowledged, nor is there any evidence that he had been served with summons or knew of the suit before the deed was recorded, nor that the acknowledgment or recordation of the deed was the result of the suit. While an inference might have been otherwise drawn from the facts in evidence, we cannot say that the court erred in not drawing it. But there is no evidence tending to show that plaintiff had at any time prior to bringing the suit, nor for long after, any knowledge whatever of the suit, or the circumstances out of which it arose.

It does appear beyond dispute that defendant was a creditor of said Joseph A. Cook when the deed was made. This indebtedness had its origin in certain shares of the Artesian Land & Water Company, a corporation, owned by said Joseph A. Cook. Defendant was a creditor of the corporation, and sued it by foreclosure proceeding in 1888, and obtained judgment for a deficiency in 1890. It was upon the proportion of this liability due from said Cook as a stockholder upon which defendant afterwards attached the land in question.

As to the consideration, the deed reads: "The party of the first part, in consideration of the sum of one dollar and other consideration dollars ($1.00) [sic] to him in hand duly paid, has sold to party of the second part, her heirs," etc. Both husband and wife testified that she paid him one dollar at the delivery of the deed. The wife also testified that her husband owned a certain house in Auburn, N. Y., the proceeds of which her husband had always said she should have, and that he had realized $5,000 out of this property and put in the California property (the subject of this litigation), and that when he got his title to the California property he would deed it to her. He testified that long before the date of the deed (June 1, 1891) he had told her he would convey the California property to her as soon as he got his title. The Auburn property stood in the name of the husband. But, if these facts could be held not to import a valuable consideration, the law declared that a transfer could not be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. The circumstances, therefore, relating to the consideration, can only figure in determining whether they tended to show fraud. At the time of the transfer, plaintiff knew nothing of the indebtedness of her husband existing in California. She did not know of the attachment until long after it was commenced, and after the deed was recorded and this suit was brought. No evidence points to her knowledge of her husband's insolvency, or belief that he was insolvent, or of facts that would put a prudent person having an interest upon inquiry. So far as the evidence shows, she was an innocent vendee, without notice of any legal infirmity in the title or in the grantor. Whether the transfer was or was not without valuable consideration, as has been said, can only be regarded as indicia of fraud. It was held in Ryan v. Tomlinson, 39 Cal. 639, "that a verbal agreement for an exchange of real property, which has been carried into effect by the execution of proper conveyances in pursuance of the agreement, is not void under the statute of frauds." In Robins v. Hope, 57 Cal. 493, it was said: "Where an adequate motive for making a deed is apparent, that circumstance [want of consideration] does not necessarily militate against the bona fides of the transaction." When the deed was made to plaintiff both the husband and wife understood that it was to carry out the previous agreement that plaintiff should become the owner of the California property, and I think that, under the circumstances, there was an adequate motive for making the deed. The husband, as we shall see later on, was in good circumstances financially, and there was nothing in their surroundings to suggest insolvency at that time, or danger of insolvency. And it was competent for plaintiff to show other consideration than that mentioned in the deed. Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

I can find no evidence of fraudulent intent on the part of grantor or grantee in the matter of consideration. But it is urged that the husband was insolvent when he conveyed to his wife, and that the conveyance was voluntary, and therefore void. Appellant's position is a non sequitur, because it omits the essential additional element of fraudulent intent. Since the very elaborate consideration of this question by Mr. Justice Garoutte in Bull v. Bray, 89 Cal. 286, 26 Pac. 873 (many times since approved), there has been no doubt as to the law of this state, and it is that, "in an action by a judgment creditor to set aside deeds of gift made by the judgment debtor to his wife as being void as against prior creditors, it is necessary specifically to find that the deeds were made with a fraudulent intent in order to sustain a judgment for the plaintiff, and such findings cannot be inferred from findings that the deeds were without consideration, and that the judgment debtor was insolvent when he made them, though without full knowledge of his actual financial condition, and that by the making of them he hindered, delayed, and defrauded the plaintiff in the collection of his debt." In a concurring opinion, Mr. Chief Justice Beatty said: "It does not seem possible to avoid the conclusion that the law of California on the subject of voluntary conveyances by insolvent debtors is such as in the opinion of Justice Garoutte it is declared to be. But I cannot refrain from expressing the belief that it is most unfortunate that the court should be forced to that conclusion. When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as creditors are concerned. They are necessarily deprived of what is rightfully theirs, and the law ought to pronounce such a transaction ipso facto fraudulent and void as to them. * * * It ought to be changed, but the legislature alone has the power to change it." And the legislature did change it (probably as the outgrowth of this decision), but the defendant cannot avail himself, as we have seen, of the changed law. But appellant says that the husband was insolvent, and in Emmons v. Barton, 109 Cal., at page 671, 42 Pac. 305, Mr. Justice McFarland, for the court, said: "Pronounced insolvency at the time of the grant would no doubt be a strong circumstance tending to show fraudulent intent, and, in the absence of other controlling facts, it would be sufficient to justify a finding of such intent." Was insolvency proved, and was it of such a pronounced character as to warrant the inference of fraudulent intent? Appellant insists that the evidence shows that the said Cook was insolvent when he made the transfer to his wife. The evidence of Joseph A. Cook is uncontradicted, and tended to show that he owned property in the state of New York at the time of the transfer in question (June 1, 1891) of the value of $36,000, on which there was a mortgage lien of $3,000 and no more; that he continued the ownership until 1893, when the mortgage debt was paid, and the property sold by said Cook to a company then formed, and the said Cook accepted stock in the company for his interest, valued at $30,000. A member of the company was to put in $25,000, and the property (salt works) was to be enlarged. Eight thousand dollars of the company bonds were sold, and $6,000 more used by a director of the company without its knowledge as security for the loan of $6,000 he had made of a friend, making $14,000 of bonded debt. These bonds were secured by a deed of trust or mortgage on all the corporate property. The mortgage or deed of trust was subsequently foreclosed for this bonded debt, and all the property sold under foreclosure, and the said Cook thus lost all his interest in the property. This took place, as testified to by said Cook, some time in 1894. The trial court evidently regarded this as sufficient to show that the said Cook was not insolvent in 1891, when he made the transfer to plaintiff, and we cannot say that the court erred in this conclusion. But it was urged by appellant at the trial, and is urged here, that the ownership of property in

New York state at the time of the transfer, or the solvency of the grantor in New York at that time, is not to be considered, if, with respect to his property in the state of California, and his indebtedness in the latter state at the time of the transfer, he was not solvent. The said Cook is not shown to have had any property in this state at the time of his indebtedness to defendant, other than his interest in the property mentioned in the complaint, and the value of this interest nowhere appears. It was bid in at the sale for the debt. The question is presented whether a person residing in another state, and being indebted in this state to an amount equal to or in excess of the value of his property owned in this state, but who has ample property in the state of his residence to meet all his obligations, must be regarded as insolvent, and that a voluntary transfer of his property in this state, or a transfer without a valuable consideration, is fraudulent and void as to creditors at the time of the transfer. When is a person insolvent under our law? The act of 1880 in force when the transfer in question was made does not define what shall constitute insolvency. In Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305, this court said that it saw no reason why the definition of insolvency as given in section 3450, Civ. Code, is not correct under the act of 1880. The section reads: "A debtor is insolvent within the meaning of this title [the title is "Assignments for the Benefit of Creditors"] when he is unable to pay his debts from his own means, as they become due." There is no suggestion here that the "means" from which the debts are to be paid must exist in this state. In the case of Sacry v. Lobree, 84 Cal. 41, 23 Pac. 1088, the definition of insolvency was very fully given,—perhaps more fully than elsewhere to be found in our Reports,—but it did not involve the question here. In Thompson v. Paige, 16 Cal. 77, it was held that an instruction "that a man who is insolvent for the want of means to pay his debts in this state is in law insolvent, without reference to any property in another state," was too broadly stated. The question is too important a one to decide in a case where it is not necessarily involved. In the case here, insolvency is only an evidence of fraud, and while it might in some cases be conclusive, if property elsewhere than in this state must be excluded, I do not think it so in this cause, in any view. The evidence shows the financial condition of the husband when he made the deed, and has already been referred to. There is no evidence tending to show that in 1891 either the husband or wife had any doubt of his solvency. There is nothing to show that the deed was made because of any financial embarrassment of the husband, present or prospective. At that time the liability of the husband to defendant had been ascertained, but there is no evidence that the husband knew of its existence. The attachment suit was brought against the husband 16 months after the deed was made, and while the husband was operating his salt works in New York. It is claimed that the husband made certain statements to defendant in 1893 tending to show that the deed was made to avoid the attachment or defraud defendant. The statements are denied by the husband as a witness, but, even if he made them, I do not think he could be heard to impeach his title made two years before; and to receive such statements as importing verity, and resulting in the overthrow of plaintiff's title, there should be no doubt left in the mind of the court that they truly reflected the situation when the deed was made. The court below found no evidence of fraud in the transaction; and, if the court erred in holding that the said Cook was not insolvent, I do not think that the technical insolvency shown, on the theory of insolvency advanced by appellant, was such as to evidence fraud. My conclusion, therefore, is that there was no reversible error in the interlocutory decree, and it is recommended that the cause be remanded, with directions to proceed to partition the property in accordance with the findings and judgment of the court below.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed, with directions to proceed to partition the property in accordance with the findings and judgment.

(117 Cal. 128)

## LOFTUS et al. v. FISCHER et al. (Sac. 123, 185.)[1]

(Supreme Court of California. May 25, 1897.)

APPEAL—HARMLESS ERROR.

Plaintiffs alleged the existence of a partnership and asked an accounting, and a defendant by answer joined with the plaintiffs in that allegation, and made allegations of an affirmative character against a co-defendant, and also filed a cross complaint against such co-defendant, seeking a partnership accounting. The court on motion struck such affirmative matter from the answer, and sustained a demurrer to the cross complaint without leave to amend, and found, from the evidence submitted, that there was no partnership. *Held* that, if it was error to have sustained the motion and demurrer, it was not prejudicial.

Department 2. Appeals from superior court, city and county of San Francisco.

Suit by Mariam V. Loftus and another against Jacob Fischer and others. From judgment for defendants, plaintiffs appeal. Defendant Charles J. Behlow sought relief against his co-defendant Jacob Fischer, and from a judgment for Fischer he appeals. Appeals were also taken from an order, made after final judgment, directing property to be turned over to one of the defendants. Affirmed.

Jas. L. Crittenden, for appellants. Scrivner & Schell and Wheaton, Kalloch & Kierce, for respondents.

HENSHAW, J. These are separate appeals from the judgment, taken within 60 days after its rendition, the evidence being brought up for review by a bill of exceptions. In the case numbered "Sacramento 123" the plaintiffs are appellants; in the case numbered "Sacramento 185" defendant Behlow is appellant. As the points presented upon both appeals are identical, they may be considered in one opinion. There are also appeals from an order of the court, made after final judgment, directing the receiver to turn over the property to the defendant corporation, the Consolidated Golden Gate & Sulphuret Mining & Development Company.

This litigation has repeatedly been before the court in one or another of the different phases which it has assumed. An extended review of the facts is therefore unnecessary. It will suffice to refer, for them, to the cases of Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509; Fischer v. Superior Court, 98 Cal. 67, 32 Pac. 875; Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064; Loftus v. Fischer, 114 Cal. 131, 45 Pac. 1058; Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561.

The amended complaint, upon which the present appeal comes before this court, pleads the formation and existence of a mining partnership, of which plaintiffs were members; pleads the formation of the defendant corporation, that it was organized to be but the name and mere medium of the partnership in carrying on its business, and that the co-partnership should be the real and beneficial owner of the property to be transferred through the name of the corporation; pleads the conveyance to the corporation of the partnership property; pleads the issuance by the corporation to the partners of shares of its stock, which were only to represent the interests of the partners, respectively, in the partnership; pleads the continuance of the partnership in this form; avers an interest in the partnership upon the part of certain defendants, and in particular upon the part of defendants Long and Behlow; sets forth certain acts and threatened acts of defendant Fischer imperiling the interests of the partners and of the partnership business, in fraud of their rights; and asks that an accounting be had, the respective interests of the partners determined, and the affairs of the partnership closed. There is also an allegation that Fischer purchased from the co-partnership 19,200 shares, and caused said 19,200 shares to be issued in the name of Charles Behlow, and that these shares were thereafter transferred by him to Fischer.

Defendant Behlow answered, making no denial of any of the matters set forth in the complaint, saving that he denied that the 19,200 shares issued to him had been transferred by him to Fischer, "except by reason of a fraud practiced and perpetrated upon him by said Fischer," and then proceeded at great length to set forth the facts and circumstances of the alleged fraud. These allegations, in brief, charge Fischer with obtaining by fraud 22,000 shares of the stock, the rightful property of Behlow, and an additional 5,000 shares of stock from Long, to whose interest, it is averred, Behlow had succeeded. The prayer is that the court decree that Behlow is and always has been the owner of an interest in the partnership to the extent of 5,000 shares, and that the court decree that the 22,000 shares were obtained by Fischer from him through fraud and fraudulent representations, that Behlow be declared to be the rightful owner thereof and of the interest in the co-partnership represented thereby, that Fischer be required to assign and deliver the same to him and to account to him for all moneys received as dividends thereon, and that Behlow's total interest in said co-partnership be decreed to be represented by 31,800 shares of the capital stock. The prayer joins that of the complaint in asking for an accounting, a dissolution, and the appointment of a receiver.

At the time of the filing of this answer defendant Behlow also filed a cross complaint, in which all the history of the copartnership, and the transfer of its property and business to the corporation as its agent for the conduct and management thereof, are set forth, the same specific averments of fraud are made against Fischer, and the same relief is prayed for. This cross complaint is substantially the same as was Behlow's complaint in intervention. Loftus v. Fischer, 114 Cal. 131, 45 Pac. 1058. Motion was made by defendant Fischer to strike out defendant Behlow's answer, and a general demurrer was also interposed to the cross complaint. The court struck from the answer all the affirmative matter therein contained touching the alleged fraudulent practices of Fischer. It likewise sustained the demurrer to the cross complaint, and refused to cross complainant leave to amend.

In this state of the pleadings trial was had. The court found as follows: "The said corporation never contracted or agreed that it would act as the agent of any partnership whatever, and never did act as an agent for any partnership whatever. The said corporation never contracted or agreed that the said partnership, nor any partnership, could carry on any partnership business whatever, either in the name of said corporation or by means of the said corporation, in any manner or way whatever, and no partnership business was ever carried on under or in the name of said corporation in any manner or form whatever. The court further finds that, when the said E. C. Loftus, Charles J. Behlow, Jacob A. Fischer, and William G. Long conveyed to the said corporation, by the deed of September 4, 1889, the property described therein, and the said corporation had paid the consideration and performed the conditions which it was agreed should be performed, as stated in the offer made to said corporation by the said parties of the 3d day of September, 1889, all of the partnership debts and liabilities of the said parties became entirely settled, and all of the partnership property was entirely disposed of, and from that time to the present there has been no unsettled matters of the partnership which existed between the said parties." These findings are amply sustained by the evidence. The judgment and decree in accordance with them, and the other findings made, denied plaintiffs and defendant Behlow the relief sought.

Appellants complain of the ruling of the court striking out portions of the answer, and sustaining, without leave to amend, the demurrer to the cross complaint. It is contended that, the action being one for a partnership accounting, it was necessary for the court to determine the interests, respectively, of the partners, and that to do this it was incumbent upon the court, and indeed necessary for it, to entertain the cross complaint, and to hear and pass upon the charges of fraud contained in the answer, by which it is asserted that Behlow was nominally, but not in equity, deprived of his partnership interest, indicated by the shares of stock. But, under the circumstances of this case, this question does not call for determination. Though Behlow's claims against Fischer were eliminated, and though it may be conceded that, in the absence of the eliminated pleadings, it was impossible for the court to have determined as between Behlow and Fischer what their respective interests in the partnership might have been, the controversy first to be determined by the court was whether or not a partnership existed. Upon this proposition Behlow was upon the side of the plaintiffs, and he was not deprived by the court of his right to make any proper showing. Had Behlow's pleadings remained in the case, the court, in directing the order of proof, would have first required substantial evidence of the existence of the partnership as pleaded before it passed on to the determination of the respective partners' interests. Upon this question all the parties were before the court, and all were given a hearing; and after this hearing the court determined, as the findings disclose, that the partnership pleaded did not in fact exist, and had in fact terminated by the conduct of the partners, under the terms of their agreement with and conveyance to the corporation. Therefore, if it be conceded that the rulings of the court were erroneous (and this is not decided), it was error which, under the determination of the court upon the question of partnership, could not and did not injure the defendant Behlow.

The judgment appealed from is therefore affirmed, and with it the order of court, made after judgment, directing the receiver to turn over the property to the defendant corporation. For the reasons given in Loftus v. Fischer, 114 Cal. 131, 45 Pac. 1058, the motion to tax appellants' costs upon these appeals against respondents is denied.

We concur: TEMPLE, J.; McFARLAND, J.

117 Cal. 219

## BROOKS v. FORINGTON. (L. A. 125.)

(Supreme Court of California. June 4, 1897.)

MORTGAGE FORECLOSURE — COUNSEL FEES — COMPLAINT—SCOPE OF PRAYER.

1. On foreclosure by action, recovery cannot be had on default for counsel fees stipulated in the mortgage under a prayer for sale of the mortgaged premises, and application of the proceeds to the amount due, though the right to such counsel fees is averred in the complaint; Code Civ. Proc. § 580, providing that the relief granted on default cannot exceed that "demanded" in the complaint.

2. Such counsel fees are not part of the "costs of suit," so as to be recoverable under a prayer therefor; Code Civ. Proc. § 1021, providing that costs and disbursements shall be allowed "as hereinafter provided," and there being no statute allowing counsel fees as costs.

3. A provision in a mortgage that there might be retained, out of the proceeds of foreclosure, "all costs and charges of suit, including counsel fees," does not make such fees a part of the costs, so as to be recoverable on default under a prayer for "costs of suit."

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Truman Brooks against W. S. Forington to foreclose a mortgage. There was a judgment for foreclosure on default, and defendant appeals. Modified.

Geo. B. Fletcher, for appellant. Wm. R. Cooley and F. A. Dorn, for respondent.

VAN FLEET, J. Action to foreclose a mortgage, in which defendant suffered default. The mortgage provided that, in the event of foreclosure, the mortgagee might retain from the proceeds of sale the costs and charges of suit, "including counsel fees at the rate of —— per cent." The prayer asked for the principal and interest due, "and for costs of suit," the sale of the mortgaged premises, and application of proceeds in payment of the amount due, and for general relief; but it did not in terms ask an award of counsel fees. The court, in its decree, however, made plaintiff an allowance for counsel fees in the action; and the only question involved in the appeal is whether the allowance of that item was proper under the circumstances. Appellant contends that it was not; that the allowance was in excess of the relief demanded in the complaint; and that this was in violation of section 580 of the Code of Civil Procedure, which provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." Respondent contends that the prayer was sufficient to entitle the court to make such allowance; that in an action of foreclosure it is only necessary to aver the specific relief to which plaintiff is entitled; and that under a general prayer that the mortgaged premises be sold, and the proceeds applied to the amount found due, the plaintiff would be entitled, on default, to any relief consistent with the averments of the complaint; that, as the right to counsel fees was properly averred, the award thereof was authorized. The position of respondent does not find support in the decisions of this court giving application to section 580. The relief "demanded in his complaint" is held to refer to the relief asked in the prayer,—the feature of the pleading to which alone reference may be had in default cases to ascertain what relief the plaintiff seeks; and the rule of the statute applies in its strictness to actions in foreclosure alike with those of any other character. Raun v. Reynolds, 11 Cal. 14, 19; Gautier v. English, 29 Cal. 165; Parrott v. Den, 34 Cal. 79. In Raun v. Reynolds, where the objection was to the manner in which the property was directed by the decree to be sold, it is said, in reversing the judgment: "Judgment was taken in the cause by default, and the decree could give no relief beyond that which was demanded in the bill. Prac. Act, § 147. The complaint simply asked a foreclosure of the mortgage and a sale of the property to satisfy the judgment. There was no prayer that the sale should be had in a manner different from that prescribed in the statute for sales of real property under execution. Admitting the authority of the courts to direct in the decree the manner in which the sale should be conducted, there is no allegation in the complaint which would warrant a demand that the usual course adopted in judicial sales should be departed from in this instance." In Gautier v. English it was held that a judgment by default in an action in foreclosure on a note drawing interest at more than the legal rate should not direct that the judgment bear interest at the conventional rate, in the absence of a demand for that rate in the prayer. In Parrott v. Den the complaint averred that the mortgage allowed the plaintiff to retain, out of the proceeds of sale, counsel fees of 5 per cent., and all taxes and assessments upon the property paid by the mortgagor, with interest thereon at 2 per cent. per month; and the prayer asked for the counsel fees, but omitted any demand for the taxes or interest thereon or on the counsel fees, which latter items were, however, allowed to plaintiff by the court below. This was held error, "in that the relief granted exceeds the relief demanded in the complaint"; and the allowances in excess of the specific demand of the prayer were ordered stricken from the judgment.

Applying the rule of these cases,—and we are pointed to none to the contrary,—it is quite obvious that respondent was not entitled to counsel fees under the general features his prayer suggested. Nor was he so entitled, under the demand therein, "for costs of suit." Counsel fees are not costs or disbursements in the action allowed by the statute to the prevailing party. Code Civ. Proc. § 1021. Nor, when provided for by the terms of the contract, is such charge deemed a part of the costs, or recoverable as such, but is in the nature of "a special damage expressly authorized by the contract to be recovered in addition to the general damages," and must be expressly averred, with the right in defendant to defend specially against its allowance. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755. Manifestly, then, such specific relief may not be had on default under any general prayer for damages and costs. Being matter of purely special or exceptional recovery, and the defendant being entitled to look solely to the prayer in determining whether he will defend against the relief sought in the action, if such special relief is not therein specifically demanded it is to be deemed waived. Gautier v. English, supra.

But it has been suggested that, although such fees are not included in the general or statutory costs, there is no reason why the parties may not, by their contract, make them a part of the costs in the action, and stipulate that they shall be recovered as such, and that such is the effect of the stipulation in the mortgage; and the recent case of O'Neal v. Hart (Cal.) 47 Pac. 926, is cited in support of the suggestion. But, assuming that it would be competent for the parties to make that a part of the costs which is not such by law, we do not regard the language of the mortgage as having that effect. It makes the counsel fee a charge against the mortgagor, recoverable on the foreclosure, and secured by the mortgage, but not as costs of the action; and that is all that is decided in O'Neal v. Hart. We think the item of counsel fees was improperly allowed, and that the judgment should be modified by striking that item therefrom. The cause is remanded to the court below, with directions to modify its judgment accordingly; appellant to have his costs of the appeal.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

117 Cal. 215

## MEHERIN et al. v. SAN FRANCISCO PRODUCE EXCHANGE. (S. F. 465.)

(Supreme Court of California. June 3, 1897.)

LACHES—BAR TO EQUITABLE RELIEF—PRIOR DEMAND—LIMITATIONS.

1. Where a firm, without excuse, delays for more than seven years to take any steps to set aside an order suspending it from membership privileges in a produce exchange, a finding that its rights to equitable relief have been barred by its laches will not be disturbed.

2. Where a demand is necessary before the commencement of an action, it must be made at least within the statutory period of limitations, since a person cannot extend the statute of limitations indefinitely by failing to make demand.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Denis J. Meherin and another against the San Francisco Produce Exchange. From a judgment in favor of defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Mullany, Grant & Cushing, for appellants. Garber, Boalt & Bishop, for respondent.

McFARLAND, J. The plaintiffs constitute a partnership under the firm name of Meherin Bros., and as such were a member of the defendant, which is a corporation very similar in its character and purposes to the other numerous produce exchanges throughout the country, described by Messrs. Bisbe & Simonds in their treatise on the Law of the Produce Exchange. On November 12, 1884, the defendant, by a unanimous vote of its governing body, suspended the plaintiffs from membership privileges until certain decisions recited in the resolution of suspension as having been made by the arbitration committee and the committee of appeals of the defendant should be complied with. On the 4th day of June, 1892, the plaintiffs commenced this action for the purpose of having it adjudged that they were a member in good standing of the defendant, and entitled to all the rights, privileges, etc., of such member, and that the defendant corporation be adjudged to permit plaintiffs to exercise all their rights as a member thereof, and that plaintiffs also have judgment against defendant for $20,000 damages for exclusion from said privileges. The case was tried without a jury. The court made findings and rendered judgment for the defendant, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

A great deal of the testimony, most of the findings, and the main parts of the arguments and briefs of counsel were directed to certain matters which occurred on a trial of plaintiffs for an alleged violation of their duties as a member of the defendant before a certain arbitration committee and a committee on appeals of the defendant, and other matters touching the character and purpose of the defendant, its powers, the sufficiency of notices given appellants of the trial before said committees, etc. The findings of the court upon all of these matters were in favor of respondent, but we do not deem it necessary to follow counsel in their elaborate arguments of these points, because we think that the judgment must be affirmed for another reason.

The court, among other things, found as follows: "That plaintiffs, and each of them, for more than seven and a half years after the said resolution of the board of directors of the corporation defendant suspending them from membership, acquiesced in such suspension, and took no steps whatever to set aside such suspension, and were and are guilty of laches in the premises, and that no fact or circumstance has been shown to the court tending to excuse the same or to counteract the effect thereof." The foregoing was among the findings of fact, and the court, among its conclusions of law, found "that, even if otherwise entitled to relief, plaintiffs are, and each of them is, barred in equity by their laches in not sooner instituting this action." We think that these findings are fully warranted by the evidence and the law. Whether or not the plaintiff has been guilty of laches in any particular case is a question very largely within the province of the trial court. As was said in Chapman v. Bank, 97 Cal. 159, 31 Pac. 897: "The matter is one which is left to the sound discretion of the chancellor in each case. The learned judge of the court below found that the plaintiff's cause of action was barred by his laches, and the finding must stand." If the plaintiffs ever had a cause of action at all, such action accrued at the time that the resolution of suspension was passed, which was nearly eight years before the commencement of the action. The respondent has done no other act in the premises since the passage of the resolution of suspension. On the 11th of August, 1890, appellants demanded of respondents that they be permitted to exercise the rights of a member in good standing of said defendant; but that does not put any different phase on the question, and this demand itself was not made until six years after the suspension.

It is not necessary to consider whether or not such a demand was necessary before the commencement of the action, because, if such a demand was necessary, it should have been made within a reasonable time, which would have been at least within the statutory period of limitations after the order of suspension. In such a case a party cannot extend the statute of limitations indefinitely by failing to make a demand. Opinion by Beatty, C. J., in Bills v. Mining Co., 106 Cal. 21, 39 Pac. 43; Prescott v. Gonser, 34 Iowa, 179; Baker v. Johnson Co., 33 Iowa, 151; Codman v. Rogers, 10 Pick. 119. In the case last cited the court say: "A party must not be permitted to sleep over his rights to the prejudice of the party on whom he makes the claim, who by the delay may be deprived of the evidence and means of effectually defending himself. A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action, and in both cases the same presumptions arise from delay."

In the case at bar the court found that there were no circumstances to excuse the delay, and this finding cannot be successfully attacked. It is true that the appellants paid certain dues and assessments, but they were those for which a suspended member was liable. The evidence does not show any act done by respondent preventing appellants from exercising their rights of membership, other than the suspension by the resolution of November 12, 1884; so that the situation of the parties with respect to the right of the appellants to the privileges of a member of the defendant was exactly the same at the time this suit was brought as it was at the time of the suspension. The resolution of suspension prevented appellants from exercising any of the rights of a member of respondent, and appellants so understood it from the date of its adoption. Therefore, appellants' cause of action, if any they ever had, accrued in November, 1884. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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117 Cal. 168

## SAN LUIS WATER CO. v. ESTRADA et al.

(L. A 210.)

(Supreme Court of California. May 27, 1897.)

OBJECTIONS TO PLEADING—WAIVER—CORPORATION—SPECIAL ACT — SALE OF FRANCHISE — WATER RIGHT—QUANTITY—EVIDENCE—RIPARIAN OWNER—FAILURE TO PLEAD—FINDING—HARMLESS ERROR—DIVERSION OF WATER—CHANGE OF PLACE—APPEAL—REVIEW OF EVIDENCE.

1. By going to trial on the merits without objection to the answer or any evidence under it, plaintiff waives the objection that certain allegations of the complaint are not specifically denied.

2. Act March 28, 1872, granted to three persons "and their assigns" the exclusive right for 25 years to supply the inhabitants of the town of S. with water. It prescribed certain duties, and authorized the town "to purchase all the works and franchises" granted, after 15 years. A corporation was duly organized three years later, and became the owner of the franchise through mesne conveyances. It did not appear that any of the original grantees had any interest in the corporation, or that they had caused it to be formed. *Held*, that the original grant was not the creation of a corporation by special act, within the prohibition of Const. art. 4, § 31.

3. The grant, being to the grantees "and their assigns," conferred the right to sell or assign the franchise.

4. Under Civ. Code, § 354, empowering a corporation "to purchase, hold, and convey such real and personal estate as the purposes of the corporation may require," and "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation," a corporation formed to supply a town with water may purchase and hold a valid franchise, previously granted to certain persons, of the exclusive right for years to furnish such supply.

5. A finding that a diversion of water amounted to 500,000 gallons a day is supported by the testimony of a civil engineer that in 1894 he measured the quantity by velocity and by actual measurement, and found it to equal that quantity, and by the testimony of one who was superintendent of the water company from 1888 to 1894 that he had seen the flume carry 400,000 gallons and had never seen it run full, and that the size of the flume had never been altered,—the evidence being uncontradicted.

6. A superintendent of a water company from 1878 to 1888 testified that the company had diverted the water continuously since 1878, and that the size of the flume by which the diversion was made was the same then as at the time of the trial, and that the company had what its flume would carry all the time; but did not testify as to the actual quantity. *Held*, that the court could find that the appropriation prior to 1878 was equal to the quantity flowing afterward.

7. On a trial to quiet plaintiff's title to water appropriated in 1875, it appeared that plaintiff had the exclusive right to furnish the city of S.

with water, and had used and was using the water right for that purpose; that plaintiff claimed an appropriation of 500,000 gallons a day, and that the original appropriation had not been enlarged. Plaintiff was allowed to show how much water was required to supply the city of S. in 1894. *Held*, that the evidence was admissible to show, at least, that plaintiff was not taking water in excess of its needs, and possible error was not prejudicial to defendants, since the reviewing court cannot say as a fact that the population, if smaller in earlier years, used less water then than was used in 1894.

8. Where the evidence is conflicting, findings by the trial court will not be disturbed.

9. In an action by a lower appropriator to quiet his title to the waters of a stream as against an upper appropriator and riparian owner, where defendant pleads only a prior appropriation, and fails to allege that he is entitled as a riparian owner to any definite quantity, or what proportion of the stream he could reasonably exhaust, an issue as to the extent of defendant's right as a mere riparian proprietor is not raised.

10. Where plaintiff bases his claim to a water right on a prior appropriation and adverse use, and the evidence establishes the right by prior appropriation only, a finding for plaintiff as to adverse use is not reversible error.

11. A riparian owner, or an appropriator of water, may change the place of diversion, and the appropriator may do so, if necessary, even on the servient tenement, when others are not injured by the change.

12. The necessity of pointing out wherein the evidence is insufficient to justify a finding, as claimed, is obviated where there is no evidence to sustain the finding, and the various points raised have necessarily called attention to that fact.

13. It is error to exclude evidence where no ground for the objection to it is stated.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A Gregg, Judge.

Action by the San Luis Water Company against Alberto Estrada and others. From a judgment in favor of plaintiff, and from an order overruling a motion for new trial, defendants appeal. Modified.

Venable & Goodchild and W. H. Spencer, for appellants. Graves & Graves, for respondent.

CHIPMAN, C. This is an action to quiet the title of plaintiff to the waters of San Luis Obispo creek, and to restrain the defendants from diverting said waters. The complaint alleges that plaintiff became a corporation June 4, 1895, whose object it was to furnish the town (now the city) of San Luis Obispo, in the county of that name, and the inhabitants thereof, with pure, fresh water, and is now so engaged; that plaintiff became the owner about the date named, by assignment and through mesne conveyances, of a certain franchise, granted by the legislature of California to M. A. Benrimo and others by an act entitled "An act to provide for the introduction of good and pure water into the town of San Luis Obispo," approved March 28, 1872; that the grantees of said franchise, and plaintiff and its predecessors in the ownership of said franchise, have in all things complied with the terms and conditions thereof; that, to carry out the purposes of the corporation, it erected a dam across the bed of San Luis Obispo creek about October 25, 1875, and appropriated and diverted through a dam, pipes, and flume all the waters of said creek, and ever since said date has continuously and adversely to defendants, and under claim of right, diverted all said waters, and ever since said date has been, and now is, the owner of all the waters of said creek; that about June 25, 1894, certain of the defendants built dams across said creek in its natural bed above plaintiff's point of diversion, and by means thereof diverted said waters through flumes and ditches on the lands owned by certain of said defendants, and are now using said waters and obstructing their flow, and are preventing plaintiff from diverting and using all of said waters; that said defendants threaten to keep said dams across said creek and obstruct the flow of water, etc. The complaint was verified. Jones and Moreland, two of the defendants, by their attorneys, filed a demurrer to the complaint, which was overruled, and they filed a separate answer. No point is made on the demurrer. To the answer of Jones and Moreland respondent objects that it is not sufficient, and that judgment should be affirmed as to them. But plaintiff went to trial on the merits without objection to the answer, or any evidence offered under it, and will not be allowed to raise the point for the first time in this court that certain allegations of the complaint are not specifically denied. It will be held to have waived all objection by failure to except at the proper time. McCullough v. Clark, 41 Cal. 298. The court found the allegations of the complaint to be true, with certain modifications. It found that one Joaquin Estrada, predecessor of some of the defendants, for more than 22 years prior to 1893, was in the quiet possession of certain land lying on said creek immediately above the point of plaintiff's diversion; that all the time said Estrada had been in possession he used of the waters of said creek for ordinary domestic purposes, and for watering stock, and said uses continued to the present time; that about 1870 said Estrada built a dam across said creek near his house on said land, and appropriated by a ditch on the east side of the creek waters sufficient for all seasons when required to irrigate and raise crops upon 7 acres of said land on the east side of said creek below his said dam, and said water has been used adversely to plaintiff and the whole world (except said Jones and Moreland) to this time; that since 1875 the said Estrada and those claiming under him have appropriated and used sufficient water to irrigate about 35 acres of land for purposes of cultivation, but subordinate to and after plaintiff had taken 500,000 gallons per day of said water; that one Sandy Sumner in 1870 was seised in fee of certain land on said creek next above that of said Estrada; that said Sumner in 1870 erected a dam across said creek, and upon his said land, and diverted waters of said creek by ditch on the easterly side, and used the said water to run a mill, for domestic uses at his house, and for watering stock on said land, and after said use returned the water to the creek channel, and so used said water adversely to plaintiff to February 20, 1882, when, being seised of the lands, he conveyed them to defendant Jones; that Jones continued to use the said waters as had been done by said Sumner; that for six years last past defendant Moreland has been a tenant of said Jones, and has made like use of said waters, and also to irrigate about 5 acres of land, but the irrigation of said 5 acres was after plaintiff had taken its said daily supply of 500,000 gallons. As to the claim of Maria Y. Harris, a defendant, and those claiming under her, the court found that an adverse use to plaintiff and the whole world had been proved to water as diverted through a ditch, or a grade of 2¾ inches fall in its first section of 10 feet, said stream so diverted being 16 inches wide and 1½ inches deep, and appropriating 50,000 gallons of water every 24 hours at the point of diversion, and no more. From these facts thus found the court concludes: That the plaintiff is entitled to the possession and use of 500,000 gallons per day of said water, and is entitled to divert said water at the point of diversion; that those claiming under Joaquin Estrada are entitled, except as against defendants Jones and Moreland, to divert and use by means of their dam sufficient of said waters to irrigate on the east side of said creek as much as can be irrigated by water taken by said dam and ditch constructed by said Estrada; that said Jones and Moreland are entitled, for domestic purposes at their house and for watering stock upon their said land, to divert through their present ditch water for said uses, and to carry the same on the easterly side of said creek to a place on said creek where the said Sumner Mill formerly stood,—the right to use said water for irrigation to be after plaintiff has taken out its 500,000 gallons per day, and subordinate to the rights of plaintiff; that said Maria Y. Harris was seised in fee June 3, 1891, of the lands mentioned in the answer of one of the defendants; that the allegations therein as to certain springs are true; that for more than eight years prior to June 30, 1891, she and those claiming under her had appropriated through flumes and ditches water from said springs, and used the same for watering stock and for irrigation, adversely to the whole world, and said appropriation amounted to 50,000 gallons of water per day. The court grants the injunction prayed, except as to the rights specially found to be in certain defendants, and already noted; the title of plaintiff is quieted to 500,000 gallons per day. The appeal is from the judgment and from the order overruling the motion for a new trial.

The first point made by appellants in the assignments of error is that the trial court erred in admitting in evidence the franchise pleaded in the complaint, and its transfer to plaintiff, and in finding that plaintiff is the owner of said franchise. The precise point made is that the power to supply a city with water cannot be conferred, directly or indirectly, upon a private corporation by special act. By act of the legislature entitled "An act to provide for the introduction of good and pure water into the town of San Luis Obispo," approved March 28, 1872, a certain franchise was granted to M. A. Benrimo, C. W. Dana, and W. W. Hays. Section 1 grants to these persons and their assigns the exclusive right for 25 years to supply the inhabitants of the town of San Luis Obispo with water. Succeeding sections prescribe certain duties to be performed by the grantees, and confer certain rights. By section 7 the town is authorized "to purchase all the works and franchises" granted after 15 years. No other authority to sell is given in terms. The plaintiff is a corporation duly organized under the laws of this state June 4, 1875, and alleges that it became the owner through mesne conveyances of said franchise about the same date last mentioned. Appellants rely upon San Francisco v. Spring Valley Waterworks, 48 Cal. 493. By an act entitled "An act to authorize Geo. H. Ensign and others, owners of the Spring Valley Waterworks, to lay down water pipes in the public streets of the city and county of San Francisco," approved April 23, 1858, the legislature of this state granted to said Ensign and his associates certain rights to lay down water pipes in the streets of San Francisco, prescribing certain details of conditions, not necessary to be stated. Section 8 provided: "This act shall not take effect unless the parties named in section one shall within sixty days after its passage duly organize themselves in conformity with the existing laws regulating corporations now in force in this state." The said Ensign and his associates formed a corporation soon after under the name of the Spring Valley Waterworks, and introduced water into the city. The act of April 23, 1858, was amended subsequently, and certain other legislation occurred with reference to the company, but it is not involved in the question now presented. When this act was passed, section 31, art. 4, of the constitution provided that "corporations may be formed under general laws, and shall not be created by special act, except for municipal purposes." It was contended in the case that arose supra that this was an attempt to confer corporate rights by a special act upon Ensign and his associates in violation of this article of the constitution. It was held by the court that "an act which grants to individuals and their assigns certain powers and privileges, and then provides that the act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed." and the act was held to be unconstitutional in this respect. In the case now before us quite a different state of facts exists. The act conferring the franchise or rights upon Benrimo and his associates had no such condition as that in the act of 1858, requiring them to form a corporation. When the act here in question was passed, the corporation had no existence in fact, or, so far as we know, in expectancy, and it was not formed until three years later, and it does not appear that any of the original grantees of the franchise had any interest in the corporation, or that they caused it to be formed. It seems to me that the only question presented, therefore, is whether the corporation duly formed to supply the town (now city) of San Luis Obispo and the inhabitants thereof with water could, under any circumstances, purchase and become the owner of this franchise. Appellants do not attack the validity of the franchise to Benrimo and associates, but they say that the assignment of the franchise to the corporation was illegal and void, and the corporation could not hold or exercise it. The plaintiff corporation to which the transfer was made was formed for the purpose and object of furnishing the town of San Luis Obispo and the inhabitants thereof with pure, fresh water, and has been so engaged since its organization. Section 283 of the Civil Code declares: "A corporation is a creature of the law, having certain powers and duties of a natural person." In the Dartmouth College Case, 4 Wheat. 636, Chief Justice Marshall said: "Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. * * *" Speaking of certain properties pertaining to corporations, he further said: "They enable a corporation to manage its affairs, to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use." Among the powers of corporations given by our statutes are: "* * * (4) To purchase, hold and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part. * * * (8) To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation." Civ. Code, § 354. The grant to Benrimo and his associates was also to their assigns. There can be no doubt but that they might, by the terms of the grant, sell or assign the franchise. It seems to me too plain to require argument that the purchase by the plaintiff was strictly and directly within its powers, and contributed necessarily and directly to its objects and purposes. If any connection could be traced between the plaintiff and the passage of the special act of 1872, or it appeared that the act was obtained for the purpose of evading the constitutional inhibition, I could see how the case of San Francisco v. Spring Valley Waterworks, supra, might apply. But, in view of the facts in this case, I cannot regard the article of the constitution mentioned or the case last cited as having any application here.

Second. Appellants urge that the evidence is insufficient to support the finding that plaintiff constructed the dam in 1875, or appropriated 500,000 gallons of water, or any water, or that it has used said water adversely to defendants.

1. As to the construction of the dam there was no evidence except incidental references to it by witnesses, but there was no denial by any of the answers that plaintiff did construct a dam in 1875 as alleged, and this fact stands admitted.

2. As to the diversion of 500,000 gallons of water, or any water which is derived, H. Dittrick, a civil engineer, testified: "I made measurements of the water there last year (July, 1894). Know the flume that conducts the water from the creek to the San Luis reservoir. The capacity of this flume is half a million gallons in twenty-four hours. Made measurements in two different ways; first measuring it by velocity, and second by actual measurement. Had a large barrel, and take the time how long it took to fill that barrel, and on the contents of it figured out the flow in twenty-four hours." Mr. Nock, who was superintendent of plaintiff corporation from 1888 to 1894, said he had known the flume to carry 250,000 gallons, and has seen it carry 400,000 gallons. He said he had never seen the flume run full, but it would carry all the waters of the creek in the summer time. The size of the flume was shown to have been the same from the beginning. Defendants offered no evidence as to the capacity of the plaintiff's flume. I think the evidence justified the finding as to quantity.

3. Was there an appropriation by plaintiff, and what was its nature? Appellants deny that the right was adverse to defendants, or that any appropriation was made. The evidence is clear that there was an appropriation. The only matter open to dispute is as to how the right was acquired, and to what extent as against defendants' right. Appellants claim that there is no evidence of quantity taken prior to 1888. Mr. Egan, superintendent from July, 1878, until August, 1888, when he was succeeded by Mr. Nock, testified that the company had diverted the water continuously since 1888, and that the size of the flume by which the diversion was made was the same then as now; that the water company had what its flume would carry all the time. He does not testify as to actual quantity, but I think the court might well have found that the quantity diverted has not been increased, but was the same all the time. At any rate, there would seem to be no good reason for holding otherwise from the evidence.

Evidence was admitted against defendants' objection to show how much water was required to supply the city of San Luis Obispo. I agree with appellants that the growing necessities of the town—assuming that they did grow—did not give plaintiff the right to more water than it had first appropriated, superior to rights that defendants may meanwhile have acquired, and this would be so, I think, whether plaintiff had or not the right of eminent domain; but the evidence might be admissible to show that plaintiff was keeping within the powers and objects of the corporation, and was not taking water in excess of its needs. It would not follow that, because the town now requires 500,000 gallons daily, therefore, the plaintiff appropriated that amount in 1875; and I do not understand that the court admitted the evidence to prove that fact alone. Defendants say that if the town needed 500,000 gallons daily in 1894, it could not have needed so much in 1878, when the population was less; and they say this court will take judicial notice of the United States census for 1880 and 1890 to show this. We cannot say as a fact that less population in 1878 used less water than a greater population used in 1894. This would be carrying inference too far. If it was true, defendants should have proved it, and when proved there might have followed some inference that the appropriation of water was less then. If there was error in admitting the evidence, it was harmless.

Third. It is claimed that the evidence is insufficient to justify the finding that the use of the water by defendants was subordinate to plaintiff's use thereof; and this because such could only be the case (1) when an appropriation of a certain quantity of water had been made prior to defendants acquiring riparian rights; (2) by acquiring water rights from defendants, which could only be in writing,—and there is none; (3) by adverse use,—and there could be none in this case, because plaintiff only took what defendant suffered to flow by.

As we hold that plaintiff made an appropriation of a given quantity of water in 1875, it becomes necessary first to inquire as to defendants' rights at that time. First on the stream above plaintiff's dam was the Estrada land. The Estrada land was in an early day, 1849, occupied by one Bonillo under Mexican grant. He sold his claim in March, 1869, to P. W. Murphy, but the grant lapsed, and no claim is made under it. Bonillo occupied the land up to 1872. It is not clear when Estrada went into possession. The defendants give the date more than 22 years prior to 1893, and the court finds this to be true. United States patent issued to him September 23, 1879. There is a good deal of evidence as to the use and appropriation of water made by Bonillo and Estrada before patent issued. It was public land when they occupied it. It does not appear whether Estrada filed a pre-emption or a homestead. But riparian rights are claimed by defendants. The evidence as to the amount of water appropriated by Bonillo and Estrada prior to 1875 is conflicting. It seems there was water taken and used on the Estrada place, and water used further down, called the "Goldtree Place," and this latter place is the land apparently acquired by plaintiff. The evidence shows an appropriation and use continuously for many years prior to 1875 on the Estrada place, and adversely to plaintiff; but as to the amount the evidence is conflicting. The Estrada garden is variously estimated at from 6 to 30 acres in extent. But whether all the land was irrigated is not clear, nor is it clear just what the extent of the irrigable land was. The witnesses are much confused and involved in their answers, and at times are unintelligible. Apparently references were made to physical objects, a chart or map of which I infer was used at the trial, and which is not given in the record. Looking at the record alone, there would seem to be a preponderance of evidence against the finding as to the extent of land in the Estrada garden, and the land irrigated long before 1875, but there is not much disagreement as to size of the ditch during all the time. The water came from a dam first erected to furnish power to run a mill, and there was evidence that when the mill was run there was no water for irrigation; the ditch could be used for only one purpose at the same time. The trial court could best judge what evidence to believe and what disbelieve, and we cannot now undertake, from the record, to sift the wheat from the chaff. In view of the conflicting evidence, I think the finding of the court as to the Estrada water right, held to be prior to plaintiff's, should stand. The court further found, as to the Estrada water right, the right to irrigate thirty-five acres of land, but subordinate to plaintiff's right to the water. This finding rests upon the evidence of a greater use of water by Estrada since plaintiff's rights accrued than prior to that time. The evidence is conflicting as to when this greater use began, and as to the extent of the use, and as to whether the use was adverse to plaintiff, or under claim of right, or subordinate to plaintiff's right. Much evidence was introduced pro and con as to agreements entered into between plaintiff and some of the defendants,—particularly those representing the Estrada lands,—partly as to whether the money paid by plaintiff was for the right to the water or as wages or compensation for looking after the water for plaintiff, or as to whether it was to avoid trouble with these parties. The evidence is conflicting, and we cannot say the court erred in the conclusions drawn from it. The plaintiff does not claim under defendants by purchase or otherwise. It claims by appropriation, and the evidence tends to establish its claim. There was no attempt made by plaintiff to establish its right by agreement or purchase. The plaintiff's evidence tended to show that such was not the purpose of its payments of money except in one instance, which would not change the result of the evidence, and hence the doctrine laid down in Hayes v. Fine, 91 Cal. 391, 27 Pac. 772, cited by defendants, does not apply.

Appellants make the point also that there could be no appropriation of water by plaintiff by adverse use, for it only took what defendants suffered to flow by, and that defendants had riparian rights which could not be lost by nonuse, and no rights could be acquired by plaintiff by taking water below them; citing Hargrave v. Cook, 108 Cal. 73, 41 Pac. 18. The rights of upper riparian owners as against the rights of lower appropriators of water are very clearly stated by Mr. Justice Henshaw in the case cited. In that case, however, the riparian owner pleaded his rights as such. But in the case here no riparian rights were pleaded by any of the defendants. They pleaded only the right by appropriation. In the case of Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889, it was decided that an answer pleading a prior appropriation, but which fails to allege that the defendant is entitled as a riparian owner to any definite quantity of water, or what proportion of the waters of the stream he could reasonably exhaust for that purpose, is insufficient to raise an issue as to the extent of defendant's right as a mere riparian proprietor. The question of riparian rights does not, therefore, arise in this case.

It seems to me that from the evidence and the pleadings the question of adverse use is not necessarily involved in the claim of plaintiff or defendants, except perhaps as to defendant Harris. Plaintiff and defendants allege appropriation and ownership, and also adverse use, and the court finds for plaintiff on the issue of adverse use. But the evidence tends to establish the right of plaintiff by prior appropriation, subject to certain prior rights of some of the defendants, and I do not, therefore, regard it reversible error, if the finding as to adverse use is not supported by the evidence, for plaintiff's right may stand upon prior appropriation, even though it fails on other grounds. Appellants, claiming under Estrada, contend that, if they have the right to use a certain quantity of the water of the creek, they have the right to take it where and how they like, while the judgment is that they must take it only from a dam and ditch at a point of no practical use to them; citing Civ. Code, § 1412; Ramelli v. Irish, 96 Cal. 217, 31 Pac. 41; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171. There can be no doubt that a riparian owner or an appropriator may change the place of diversion, and the latter may do so, if necessary, even upon the servient tenement, when others are not injured by the change. The judgment here is that the Estradas take the water to which they are entitled from a particular dam and ditch upon their land 100 yards below the Estrada house, and the finding of the court, it is claimed, is not supported by the evidence. This limitation is not warranted by the evidence. I can find no evidence, and respondent points out none, by any witness, that to change the place of use on the Estrada place would injure plaintiff, and to justify the finding this should have been made to appear. It may be very important to the use of water given the Estradas that its place of use be changed, and, if it can be done without injury to any other person, there is no reason for prohibiting it. The decree should be modified in this regard, and made to conform to the provisions of Civ. Code, § 1412, and the decisions of this court, as to the right to change the place of use, found in the cases last above cited. Respondent replies that there is no specification of the particulars wherein the evidence is alleged to be insufficient to justify this finding, and for that reason the evidence cannot be reviewed; citing Thorne v. Hammond, 46 Cal. 530. It is true, as a general proposition, that this court will not review the evidence in a bill of exceptions unless it specifies the particulars in which the evidence is alleged to be insufficient to sustain the decision. Code Civ. Proc. § 648. But the various points raised have necessarily called attention to the fact that there is no evidence to sustain the finding, and, if there be no evidence, the party complaining could hardly be expected to point it out. In such case the burden should be on the party sustaining the findings to call attention at least to enough evidence to justify the finding.

I think the point made by respondent as to the necessity of pointing out wherein the evidence is insufficient to justify the findings should hold good in some of the other assignments of error. I have, however, endeavored to notice all the material matters drawn in question by them. The Jones and Moreland water right was next above that of Estrada. Jones purchased in 1882 from one Sandy Sumner, who testified that he went into possession under Bonillo in 1866. He took out water in a ditch by means of a dam in 1868, and used the water for mill power, for household purposes, and for stock, but did not use the water for irrigation except a small garden patch once in two weeks. Moreland, who was Jones' tenant, testified that he used the water for household purposes and for stock, and a little for irrigation (quantity not given). The remaining water was returned to the creek after the above uses. The court found that Jones and Moreland are entitled to divert the water for domestic purposes and for watering stock, and carry the water to the old mill site, but the court subordinates the use of water for irrigation to the right of plaintiff. If these defendants had shown any given or ascertainable quantity of water used by Sumner for irrigation, I think it should stand on the same footing as that used for domestic purposes, for it was used for all purposes at the same time. But, as no given quantity is proven to have been used for irrigation, and seems to have been small at most, I think the court did not err in placing the limitation it did.

As to the findings of the court upon the Maria Y. Harris claim, no objection is made. Defendants pleaded a certain lease of the Estrada lands, and its assignment to plaintiff by way of estoppel. When offered in evidence by defendants, it was refused by the court, and I think improperly. There was no ground of objection stated, and for that reason the objection should have been overruled. But I can see no good ground for refusing it. As evidence tending to show that plaintiff did not own the quantity of water it claimed, it was admissible, and also as tending to admit defendants' right. As it turned out, however, it was, as is claimed by defendants, brought out on plaintiff's cross-examination; and, as it got into the case through plaintiff, it cured the error. At most, however, it was significant only as tending to show the facts above noted. It was not urged by defendants as proving or tending to prove an estoppel.

Defendants' specification of errors of law occurring at the trial have received attention so far as they have been urged in their brief. My conclusion is that the judgment and order of the lower court should be affirmed, except that the limitation as to the place of use of the Estrada water should be removed as herein pointed out, and that the decree, when modified as above suggested, should stand affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed, except that the limitation as to the place of the use of the Estrada water should be removed as herein pointed out, and the decree when modified as above suggested is affirmed.

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117 Cal. 96

## SAVINGS BANK OF SOUTHERN CALIFORNIA v. ASBURY et al. (Sac. 213.)

(Supreme Court of California. May 25, 1897.)

MORTGAGE FORECLOSURE—PLEADING—FAILURE TO ADVANCE MONEY LOANED—RIGHTS OF PARTIES—DAMAGES.

1. An allegation in foreclosure that a mortgage note was executed by defendants for $30,000, but that the actual amount was and is $12,500, and not $30,000, sets forth with sufficient certainty the amount of the mortgage debt which plaintiff seeks to recover.

2. Where a complaint fails to show that water rent paid by plaintiff is a lien on the land sought to be foreclosed, evidence of such payments should be excluded.

3. Where plaintiff seeks to foreclose a mortgage with consideration named of $30,000, but alleges that $12,500 was the actual amount of the same, the defendant, under a cross complaint, may prove by parol that plaintiff had agreed to pay the remaining $17,500 in partial payments from time to time, subsequent to the execution of the mortgage, and, on such proof, may be entitled to a judgment against complainant for this amount.

4. Damages arising from the sacrifice of property, occasioned by the pressure of creditors, are consequential, and not recoverable against one who has bound himself to loan money, and failed to do it.

5. Plaintiff alleges that the actual amount of a loan, for which a $30,000 note was given, was $12,500. Defendant, in his answer, denied that the loan was for any sum other than $30,000. *Held* that, under the issues, evidence that, at the time the loan was made, plaintiff agreed to advance $30,000 on the note, is competent.

6. A mortgagee cannot recover on a note, nor foreclose a mortgage therefor, so long as he retains in his hands a portion of the money to be paid in consideration of the execution of the instruments, and refuses to perform his part of the agreement.

7. A mortgagee who has retained in his hands, of the consideration money, an amount greater than the interest accrued on the sum actually advanced, cannot declare the note due prior to maturity.

8. To maintain a cross complaint, seeking to recover of the mortgagee an unpaid portion agreed upon as the consideration for the mortgage, the mortgagors are not required to tender the plaintiff the interest on the amount they had received.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Suit by Savings Bank of Southern California against Asbury and others. From a judgment for plaintiff and order denying a new trial, defendants appeal. Reversed and remanded.

Frank H. Short, M. K. Harris, and Denson & De Haven, for appellants. L. L. Cory and H. D. Cassiday, for respondent.

HARRISON, J. The plaintiff seeks herein the foreclosure of a mortgage upon certain land in Fresno county, and its sale in satisfaction of the debt secured thereby. The complaint alleges that on or about June 1, 1893, the mortgagors made to it their promissory note of that date for the sum of $30,000, payable in three years thereafter, with interest thereon payable semiannually, and at the same time executed a mortgage upon said lands, as security for its payment; that, although the note expressed the sum of $30,000, the actual amount of the loan to the defendants was only $12,500; that, under provisions therefor in the mortgage, the plaintiff had paid certain moneys for insurance upon the mortgaged property, and for water appurtenant to the land; that none of the interest that had accrued upon the note had been paid; and that the plaintiff, as authorized by said note, had elected to consider the whole of the debt due. Judgment was prayed for accordingly. The appellants demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action against them, and also that it was ambiguous and uncertain. Their demurrer was overruled, and they then answered the complaint, denying its several allegations, and also filed a cross complaint, in which they set forth the facts connected with the execution of the note and mortgage, and alleged that the plaintiff at that time, and as a part of the same transaction, agreed to pay over and advance to them the full sum of $30,000; that, although requested so to do, it had refused to pay or advance to them $17,500 thereof. In a further cause of action for a cross complaint, they set forth certain facts, and alleged that, by reason thereof, they had been subjected to great damage. Judgment was asked by them against the plaintiff for the balance due on the loan of $30,000, and also for the damage that they had sustained. The plaintiff demurred to the first of these cross complaints, upon the ground that it did not state facts sufficient to constitute a cause of action, and to the second upon the same ground, and also for ambiguity. Although the appellants, in their pleading, styled their causes of action separate cross complaints, they in reality are only separate counts for a single cross complaint, and were evidently so regarded in the court below, as appears from its order "that the demurrer to the cross complaint of defendants be, and the same is hereby, sustained." Upon the sustaining of this demurrer, no amendment was offered to the cross complaint, and the cause was tried upon the original complaint and answer. Judgment was rendered for the plaintiff in accordance with its complaint, from which, and an order denying a new trial, this appeal has been taken.

1. The demurrer to the complaint was properly overruled. The allegations therein of the execution of the promissory note, and the mortgage to secure its payment, and of the amount advanced thereon to the defendants, and the further averment of the nonpayment of interest, and the election by the plaintiff to treat the entire principal sum as due, sufficiently stated a cause of action. The further allegation "that the said promissory note was executed by the said defendants in the sum of $30,000, as evidence of a debt for a loan, but that the actual amount of the principal sum of such debt and loan was and is the sum of $12,500, and not the sum of $30,000," sets forth with sufficient clearness and certainty the amount of the debt for which the mortgage was executed, and which the plaintiff sought to recover. The allegation of the payment by the plaintiff "for the water appurtenant to said premises" sufficiently stated the amount paid by it, and that it was due, and had not been paid. If, in fact, this constituted a lien upon the land, it was not necessary to state which of the defendants failed to pay it, or the terms of the agreement by which it had become due. The complaint does not, however, show that this amount was a lien upon the land, or that its payment was secured by the mortgage, and, upon objection thereto by the defendants at the trial, the court should have excluded any evidence of such payment.

2. The court erred in sustaining the demurrer to the cross complaint. It was alleged therein that prior to the 1st day of June, 1893, the makers of the promissory note set forth in the complaint applied to the plaintiff for a loan of $30,000 upon the real property described in the mortgage, and that the plaintiff agreed to loan and advance the said sum to them for the time, and at the rate of interest, and upon the terms and conditions, set forth in said mortgage; that, in pursuance of said agreement, said defendants executed and delivered to the plaintiff their promissory note set forth in the complaint, and at the same time, and as a part of the same transaction, and for the purpose of securing the payment of the said promissory note according to the terms and conditions thereof, they executed to the plaintiff the mortgage referred to in the complaint, which was thereafter recorded at the instance of the plaintiff in the office of the county recorder of Fresno county; that, at the same time said mortgage was delivered to the plaintiff, "said plaintiff, in and by said note and mortgage, and its separate agreement then and there made and entered into with said defendants, and as a part of the same transaction, agreed to and with the said defendants executing said note and mortgage to loan, pay over, and advance to said defendants the said full sum of said $30,000 specified and mentioned in said note and mortgage, to wit, $12,000 on accepting and recording said mortgage, $10,000 within 30 days, and the further sum of $8,000 within 60 days from the date of the acceptance and recording of said mortgage by the plaintiff, and the defendants did agree to accept and receive the same"; that, at or about the time of the delivery and recordation of said note and mortgage, the plaintiff advanced and paid over to said defendants $12,500, and no more; that the plaintiff, although frequently requested by the defendants, has not advanced the remainder of said sum of $30,000, or any part thereof; and that the sum of $17,500 is still unpaid and due from it to said defendants. In the other count of the cross complaint, the defendants, in addition to the foregoing averments, alleged that, by reason of the failure of the plaintiff to pay to them the said sum of $17,500, they were unable to meet certain other obligations of theirs, and that the persons and corporations holding the same had proceeded to enforce and collect them, and had subjected property of the defendants held as security therefor to their payment, so that it had been wholly lost to them, and that they had thereby suffered damage to the extent of $50,000 and upward. The cross complainants thereupon prayed judgment against the plaintiff for the balance due to them upon the said loan of $30,000, and for the further sum of $50,000, damages so sustained by them. To each of these counts in the cross complaint the plaintiff filed a general demurrer, and also demurred specifically, upon the ground that there was no consideration for the agreement alleged in the cross complaint to have been made by it, and, in addition thereto, demurred on the ground of ambiguity to so much of the second count as claimed special damages for failure to advance the money.

The facts alleged in this cross complaint sufficiently stated a cause of action against the plaintiff for the unpaid amount of the loan. The execution to it of the note and mortgage by the defendants, upon its agreement that it would pay to them thereon the sum of $30,000, was a sufficient consideration for such agreement, and created an obligation on its part to pay the same in accordance with the terms of its agreement. The further specification in the demurrer that the alleged agreement was made prior to the time of the making and execution of the note and mortgage was evidently either an oversight, or in disregard of the allegation in the cross complaint that it was made at the same time with the delivery of the mortgage, and as a part of the same transaction. It was not necessary that the agreement should be included in the note or mortgage, nor would evidence of its having been made tend to contradict or vary the terms or provisions of either of these instruments. The note and mortgage were by their terms unilateral obligations, executed to the plaintiff by the defendants, and the agreement of the plaintiff set forth in the cross complaint was a correlative agreement on its part, also unilateral, made in consideration of the agreement on the part of the defendants, and became operative and binding upon it to its full extent at the moment that the note and mortgage had become binding upon the defendants. While the averment in the cross complaint that the agreement was made would imply that it was in writing if a written agreement was required, yet it was not necessary that this agreement should be in writing; and the rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument. Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571.

The special damages alleged in the second count of the cross complaint to have been sustained by the defendants, by reason of the plaintiff's failure to comply with its agreement, were not proximately caused by the breach of this agreement, or such as, in the ordinary course of things, would be likely to result therefrom. They were eminently such as are styled "consequential damages," and are not recoverable from the plaintiff. It is therefore unnecessary to consider whether the allegations in reference to these damages are clear and unambiguous, or whether they are expressed with sufficient certainty.

3. To the allegation in the complaint heretofore quoted that the actual amount of the debt and loan for which the note was given was $12,500, and was not the sum of $30,000, the defendants, in their answer, "deny that the said loan or indebtedness was made, or said mortgage or said note were made, for any other or different sum or loan or amount than the full sum of $30,000, which said sum the defendants subscribing said mortgage borrowed from the plaintiff herein, and which said sum of $30,000 the plaintiff herein agreed to advance to the said defendants." At the trial of the action, the witness Albrecht was asked whether, at the time the loan was made, the plaintiff agreed to advance to the defendants the full amount of $30,000 on the note. An objection by the plaintiff that the question was incompetent, irrelevant, and immaterial, and not relating to any issue in the pleading, was sustained by the court. This question was in direct line with the above averment in the answer, and was both material and relevant to the issue made thereby, and should have been allowed. If the plaintiff did in fact agree to advance the full amount of $30,000 upon the note, the above allegation in the complaint was not sustained, and the plaintiff was not entitled to judgment. Upon the execution and delivery by the defendants to the plaintiff of their note and mortgage for $30,000, in consideration of its agreement to loan them this amount of money, the plaintiff could not enforce the payment of the note against them, or foreclose the mortgage therefor, so long as it retained in its hands a portion of the money so agreed to be advanced, and refused to perform its part of the agreement. Whatever rights it might have to recover the amount of money received by the defendants, it would not have the right to bring an action upon the promissory note for such money prior to the maturity of the note. Unless the time for advancing the remaining portion of the loan was deferred by mutual agreement, the plaintiff could not, while retaining in its hands more than the amount of the accrued interest, declare the sum advanced to be due prior to the maturity of the note, nor were the defendants required, as a condition of maintaining their cross complaint, to tender to the plaintiff the interest accrued upon the amount of the loan which they had received. That portion of the judgment by which the payment of the water rate is made a lien upon the lands is erroneous. There is no averment in the complaint that it constituted a lien thereon, and the evidence at the trial was that the payment was made simply at the request of the defendants. The judgment and order denying a new trial are reversed, and the cause is remanded to the superior court, with directions to overrule the demurrer to the cross complaint, and allow the plaintiff to answer the same within such time as the court may deem reasonable.

We concur: VAN FLEET, J.; GAROUTTE, J.

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117 Cal. 204

## BRADFORD INV. CO. v. JOOST et al. (S. F. 507.)

(Supreme Court of California. May 29, 1897.)

PLEADING—STATUTE OF FRAUDS—PAROL EVIDENCE.

1. Under the code pleading, where an agreement is alleged in the answer which the statute of frauds requires to be in writing, it will be presumed it was in writing, without an allegation to that effect.

2. Plaintiff loaned money to defendant, taking as security certain mortgage bonds, under a written agreement giving power of sale, and providing that, if the security deteriorated in value, defendant should reduce the note in proportion. *Held*, that parol evidence that plaintiff offered to look only to the securities is inadmissible as contradicting the written agreement.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by the Bradford Investment Company against Behrend Joost and others. Judgment for plaintiff, and defendant Joost appeals. Reversed.

Mullany, Grant & Cushing, for appellant. Gunnison, Booth & Bartnett, for respondent.

CHIPMAN, C. This is an action to foreclose 50 bonds of a railway company, of the par value of $1,000 each, exclusive of coupons, and to have the proceeds, after judicial sale, applied to the payment of a certain promissory note made to plaintiff by Behrend Joost, the appealing defendant, for $25,000. An agreement was made by defendant Joost that the bonds might be sold for payment of the note; and plaintiff's right to a judicial foreclosure is not denied, but the right to a personal judgment against defendant for a deficiency, if any there be, is questioned. Upon filing the answer, plaintiff moved for judgment on the pleadings, on the ground that the answer denied none of the material allegations of the complaint. The court granted the motion, and ordered judgment in accordance with the prayer of the complaint, including a deficiency judgment, to which order defendant excepted, and this appeal is from the judgment against this defendant. The other defendants do not appeal. The pleadings are verified.

The answer did not deny the allegations of the complaint, which fully and clearly set forth a good cause of action on foreclosure, but the answer avers "that prior to and at the time of the making and delivery by him (defendant) to plaintiff of the promissory note and the instrument in writing mentioned, a copy of which is contained in said complaint, it was expressly agreed and understood by and between plaintiff and defendant that it (plaintiff) should and would rely upon and look to said fifty (50) first mortgage bonds of the San Francisco & San Mateo Railway Company, mentioned in said instrument in writing, exclusively for the payment of said note, * * * and that no further or personal or general liability or application or judgment should be sought or obtained; * * * that it was upon said terms and conditions, and not otherwise, that said note and written instrument were made and delivered to plaintiff." The written instrument referred to is the agreement by which the bonds were placed as collateral security for the payment of the above note, and reads as follows: "And as collateral security for the payment of the above note, and interest to grow due thereon, I have deposited with Bradford Investment Co. the following property, to wit, fifty first mortgage bonds of the San Francisco and San Mateo Railroad Company, of the denomination of $1,000 each, numbers from 951 to 1,000, both numbers inclusive; and should the said note, or any part thereof, or the interest to grow due thereon, remain due and unpaid after the same should have been paid according to the tenor of said note, I hereby irrevocably authorize and empower said Bradford Investment Company, or its assigns, to sell and dispose of the above-described property, or any part thereof, at public or private sale, with five days' previous notice to me of such sale, and from the proceeds arising therefrom to pay the principal, interest, charges, and the costs of sale, and the balance, if any, to pay over to me or my representatives upon demand. In case of deterioration of any of the above securities, or fall in the market value of the same, I hereby promise and agree to reduce the amount of said note or to increase the security in proportion to such deterioration or decrease of value, in default of which this note shall be considered due under the above stipulation. On the payment of above note, interest, and charges according to the terms thereof, this agreement shall be void, and the above-described securities returned to me. Behrend Joost." Defendant's brief is constructed upon the theory, apparently, that the learned judge who tried the case refused to consider the defense because the answer did not aver that the agreement relied upon was in writing.

The first point made by defendant is that it will be presumed that the agreement was in writing, if evidence thereof should be deemed to be necessary; citing Reagan v. Justice's Court, 75 Cal. 255, 17 Pac. 195; Emerson v. Bergin, 76 Cal. 202, 18 Pac. 264; Broder v. Conklin, 77 Cal. 336, 19 Pac. 513; Barnard v. Lloyd, 85 Cal. 132, 24 Pac. 658. To this point plaintiff replies that the cases cited are to the effect that, where the statute of frauds requires the agreement to be in writing, it will be presumed that it was so, in order to support the complaint; that at common law the rule applied to the declaration, and not to the plea; that the rule, under the code system of pleading, applies to the complaint, but not to the answer. It would seem to me clear, and in every way consonant with reason, that, if the rule is that where an agreement, to be valid, must be in writing, it may yet be pleaded without alleging it to be in writing, we certainly may plead a like agreement in defense without alleging whether it is in writing or not. Both before and after the passage of the statute of frauds the rule was the same at common law. Wakefield v. Greenhood, 29 Cal. 597; Vassault v. Edwards, 43 Cal. 458; and numerous cases since. But plaintiff says this rule had application to the declaration, and not to the plea (citing 1 Chit. Pl. 304, 534; Steph. Pl. 331); and he further says it has been expressly so held, under our code pleading, as to the answer (citing Reinheimer v. Carter, 31 Ohio St. 587; Wakefield v. Greenhood, 29 Cal. 599; Bliss, Code Pl. § 354a; Maxw. Code Pl. 92; Case v. Barber, T. Raym. 450). The case cited from 29 Cal., supra, did not involve this point. It related only to the sufficiency of the complaint, which was held good although it did not allege the agreement to have been in writing. This court said in Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753: "We cannot conceive that the rule held applicable to a complaint would be different when applied to a cross complaint, and, applying the rule referred to to the cross complaint, the averments in it are all that the law requires." The question before us here was decided in that case, unless some difference exists between a cross complaint and an answer as to pleading an agreement; and I know of none, so far as the point before us is concerned. Nor can I see why the defendant should be required to plead more specifically in an answer than he would have to do if he were setting out the same facts in a complaint; and this would be true whether his answer took the form of a cross complaint, or any other. The reason for the distinction claimed by plaintiff is stated in Case v. Barber, T. Raym. 450, supra (cited with approval in Reinheimer v. Carter, supra), to be as follows: "When the defendant pleads such an agreement in bar, he must plead it so as to make it appear to the court that an action will lie upon it; for he shall not take away the present action, and not give him another on the agreement pleaded." Bliss, Code Pl. § 354a, states the rule of pleading as does plaintiff, and cites the Ohio case in support of it. The Ohio case is based on the rule as stated in Steph. Pl. 331, and this author goes back to the old case in T. Raym. 450. The rule as stated by Mr. Chitty has the same origin. I cannot believe that the rule as claimed by plaintiff, even at common law, was well settled; but, whether so or not, it does not seem to rest upon reason, nor is it in harmony with the theory of code pleading. It was held in Tucker v. Edwards (Colo. Sup.) 3 Pac. 233, on demurrer to an answer setting up a defense relating to an agreement to convey land, but not stating that it was in writing, that it was not necessary to aver it to be in writing. If we could assume that no such agreement as defendant alleges was made in writing, we might be justified in holding with plaintiff. But, as we hold that his answer is good, we must also assume that he will sustain it by competent evidence; and this brings us to notice the second point made by defendant.

2. Defendant next contends that it was not necessary that the agreement alleged should be in writing. On the other hand, plaintiff contends that the case clearly falls within the principle that where parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; citing 1 Greenl. Ev. § 275; Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830; Guy v. Bibend, 41 Cal. 322. As the case must go back for trial, it is proper that this question should now be settled. In Harrison v. McCormick, supra, it was declared that whether a writing is upon its face a complete expression of the agreement of the parties is one of law. That the agreement here was such a contract would seem to me quite obvious. The collateral was by the terms of the agreement to secure payment of the note—all of it—and interest. There was power given to sell, and apply the proceeds to payment, and pay to defendant any surplus. It was provided that, if the securities deteriorated in value, defendant should reduce the note in proportion to the deterioration. To prove by parol that plaintiff agreed to look only to the securities is wholly at variance with this latter clause; for, if that were true, defendant would never have agreed to keep the securities good in case of deterioration. Nothing is wanting in this assignment of these securities to make it a complete legal obligation, and it is to be presumed that the parties introduced every material item and term into it. Defendant owed the full sum stated in this note. He agreed to pay that sum, with interest. The bonds were given as security for payment, not as payment. To admit oral evidence to prove defendant's contention would not only vary the agreement as to the collateral, but might also result in varying the terms of the note by oral proof of a contemporaneous agreement, and this, it has been decided by this court, cannot be done. Guy v. Bibend, supra. Defendant insists that the agreement pleaded in defense is not inconsistent with, or contradictory of, any of the provisions of the agreement set out in the complaint, and therefore the answer sets up a good defense against a deficiency judgment; but he does not, either in his opening brief or in his reply brief, mention the point now before us. We hold with him that he was not obliged to plead a written agreement, but, if he cannot prove a written agreement to the effect pleaded, his defense will and should avail him nothing. In Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571, the instrument was silent as to the time of payment, and the court held it competent to show by parol "that a period or event had been agreed upon between the parties thereto at which payment should be made." "The rule which excludes evidence affecting the terms of a written instrument does not apply when the parties have not incorporated into the instrument all of the terms of their agreement, and when the evidence offered or the agreement sought to be proved is not inconsistent with the terms embodied in the instrument." But here we have a proposition, I think, to vary by parol a complete contract as to the collateral security, and possibly to change the terms of the note secured by it, for under it defendant might

escape with less than full payment. The case of Guidery v. Green, 95 Cal. 630, 30 Pac. 786, cited by defendant, was the case of a subsequent written agreement superseding a former written agreement, and does not apply here. The agreement pleaded, I think, falls within the meaning of section 1698, Civ. Code, reading, "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Defendant claims that this refers only to the evidence that may be adduced. But, if it is thus restricted, it will suffice to compel him to exhibit an agreement in writing. Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101. Nor is this case within the exceptions mentioned in section 1856, Code Civ. Proc.; Beall v. Fisher, 95 Cal. 568, 30 Pac. 773. Section 1625, Civ. Code, provides as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Defendant says in his answer that the agreement pleaded by him was made "prior to and at the time of the making and delivery by him to plaintiff of the promissory note and the instrument in writing mentioned" (the agreement as to the collaterals). For the purposes of this case, we must presume that the defendant in his pleading had in mind a provision supplemental to, or in alteration of, the original contract, in writing. If he can prove such a provision in writing, I do not think he should be precluded from doing so without having first pleaded that it is in writing. When plaintiff moved for judgment on the pleadings, he admitted that all the averments of the answer were true. McGowan v. Ford, 107 Cal. 177, 40 Pac. 231, and cases there cited. My conclusion is that the trial court erred in granting plaintiff's motion for judgment on the pleadings, and it is recommended that the judgment be reversed and that a new trial be granted.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and a new trial granted.

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(5 Cal. Unrep. 686)

## WIESTER v. WIESTER. (S. F. 552.)[1]

(Supreme Court of California. May 29, 1897.)

PARTNERSHIP—DUTIES—RESCISSION OF DEED.

1. Under Civ. Code, §§ 2410, 2411, partners are bound to act in the highest good faith towards each other, and this continues and extends to the dissolution and liquidation of the partnership affairs.

2. Where, on settlement of a partnership, the withdrawing partner accepted certain land in payment of his interest at $70 per acre, the deed will not be set aside, on the ground of fraud in the settlement, where it was evident that both parties believed the land to be of such value, that it was located at a distance, at a town in which there was at the time a "land boom," and similar property was then selling at from $100 to $150 per acre.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by William C. Wiester against William H. Wiester. Judgment for defendant, and plaintiff appealed. Affirmed.

G. R. Lukens (H. A. Melvin, of counsel), for appellant. Denson & De Haven, for respondent.

SEARLS, C. This is an action to obtain a decree annulling a deed of conveyance by defendant to plaintiff of the undivided one-sixth interest in and to about 480 acres of land situate in the county of Pacific, state of Washington; to have it determined that plaintiff has an interest in the firm of Wiester & Co., which on August 1, 1890, was of the value of $7,000; that defendant be decreed to have received said interest in said firm under a trust for the use and benefit of plaintiff; that defendant be held to account therefor, etc. The cause was tried by the court without a jury. Written findings were filed, upon which judgment was entered in favor of the defendant. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The findings are too lengthy to be set out in full. The following will convey an idea of their drift: On the 1st of August, 1890, and for some four years prior thereto, plaintiff and defendant were partners in business in San Francisco; the former owning one-fourth and the latter, who was his uncle, three-fourths interest in the business. Plaintiff was in bad health, and wished to retire from the business. He asked his uncle, the defendant, to buy him out. The latter wished to retain plaintiff in the business, but finally consented, and they determined that plaintiff's interest was of the value of $7,000. Defendant had no ready money to pay, but had the note of plaintiff for $1,600, given when plaintiff bought into the business, and owned $479^2/_5$ acres of land near South Bend, county of Pacific, now in the state of Washington, which cost him $2,000 some five or six years previously. Neither party had ever seen the land, and all their information in regard to it came from telegrams and letters from other persons. A "land boom" was on at South Bend, a railroad and other improvements were in course of construction, and land values were rapidly enhancing. Defendant believed, from newspapers, letters, etc., that his land was worth from $70 to $100 per acre, and that he could in a short time sell it for the latter figure. Plaintiff, who knew as much of its value and prospects as defendant, proposed taking an interest in the land in payment for the remainder of his interest in the store after deducting the amount of the note. The parties agreed to this, and plaintiff accepted an undivided one-sixth interest in said land in full payment of the balance due him, and received a deed therefor. In this deal the land was reckoned at $70 per acre. The court finds that the land was at that time of the value of $50 per acre, and is now of the value of $10 per acre. At and prior to this transaction the parties were on very intimate terms of mutual friendship, confidence, and respect, which conditions existed up to about the time of the commencement of this suit. Defendant took no advantage of plaintiff by reason of their relationship or business or terms of friendship in the said transaction, and "did not make any false or fraudulent representations whatever to the plaintiff concerning the said land, or the character, location, situation, condition, or value thereof, and the said transaction was made without any deceit or fraud, and without any intent on the part of the defendant to cheat, wrong, deceive, or defraud the plaintiff," nor was he fraudulently prevailed upon to dispose of his interest in the partnership business by any false or fraudulent representations, etc., "and it is not true that he (plaintiff) has been imposed upon nor fraudulently prevailed upon by any false or fraudulent representations whatever."

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[1] Rehearing denied

Appellant objects to the sufficiency of the evidence to support each of the more important facts as found by the court. The form of the objection, in every case except one, is that "there is no evidence that," etc., followed by the substance of the finding. The exception is where plaintiff avers that "there is no evidence sufficient to produce conviction that the value of the said lands in suit at the time of the said transaction was $50 per acre." The position assumed by the learned counsel for appellant is: (1) Plaintiff and defendant were blood relations, between whom the most intimate and confidential relations existed. (2) They were partners, and, under sections 2410 and 2411 of the Civil Code, they were trustees for each other, and bound to act in the highest good faith toward each other, and not to obtain any advantage in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind, and that this status continued and extended to the dissolution and liquidation of the partnership affairs. (3) That, as the evidence is largely documentary, being contained in the depositions of witnesses, the opportunities of this court to judge of its value are as good as those of the court below, and hence that the general doctrine that we will not interfere in a case of substantial conflict of evidence has no application.

We have perused the evidence in the light of these confidential relations between the parties, and from that standpoint find nothing to warrant a reversal of the judgment. If defendant became liable to plaintiff at all, it was for representing the value of the land at $80 per acre at the time of the sale, either knowing it to be less or not knowing it to be worth as much as that sum. We think the evidence was sufficient to warrant the court in finding, not only that the defendant believed his statement as to the value of the land, but that it was literally true at the time.

Upon the first branch of the proposition the evidence shows that defendant had a brother-in-law named Dennis, who was in the employ of the Northern Pacific Railroad, and located at Tacoma or in that region. About April 18, 1890, Dennis wrote to defendant, for a would-be purchaser of defendant's land, offering $12 to $20 per acre therefor, if properly located and valuable for agriculture, etc. Dennis accompanied this letter with another, in which he stated he had private information to the effect that a railroad was to reach the coast in that vicinity, a town to be built, boomed, etc.; that defendant's land was worth $60 per acre; and, among other things, said: "But if I cannot sell your South Bend tract for $60, my name is not Dennis," and "This much I feel confident of, that I can sell it for $50 per acre within sixty days." He advises defendant "to hold it, even if you could get $60 per acre." About April 25th Dennis telegraphed defendant from Tacoma: "Don't sell any price until hear from me. North tract worth half a million if located right." In May, 1890, defendant requested a traveling salesman of his firm, who was going north, to look after the land, and report to him. He telegraphed to defendant that the land was worth $200 per acre. There is nothing to indicate but that full confidence was placed in these reports by defendant.

As to the evidence of the value of the land on August 1, 1890, the date of the sale to plaintiff, there were the depositions of five witnesses, residents of the vicinity, and familiar with prices in 1890, who placed the value of the land at from $75 to $150 per acre. Some of these witnesses fortified their opinions of value by describing sales and offers made to purchase lands in the vicinity, but somewhat nearer to the new town, at prices greatly in excess of the value fixed by them on this land. On behalf of plaintiff some seven witnesses were offered, who generally fixed the value of the land at from $5 to $10 per acre; but it is quite apparent that most of them speak of the value in the present rather than in the past, and a number of them say, in substance, that all prices above those fixed by them were fictitious, related not to intrinsic value, were the effect of a boom, etc. One of them, the manager of a large lumber company, owning large tracts of land, did say: "I considered all property unimproved in South Bend worthless at that time, and do so consider it now, as the town has three sets of bonds on it, and would have more if anybody would take them." The same witness, however, admitted that his company in 1891 sold 40 acres of land adjoining the town for $15,000, one-third cash, balance in one or two years. He added that the balance was never paid. In 1890, 98 acres in the section adjoining the land of defendant was sold for $10,000, half cash, balance in two years, etc.

Under this state of the evidence, the court would have been, as we think, warranted in finding a higher value of the land than that fixed. Conceding that, in a case like the present, where the testimony as to the value of the land is largely contained in the written depositions of witnesses, we are in as good a position to pass upon its weight and character as the court below, and we still think the findings, and each of them, are correct, and supported by the weight of evidence. There are no errors of law calling for reversal or requiring comment. We recommend that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

117 Cal. 223

## McCAUGHEY v. SCHUETTE et al. (L. A. 115.)

(Supreme Court of California. June 4, 1897.)

In bank. Petition for rehearing. Denied.
For opinion in division, see 46 Pac. 666.

PER CURIAM. After a careful examination of the points involved in this appeal, we are satisfied with the opinion and judgment rendered in department. For the reasons given in the department opinion (46 Pac. 666), the judgment and order appealed from are reversed, and the court is directed to sustain the demurrer to plaintiff's complaint, with leave to plaintiff to amend.

117 Cal. 186

## PEOPLE v. LEWIS. (Cr. 211.)

(Supreme Court of California. May 27, 1897.)

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.

One attacked in his own house does not have to retreat, to justify killing his assailant.

In bank. Appeal from superior court, Shasta county; Edward Sweeny, Judge.

Frank A. Lewis was convicted of manslaughter, and appeals. Reversed.

Claw. W. Taylor and J. Chadbourne, for appellant. W. F. Fitzgerald, Atty. Gen., Chas. H. Jackson, Dep. Atty. Gen., M. P. Rose, and Thos. B. Dozier, for the People.

HENSHAW, J. The defendant was prosecuted for the murder of William H. Farrell, and was convicted of manslaughter. He appeals from the judgment, and from the order denying him a new trial. Defendant was the husband of Farrell's sister, and, with his wife and nine year old son, was living upon a mountain ranch in Shasta county. Farrell, though he was a not an infrequent visitor at his brother-in-law's house, was ill disposed towards him. His grievance was founded upon a claim of moneys due him from Lewis for services, and there is much evidence of oft-repeated threats upon his part, crouched in most abusive language, "to maul Lewis," "to stamp his God damned guts out," "to fix him," and "to kill Lewis, or Lewis would kill him." Some of these threats had been uttered to defendant himself, in the presence of his wife. Others had been communicated to him. Farrell was the younger, stronger, and more active of the two. Upon the day before the homicide, Farrell, stopping at defendant's home, told his sister that one John Miller, at a rodeo, had recently said in his presence, and in the presence of others, that Frank Lewis had stolen his hogs, and had stolen the salt to salt them with. Farrell had then left the house, and gone on to spend the night with one William Wagner, a boy of 17 years, who was camping a short distance away from defendant's home. Wagner broke camp the following morning, and, by previous arrangement with defendant, brought his camping utensils for storage to Lewis' house. He was accompanied by Farrell. The two arrived shortly before 8 o'clock in the morning, and were hospitably received by Mr. and Mrs. Lewis. They had delayed breakfast for them, and invited them to the meal. The young men, however, had eaten their breakfast before breaking camp, and so declined the invitation, and sat down in the door of the front room of the house, while the Lewis family went to their breakfast table in the kitchen. Farrell and Wagner both carried rifles. Lewis had taken Wagner's rifle while helping him to dismount and unpack, and had placed it in the kitchen. Farrell put his rifle inside the door near the threshold of which he was sitting. An open door between the room in which the young men sat and the kitchen where the family were at breakfast permitted conversation. At the table were the Lewises, husband, wife, and son, and Dan Nichols, a half-breed Indian boy, nine years old. The Lewises asked young Wagner if he had been at the rodeo, and had heard Miller charge Lewis with the theft of his hogs. Wagner replied that he had been at the rodeo, but had not heard Miller's accusation. Either Mr. or Mrs. Lewis then asked Farrell who besides himself had heard it. He answered, giving several names, and wanted to know if his word was doubted, and if his word was not good enough for Lewis. Lewis replied that, of course, Farrell's word was good, but he wanted to have some one else corroborate it; so that when he went for Miller, if Miller should deny it, it would not rest simply upon Farrell's statement against Miller's. Farrell became angry, and began to abuse Lewis, saying he was not big enough to dispute his word; if he wanted to dispute his word, to come out and settle. Lewis answered that he did not have to come out, and Farrell retorted that he would make him. Lewis then said he wanted no trouble, and Farrell replied that he was going to have trouble. Lewis arose from the breakfast table, and passed into the front room. As he did so, Farrell stepped out of the front door, and picked up an iron-bound singletree. Lewis stopped in the front door, and told Farrell to leave the ranch, that he wanted no trouble. Farrell replied that he would not leave, and could not be put off, and challenged Lewis to come out. Lewis asked what he meant to do with the singletree, and Farrell replied that he would show him. Then, according to the testimony of Wagner, Lewis picked up Farrell's rifle, standing inside the door, and saying, "Damn you, I will learn you to fight me," fired, and Farrell, who was standing eight or ten feet away, fell to the ground. According to the testimony of Mr. and Mrs. Lewis, Farrell, when asked the last time what he meant to do with the singletree, said, "I will beat your brains out, you damned son of a bitch; I will beat your brains out," and advanced upon Lewis with the weapon raised. Lewis seized the rifle, and fired, when Farrell was nearly or actually within striking distance. Farrell "swung around," dropped the singletree, recovered himself, and came into the house, calling upon Wagner to give him his gun. Lewis left the house. Farrell seized Wagner's rifle, which was in the kitchen. Mrs. Lewis struggled with him for its possession. Farrell visibly and speedily weakened from his wound, and finally ceased the struggle, and was put to bed by his sister. Wagner and the Indian boy were sent for assistance. Mrs. Lewis went out to meet her husband, leaving her own little boy to attend his uncle. While she was gone, Farrell, with his pocketknife, cut his own throat. He had been shot in the abdomen, the bullet passing through the intestines, severing the messenteric artery, and lodging in the hip bone. The wound was mortal, and of a nature to cause intense suffering.

The court instructed the jury in the following language: "If, from the evidence, you believe that, without any overt act or physical demonstration upon the part of the deceased sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he (the defendant) fired the fatal shot at the deceased, and killed him, such killing, under such circumstances, was not justifiable." Complaint is made of this, not as embodying any erroneous proposition of law, but as being foreign to any reasonable theory which might be taken of the evidence. But, by the testimony of Wagner, Farrell was shot, and fell 10 feet away from the front door in which Lewis was standing. The latter picked up the gun, aimed, and fired, saying, "Damn you, I will learn you to fight me." If this evidence was accepted by the jurors, it remained for them to decide whether Farrell's conduct was such as to justify the defendant, under subdivisions 2 and 3 of section 197 of the Penal Code. The instruction was therefore pertinent.

Upon the law of self-defense, the court instructed the jury as follows: "The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is: Would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified. If this was defendant's position, it was his right to repel the aggression, and fully protect himself from such apparent danger. *If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must fly, or, as the books have it, must retreat to the wall.* But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack may be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of slaying his assailant avoided. If the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need retreat no further." Appellant especially complains of the italicized language. Respondent shows that this is an exact quotation from an instruction approved in People v. Iams, 57 Cal. 115; but in People v. Williams, 73 Cal. 531, 15 Pac. 97, this court, in bank, said that while the whole charge of the court in People v. Iams was approved, but a small part of it was really under consideration, and, as to the rest, the declaration was obiter, and that, while the charge upon the whole was an able résumé of the law, portions of the charge, if isolated, would require qualification. In People v. Hecker, 109 Cal. 451, 42 Pac. 307, where the right of self-defense is considered at some length, it is pointed out that our law nowhere imposes the duty of retreat upon one who, without fault himself, is exposed to a sudden felonious attack, and that the duty of withdrawal or retreat is imposed upon him alone who is the first aggressor, or has joined in a mutual combat; and it is further said that while, at common law, there was a contrariety of opinion upon the part of the writers as to the duty of retreat, which contrariety has found its way into the differing decisions of our state courts, this state has upheld a defendant's right to stand his ground, and meet by force a sudden and violent attack. "So that, while the killing must be under an absolute necessity, actual or apparent, as a matter of law that necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense." Wharton, in the eighth editions of his Criminal Law (section 486a), discussing the necessity of retreat, holds retreat to be necessary upon the part of one who has been the aggressor, and in cases of mutual personal conflict, but concludes: "Nor is retreat required from a party who at the time is standing on his rights." In the tenth edition of his work it is said (section 99): "It has also been said that a party who can fly from an aggressor is bound to fly, and cannot set up self-defense. This, as we will hereafter see, is so far true that an assailed party cannot, unless driven to the wall, take his assailant's life; but, as an elementary proposition, it is not true that, if I can evade the attack by flight, then I must fly to evade the attack. If this were the law, few persons in times of trouble could remain at their posts. This, however, by confining the right of self-defense to attacks of which there could be no prior suspicion, would virtually abrogate the right, for it would be to say that the right of self-defense only exists when there is nothing to defend, and, besides, the fundamental principle is that right is not required to yield to wrong." Rice on Evidence (section 360) thus sums up the principle: "A very brief examination of the American authorities makes it evident that the doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed to avoid chastisement, or even to save human life, and that tendency is well illustrated in the recent decisions of our courts bearing on the general subject of the right of self-defense." It was in Runyan v. State, 57 Ind. 80, where the language above quoted from Rice on Evidence was employed by the supreme court. That case is quoted with approval by the supreme court of the United States in Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962; and the same eminent authority likewise quotes with approval the language of the supreme court of Ohio in Erwin v. State, 29 Ohio St. 186, where the court says: "The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant who, by violence or surprise, maliciously seeks to take his life, or to do him enormous bodily harm."

But, whatever diversity of opinion may be found in the books upon the general proposition of the duty of retreat, the right to stand one's ground when assailed in one's own home or upon one's own premises was never seriously questioned, even by the common-law writers. Thus, in East's Pleas of the Crown (page 271) it is said: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger." Likewise, in Foster's Crown Law (chapter 3, p. 273) it is said: "In case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of the danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable." In Wharton's American Law of Homicide (Philadelphia, 1855), at page 233, the author quotes from 1 Hale, P. C. 486: "In such a case, A., whether he be a householder or a lodger, being in his own house, need not fly as far as he can, as in other cases of se defendendo, for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight." Russell on Crimes (volume 1, c. 3, § 2) enunciates the same rule, while Wharton (10th Ed. § 502) thus declares: "When a person it attacked in his own house, he need retreat no further. Here he stands at bay, and may turn on and kill his assailant, if this be apparently necessary to save his own life. Nor is he bound to escape from his house in order to avoid the assailant. In this sense, and in this sense alone, are we to understand the maxim that every man's house is his castle. An assailed person—so we may paraphrase the maxim—is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made." The supreme court of this state, in People v. Payne, 8 Cal. 341, recognized the rule, and, without further quotation from authorities, it is sufficient to refer to the cases of Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962; State v. Cushing (Wash.) 45 Pac. 145; Willis v. State, 43 Neb. 102, 61 N. W. 254; and State v. O'Brien (Mont.) 43 Pac. 1091,—where a multitude of authorities will be found collated. It follows herefrom that the court erred in giving the instruction under consideration. That injury to the defendant resulted may not be doubted. We do not note any other points which call for special consideration, but, for the foregoing error, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.

(117 Cal. 157)

WELLS v. BLACK et al. (L. A. 155.)[1]

(Supreme Court of California. May 26, 1897.)

Savings Bank—Depositor — Debtor and Creditor — Stockholder's Liability — Waiver — Agreement — By-Laws — Finding of Fact — Limitations.

1. A savings bank was organized, under Civ. Code, div. 1, pt. 4, tit. 10, regulating savings and loan corporations, and had a capital stock

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[1] Rehearing denied.

and stockholders. Under its by-laws, term deposits were payable six months after demand, and ordinary deposits at longer or shorter periods after demand, dependant on the amount to be withdrawn. Depositors received such interest as the directors might determine, and, less such interest payments, the profits belonged to the stockholders. *Held* that, unmodified by special contract, the relation of debtor and creditor existed between the bank and the depositors.

2. The liability of the stockholder, in such case, for his proportion of the debt, could be modified or waived by contract.

3. A waiver of stockholder's liability, classed as one of the by-laws and printed with them in each depositor's book, and followed by a formal agreement to be signed, was of no effect unless actually signed by the depositor.

4. A by-law asserting that the stockholders were not held to their constitutional liability was void, since corporations may make only such by-laws as are consistent with the constitution and laws of the state.

5. A finding of fact by the court, on sufficient evidence, will not be disturbed.

6. Where the relation of debtor and creditor exists between a banking corporation and its depositors, a debt is created and a liability incurred at the time of the acceptance of each deposit; hence, under Code Civ. Proc. § 359, requiring actions to enforce a liability against stockholders of a corporation to be brought within three years after the liability is created, an action against the bank stockholders is barred as to all deposits made more than three years before its commencement.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Edwin A. Wells against William Black and others. From a judgment in favor of plaintiff, and from an order denying them a new trial, defendants appeal. Modified.

McNealy & Whitehead, E. Parker, M. A. Luce, and Bryant Howard, for appellants. Works & Works, for respondent.

HENSHAW, J. Plaintiff, as a depositor in the Savings Bank of San Diego, a corporation organized under the laws of this state, and as assignee of the claims and demands of other depositors therein, sued defendants to enforce their constitutional and statutory liability as stockholders of the bank. Judgment passed for plaintiff, and from this and from the order denying them a new trial defendants appeal. The propositions for which they contend may be thus stated: (1) The bank of which defendants were stockholders was a savings bank, and deposits therein did not create corporate debts or liabilities. (2) If, however, a stockholder's liability exists for such deposits, that liability was waived by the depositors in this case. (3) In any event, that liability is barred by the statute of limitations upon all deposits made more than three years before the commencement of this action.

1. The Savings Bank of San Diego was organized under the provisions of division 1, pt. 4, tit. 10, of the Civil Code. The corporation had a capital stock and stockholders. Under the by-laws term deposits were payable six months after demand, and ordinary deposits at longer or shorter periods of time after demand, dependent upon the amount to be withdrawn. The depositors received such interest as the board of directors might determine. After paying interest to depositors the remaining portion of the profits belonged to the stockholders. We need not discuss at length the broad differences which exist between a savings institution, such as the San Diego corporation, and a savings bank, in its original conception, where depositors shared proportionally in profits and losses, and where the managers of the funds were but the trustees and agents of the members. In the latter the relation of debtor and creditor does not exist between the corporation and its depositors. In the former it generally does. The question has received detailed consideration in the case of City of Los Angeles v. State Loan & Trust Co., 109 Cal. 396, 42 Pac. 149. It was there held, under a state of facts substantially the same as these here presented, that the relation of debtor and creditor arose upon deposits in such a savings bank. It is said: "It is, therefore, apparent that a deposit in a savings bank having a capital stock may be a debt against the corporation, and, indeed, must be, since the corporation is formed by the stockholders, and the depositor deals with the corporation, not as his agent, for whose mistakes or defalcations he is responsible, but as a principal, pledging its stock and assets for the security of the depositor. Not so, however, with the savings banks of the other class, which have no capital stock, and in which the depositors are members of the corporation." This statement however, should not be misunderstood. It is a holding that under the law, unmodified by special contract, the relation of debtor and creditor exists between such a savings institution and its depositors. It is not to be construed as a declaration that this relation may not be changed by agreement of the parties. It results, therefore, that the relation of debtor and creditor existed in the present case. From this follows, of necessity, the liability of the stockholder for his proportion of the debt, saving as that liability may have been modified or waived by contract of the parties. For that this may be done there can be no question. French v. Teschemacher, 24 Cal. 558; Sedg. St. & Const. Law, 111.

This brings us to the consideration of proposition 2. The waiver insisted upon is twofold: First, by the terms of the by-laws, assented to by the depositors; second, by positive agreement, signed by them. The by-law relied upon is not in strictness a by-law at all. By-laws are the body of rules laid down for the government of a corporation, its officers and stockholders, in the conduct of its affairs. This so-called by-law is merely a form of agreement couched in the first person, presumably to be assented to in some formal way by a depositor, though this is not made to appear. In and of itself it is not binding upon anybody. It reads as follows: "In consideration of the receipt by the Savings Bank of San Diego County of the deposits now made and hereafter to be made by me with it, I do hereby, for myself, my heirs, executors, a ministrators, and assigns, covenant, promise, and agree to and with said Savings Bank of San Diego County to be governed in all respects in regard to all moneys which may be deposited by me with said corporation by the conditions above written and by its by-laws; and that all moneys now or hereafter to be deposited by me with said Savings Bank of San Diego County shall be reimbursable only out of the first disposable funds that shall come into the hands of said Savings Bank of San Diego County after the date of my demand for the reimbursement thereof, and after the payment of all sums for the reimbursement, of which demand shall have been made prior to the date of my demand, as provided for in the foregoing conditions; and, further, I waive any and all claim or claims, whether founded upon the statutes or upon the constitution of the state of California, which, without this stipulation, I might have to hold any individual corporator or corporators, officers, members, or stockholders of this corporation, or his, her, or their heirs, executors, administrators, or assigns, personally liable, jointly or severally, for any losses, and I consent to look for my security solely to the capital stock and the assets of the corporation." Had the depositors signed this, or in any other equally effective manner agreed to its terms, a different question would be presented. It was printed, it is true, with the by-laws in each depositor's book, and following it was a formal agreement to be signed, but this agreement was not, in fact, signed by any of plaintiff's assignors. Nor is the position of appellants bettered if the provision above quoted be treated as a by-law. It would then be a by-law asserting that the stockholders of this corporation were not held to their constitutional liability. But corporations may make only such by-laws as are consistent with the constitution and laws of the state. Civ. Code, § 301; Cook, Stock, Stockh. & Corp. Law, § 700a, and note. Such a by-law clearly contravenes them, and is therefore void. Being void, it carried no notice to, and had no binding force upon, depositors. Not that the corporation could not on behalf of its stockholders contract for a waiver of their liability. As has been said before, it could; but such a contract cannot find its sole expression in a void by-law. The second ground of waiver rests upon the following facts: Depositors were, as is usual, called upon to write their names in a book designated "Signature Book." At the top of each page of this book was printed matter, headed "Agreement." Below this printed matter were ruled lines extending across the entire page, and under these the page was spaced and divided by perpendicular lines. The top of each space bore appropriate and directing words, viz. "Number," "Date," "Name," "Signature," "Remarks." The printed matter, with other things, contained in its last line a release of the stockholders from liability. Upon this question it is enough to say that the court found, upon sufficient evidence, that the depositors, in writing their signatures upon the book, did not sign nor become bound by the printed agreement. There is thus presented, not the case of one who knowingly signs an agreement heedless of its contents. The finding of the court is that the plaintiff's assignors merely wrote their names in the signature book, and did not at all subscribe to the agreement.

3. Since the relation of debtor and creditor existed between the bank and its depositors, it follows that the debt was created and the liability incurred at the time of the acceptance of each deposit. At the expiration of three years the right to enforce the stockholders' liability was at an end. Code Civ. Proc. § 359; Hunt v. Ward, 99 Cal. 612, 34 Pac. 335; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 37 Pac. 499. Whatever divergence of views may be found in the earlier adjudications, the cases above cited contain the last expressions of the court upon the question. It follows, therefore, that plaintiff's cause of action is barred as to all deposits made more than three years before the commencement of the action. The judgment is ordered modified to conform to these views, appellants to have their costs upon appeal.

We concur: TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

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5 Cal. Unrep. 690

## TAGGART v. BOSCH. (L. A. 189.)

(Supreme Court of California. May 29, 1897.)

APPEAL—CROSS-EXAMINATION—PREJUDICIAL ERROR—INSTRUCTIONS—NECESSITY OF EXCEPTIONS.

1. An order denying a new trial for insufficiency of the evidence will not be disturbed where there is a material conflict in the evidence.

2. On an issue as to the genuineness of the note in suit, plaintiff testified that it was made by defendant for part of the price on sale to him of an interest in a mine by plaintiff and his partner. Plaintiff's testimony in chief was confined to the execution, delivery, and nonpayment of the note. On cross-examination he testified that he did not tell his partner on the day of the sale of having taken the note, though they executed the deed together, but told him some time later; whether a week later or two or three months he could not say. *Held*, that further cross-examination as to how soon after the sale he saw his partner was erroneously excluded.

3. In such case, there was no direct testimony as to the genuineness of the note, except plaintiff's affirmance and defendant's denial thereof. Plaintiff's partner was ordinarily engaged at the mine, and plaintiff might not have seen him for some months after the sale. The partner testified that he heard of the note the next time after he saw plaintiff, but could not say when that was. Three and a half months after the sale of the mine, plaintiff bought defendant's interest in a liquor business in which they were partners, and, to make the cash payment, borrowed a large sum at the bank, exhibiting the note in suit, which was for $3,000, as one of the securities offered. In addition to the cash payment, plaintiff gave his own notes to defendant for $1,500, nothing being said about the note in suit. Plaintiff's explanation was that he did not want to do anything to interfere with the trade, and that one-half the note in suit belonged to his partner in the mining business. His ex-

planation of not having told his partner of the note was that their relations were confidential, each doing about as he pleased. The consideration named in the deed of the mine to defendant was $500, and plaintiff testified that the actual consideration was $250 and the note. Plaintiff's partner testified that he understood the consideration to be $250 or $350. Two witnesses testified that defendant told them that it was $250. The expert testimony was equally divided as to the genuineness of the note in suit. *Held*, that the erroneous exclusion of the cross-examination of plaintiff as to when he next saw his partner after the sale of the mine was prejudicial.

4. It was error to exclude cross-examination of plaintiff as to whether he had private accounts between himself and defendant, and whether he told the bookkeeper in a liquor business in which they were partners about the note.

5. Alleged error in instructions given and in refusing other instructions cannot be considered in the absence of exceptions to the giving and refusal.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Clark, Judge.

Action by Joe P. Taggart against John D. Bosch. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Reversed.

John S. Chapman and Del Valle & Munday, for appellant. Diehl & Chambers, R. H. F. Variel, and Goodrich & Garrison, for respondent.

HAYNES, C. This action is upon a promissory note alleged to have been made and delivered by the defendant to the plaintiff on August 8, 1890, for the sum of $3,000, payable one year after date, with interest at 7 per cent. The answer denies that defendant made, signed, or delivered said note. The pleadings are verified. A jury trial was had, and resulted in a verdict for the plaintiff, upon which judgment was entered. This appeal is from an order denying defendant's motion for a new trial.

The specifications upon which the motion for new trial was heard are: (1) Insufficiency of the evidence to justify the verdict; (2) errors in ruling upon questions of evidence; and (3) that the court erred in giving certain instructions to the jury, and in refusing to give other instructions requested by defendant.

1. The sole question at issue upon the pleadings was whether the defendant made the note sued upon, and upon that question the evidence was conflicting. The plaintiff testified that he saw the defendant sign the note, and that, immediately after it was signed, the defendant delivered it to him; that it was made and delivered in the private office of Taggart & Bosch, no one else being present; that it was made and delivered August 8, 1890, the day of its date; that it was given in part consideration for the sale of an undivided one-sixth interest in an antimony mine to the defendant, the whole consideration of which was $3,250, viz. the note in suit for $3,000, and $250 in money, paid a few days after the sale; and that one J. K. Patton was equally interested with him in the mine, and in the sale of said interest. The defendant testified as positively that he did not give the plaintiff said note; that he did not sign it; that the signature thereto is not his; that he first heard of said note some time in the fall of 1891, after this suit was commenced, while he was in Leipsic, in Germany, and first saw it after his return from Europe, some time in June, 1892. If we ended our recital of the evidence at this point, it would certainly appear that there was a material conflict. Experts were called by the plaintiff, who testified, from a comparison of the signature to the note with other signatures of the defendant which were admitted to be genuine, that, in their opinion, the signature to the note was the genuine signature of the defendant, and about an equal number were called for defendant, who testified that, in their opinion, the note was not signed by the defendant. It is evidently not necessary to review and discuss the testimony given by these witnesses, nor to rehearse the able arguments of counsel for appellant as to the weight which should be given to such evidence, for, whichever way we might conclude the preponderance to be, the conflict remains, not only as to such evidence, but to the direct evidence given by the parties as well. Other testimony was given by the parties and by other witnesses, which should be stated in connection with the second point made by appellant; but it may be said in advance that it does not remove the conflict so as to permit us, under the well-settled rules of decision long and uniformly adhered to in this state, to reverse the order denying defendant's motion for a new trial, upon that ground, whatever may be our opinion as to the preponderance of the evidence.

2. Appellant contends that the court erred in certain rulings during the trial. Plaintiff and defendant were co-partners in the wine and liquor business from August, 1887, to November 25, 1890. On August 8th, defendant purchased said interest in said mine, and on that day the plaintiff and his co-owner of the mine, J. K. Patton, executed and acknowledged a deed to the defendant for said interest, both the grantors acknowledging its execution at the same time before the same notary in Los Angeles (where plaintiff and defendant had their place of business) on the same day said promissory note is claimed by the plaintiff to have been made by the defendant. Said mine is situated, as appears from the deed, in San Bernardino county; and Patton, who had been for some years associated with the plaintiff in mining enterprises, was the mining man, and attended to that part of the business, and was much of the time, perhaps usually, out of town. The execution and acknowledgment of the deed, however, showed that he was in town the day the note was made, if made at all, and the plaintiff testified that he and Patton went together to the notary, and acknowledged it, and that he did not then inform Patton that he had sold said interest for $3,250, or that he received or was to

receive a note for $3,000. The consideration named in the deed was $500. The testimony of the plaintiff, in chief, was confined to the execution and delivery of the note, and that it had not been paid. Upon cross-examination, he testified that the note was given in part consideration for an interest in the "Blue Jay Mine." He was then asked: "Where is that Blue Jay mine situated?" An objection that the question was incompetent, irrelevant, and immaterial, and not proper cross-examination, was sustained, and an exception taken. The witness then testified that the consideration of the sale was the note in suit and $250 in cash, and that the sale was of an interest in a mine which he and Patton owned, and the sale was made by him and Patton, and that he did not know where Patton was at the time the note was delivered. Plaintiff was then asked by counsel for defendant: "How soon after this sale did you see him?" The same objection was made and sustained. Counsel for defendant then stated: "I want to show that Mr. Patton was in ignorance of the existence of this document; that he was a co-owner with Mr. Taggart of this mine; and that he knew nothing about the existence of the note for some months after that. We take an exception." Counsel then asked the witness: "When did you next see Mr. Patton?" The same objection and the same ruling were made, and an exception noted. "Q. Did you ever tell Mr. Patton about getting this note? A. Yes, sir. Q. When? A. Some time following. Q. How soon after? A. It may have been a week, or it may have been two or three months, I couldn't state now (it is four years ago) just exactly when I did tell him. I told him though. Q. Didn't you state to the court, upon the trial of this cause before, that it was in November? A. I may have said so; yes, sir." In reply to further questions, the witness said he did not tell Patton that he had received or was about to receive a note for $3,000 besides the $250 "that day" (the day the deed was executed), nor while the "transaction was going on," and that the bookkeeper of Taggart & Bosch was R. M. Sharp. "Q. Did you tell him about this note?" Same objection and same ruling. "Q. You had private accounts between yourself and Bosch?" Same objection and same ruling, and exceptions were taken.

These rulings may be considered together, as they all involve the same question of law, viz.: Were they proper questions to be put upon the cross-examination of the plaintiff? The issue of fact being tried was whether the defendant made the note which was the basis of the action. The plaintiff alleged in his complaint, and had testified in chief, that the defendant signed and delivered it. The answer denied specifically that he signed or delivered it. It did not allege new matter by way of defense, but challenged the plaintiff to prove the averments of his complaint. If he failed to prove that defendant signed and delivered the note, judgment would necessarily be for the defendant, without any evidence being offered on his part; and the only question before the jury was the truth or falsehood of plaintiff's allegation. It was held in Jackson v. Water Co., 14 Cal. 18, that a cross-examination cannot go beyond the subject-matter of the evidence in chief, but should be allowed a very free range within it; that, where the defendant on cross-examination simply aims to disprove by the witness the very cause the witness himself has made, the rule excluding such evidence until defendant opens his case has no application. See, also, Harper v. Lamping, 33 Cal. 647, 648; People v. Lee Ah Chuck, 66 Cal. 667, 6 Pac. 859; Wixom v. Goodcell, 90 Cal. 623, 27 Pac. 419; McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681. A witness may be asked any question upon cross-examination which tends to test his accuracy, veracity, or credibility, and the court should be especially liberal where the witness is a party to the suit. Neal v. Neal, 58 Cal. 287; Greenl. Ev. § 446. That the court erred in the above rulings is apparent; and it is equally well settled "that every error is prima facie an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been or was done, by the error." Jackson v. Water Co., 14 Cal. 25; Carpentier v. Williamson, 25 Cal. 167; People v. Ybarra, 17 Cal. 167, 172; Rice v. Heath, 39 Cal. 609; Cleary v. Railroad Co., 76 Cal. 240, 18 Pac. 269.

The further question is therefore presented, viz.: Does it appear from the record that the defendant was not injured by the restrictions imposed upon the defendant in his cross-examination of the plaintiff? The case is peculiar, at least so far as the consideration of the evidence is concerned. But two persons, the plaintiff and defendant, know of their own personal knowledge whether the note in suit is genuine or is a forgery. It is one or the other. The plaintiff swears that it is genuine, that it was signed by the defendant in his presence, and was immediately delivered to him. The defendant as positively swears that it was not signed or delivered by him. No witnesses were called to testify to the reputation of either of the parties for honesty or veracity, yet the veracity of the two men who alone knew the truth must be determined by the jury before a verdict could be rendered. The burden of proof was upon the plaintiff, and, to enable him to recover, the evidence must preponderate in his favor. Under such circumstances, the conduct or declarations of the plaintiff, as to all matters or circumstances which tended to weaken or destroy his direct testimony that the defendant did execute and deliver the note, were competent and proper subjects upon which to cross-examine him, and a full and unrestricted cross-examination within the limits hereinbefore stated was, under the circumstances, of the utmost importance to the defendant.

It is contended, however, by the learned counsel for respondent, that the facts called for by the questions which were disallowed were subsequently disclosed in evidence, or were unimportant and immaterial and harmless, and that, therefore, the defendant was not prejudiced. The location of the Blue Jay mine was shown by the deed, but the questions, "How soon after this sale did you see him?" and, "When did you next see Mr. Patton?" were not answered, nor the facts called for disclosed. The plaintiff testified that Patton went with him to acknowledge the deed, but "couldn't say whether this was before or after the giving of the note. It was about the same day." He further testified that he did not tell Patton about the note that day, but did tell him some time after; that it might have been a week or two or three months; and that he may have testified before that it was in November. It also appeared that Patton was in charge of the mines out on the desert, and it might be that plaintiff did not see him until November, and that he told him the first time he saw him. But it might be the case that he saw him the next day or the next week after the date of the note, or every day or every week from that time until November. The jury may have inferred from the ruling of the court upon these questions that whether the plaintiff had frequent and early opportunities of informing his co-owner in the mine of the existence of the note did not affect the probability of its existence, and that, therefore, the fact that he did not tell him sooner, or the fact that he did not tell him at all, if that were so, would not affect plaintiff's credibility. The plaintiff, however, realized that some explanation of his conduct in this particular was necessary, and, upon his redirect examination, gave, as a reason for not telling Patton of the note, that their relations "were very confidential"; that Patton did as he pleased over on the desert, and he did the same at his end of the line, and that was why he didn't tell him; that "I never made any explanations to him or he to me." The witness could not have meant that he "never" explained his transactions in relation to their common property to his co-owner, else he would never know what plaintiff did; but in all this explanation of their "very confidential" relations he gave no intimation as to how soon he saw Patton after he received the note, nor when he next saw him. It certainly cannot be contended that the silence of plaintiff in regard to this note would not be more significant if he saw Patton immediately after the time he swears he received it, or saw him within a few days, or frequently between that and the time he did tell him.

But other facts disclosed in the testimony show still more clearly the materiality and importance of these questions. The plaintiff and defendant were partners in the liquor business at the time of this transaction, and had been for three years preceding. On November 25, 1890, about 3½ months after defendant bought said interest in the mine, defendant sold his interest in the firm of Taggart & Bosch to the plaintiff for $6,500, of which the plaintiff paid $5,000 in cash, and gave defendant his two several promissory notes,—one for $1,000, payable January 1, 1892, and the other for $500, due July 1, 1892. The cash payment was made by plaintiff's check on the First National Bank of Los Angeles. In order to make the cash payment, plaintiff borrowed $4,000 from said bank, and, when negotiating the loan, exhibited the note here in suit to the cashier as one of the securities he had on hand, and, so far as appears, said cashier, Mr. Shaffer, is the first person, aside from the parties to the note, who ever saw it. In buying out the interest of Mr. Bosch in the store, the plaintiff did not mention to him the existence of this note, though he showed it to Mr. Shaffer as part of his "securities," nor ask the defendant to accept it as part of the cash payment, nor even to accept a credit upon it to the extent of $1,500, for which sum he gave his own notes. Plaintiff gave as reasons for not mentioning this note to the defendant at the time he purchased his interest in the store that the relations of the parties had become strained; that their negotiations had culminated in a "give or take" proposition, made about five o'clock in the evening, and limited to 12 o'clock the next day; that it was important that the business should not be interrupted, and he did not want to call up anything that might interfere with his trading on the partnership business at that time, and, "besides, Patton equitably owned one-half of said note." Plaintiff had inserted in the deed the consideration of $500, which would make the value of the mine $3,000. He had testified that the real consideration was $3,250, which would make the value of the mine $19,500. He had taken the note in his own name, and had presented it to the bank as one of his securities, and as constituting, in part at least, the basis of his credit. He had borrowed $4,000 from the bank, to enable him to make a cash payment of $5,000 to the man whose note he held for $3,000, and, in addition, gave his own notes for $1,500, without mentioning defendant's note, because, as he testified, "I did not want to call up anything that might interfere with my trading on the partnership business at that time. Besides, James K. Patton equitably owned one-half of said note." The record gives no hint that at that or any other time there had been any dissatisfaction on the part of the defendant with his purchase of said interest in the mine. The defendant could not have forgotten that less than four months before he had given the plaintiff his note for $3,000, and no reason appears why a reference to this note should interfere with the purchase of defendant's interest in the store if the note was in fact made by the defendant. On the contrary, it is not reasonable to suppose that defendant would want to accept plaintiff's notes for $1,500, while the plaintiff held his note for $3,000, which might be transferred before maturity, and which he could be compelled to pay to the holder, though the contingencies of business might make the notes he held against the plaintiff wholly uncollectible. Nor does Patton's interest in the note present a satisfactory explanation of the problem. It had not prevented him from using it as his own in obtaining a loan from the bank, and, besides, his "confidential" relations with Patton were such that no "explanations" were ever required or made by either of them, and hence he was at liberty "to do as he pleased at his end of the line." But, if it were otherwise, there could be no reason why he should not, instead of making his own notes for $1,500, have surrendered defendant's note, and taken a new note from him, payable to Patton for $1,500; and thus have utilized his own interest in the note, and at the same time satisfied his conscience as to Patton's interest. If the circumstances surrounding and following the sale of said interest in the mine for the price and upon the terms claimed by the plaintiff, and his subsequent conduct, had been consistent with such claim, thus relieving him from involved and improbable explanations, these questions, which were excluded, as to how soon after the sale he saw Patton, and as to when he next saw him, would seem to be of trifling importance; and if from the whole of the evidence it would be clear that, however they might have been answered, the result of the case would not have been affected, the presumption of injury from the erroneous ruling would have been overcome; but when, as here, the answers to these questions might have increased the improbabilities of the transaction as testified to by the plaintiff, and compelled additional explanations, the difficulty of making which is usually increased with each recurring necessity, we cannot regard the error as harmless.

We need not enlarge upon the rulings made upon the questions put to the plaintiff as to whether he told the bookkeeper about the note, and whether private accounts were kept between plaintiff and defendant. They were neither so remote nor related to matters so improbable as to justify their exclusion. The general effect of these rulings was to improperly restrict the cross-examination of the plaintiff. We are not authorized to infer that, if these questions had been permitted, the cross-examination upon those lines would have stopped with the answers to them, but that it would have been pursued so long as the answers would indicate that it was proper or profitable. "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth. * * * It is not easy for a witness who is subjected to this test to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended." Greenl. Ev. § 446. And where it is evident, as it is in this case, that there is absolute and unqualified falsehood upon the one side or the other, no restriction upon a proper cross-examination of either of the parties who alone have personal knowledge of the fact in issue can be said to be harmless, unless shown to be so by other evidence, and that does not appear.

We have not space to discuss the remaining evidence in detail, but a brief reference to some of it must suffice. The deposition of Patton was taken and read by the defendant. He testified that he did not recollect what the price was. He was then asked: "Didn't you tell me the other day what he paid? A. Well, I told you, I think, it was $250, and Bosch told me $350, and I told him I forgot all about what it was. Q. When Bosch told you $350, he meant a hundred dollars that was sent for assessment work? A. It was all put back in the mine. It was all put in the mine, including the assessment money. Q. You are quite positive it was not over $350? A. As my understanding was, I don't, no." As to what the witness meant by his last answer we will not speculate. He further testified that he first heard of the note "the next time after I saw Mr. Taggart." He could not say how many months after, nor whether Mr. Bosch had gone to Europe, nor whether it was after Bosch had sold out to Taggart, nor whether it was five months or five days. Mrs. Bosch and T. R. Bennington testified in substance that plaintiff told each separately that he sold said interest in the mine to Bosch for $250, and Charles Kohler testified that plaintiff told him he had sold Bosch said interest for $250, and offered to sell him another one-sixth for $350. Plaintiff denied having told either of said witnesses that he sold said interest to Bosch for $250, and that he had no recollection of offering Kohler any interest in the mine for $350, or for any sum. Some circumstances were also shown upon the cross-examination of said witnesses tending to weaken their testimony; and as to defendant it appeared that in a deposition given by him he testified that the check for $250 which he gave plaintiff was given on August 8th, and postdated the 13th, and had so testified on a former trial, but, after seeing the stub, admitted that he had been mistaken, and that the check was not made until the 13th. It is not necessary to discuss the question as to what weight should be given to the expert testimony in this case, or the general question as to its weight, or the numerous authorities cited by appellant upon that subject, since both parties resorted to it, and with about equal success.

3. No exceptions appear to have been taken to the instructions given, nor to the refusal of the court to give those requested by the defendant, and they cannot therefore be considered. We advise that the order appealed from be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and a new trial granted.

117 Cal. 212

## SANTA CRUZ ROCK PAVEMENT CO. v. LYONS et al. (No. 15,760.)

(Supreme Court of California. June 1, 1897.)

STREET IMPROVEMENT — LIEN — CONSTITUTIONAL LAW—ESTOPPEL.

1. Code Civ. Proc. § 1191, providing that one who, at the request of the reputed owner of a lot, improves the same, or the street or sidewalk in front of it, has a lien on it for the work done and material furnished, is unconstitutional, in so far as it authorizes a lien by virtue of a contract with one who is only the reputed and not the actual owner.

2. The lien does not attach from the mere fact that the owner knew of the work while it was being performed, and neither made objection thereto nor gave notice that he would not be responsible therefor, which omissions, under section 1192, would give the right of lien on "every building or other improvement mentioned in section 1183," since section 1191, which alone provides for a lien on "a lot" for the work done in improving the street in front of such lot, contains no provision of that nature.

In bank. Appeal from superior court, city and county of San Francisco.

Action by the Santa Cruz Rock Pavement Company against Ellen Lyons and another. From a judgment in favor of plaintiff and an order denying a new trial, defendants appeal. Reversed.

Allen, McAllister & Frohman and John B. Carson, for appellants. Parker & Eells, for respondent.

HARRISON, J. The plaintiff seeks by this action to enforce a mechanic's lien on certain real property in San Francisco belonging to the defendant Ellen Lyons for work done by it in the improvement of the street in front of said property. The defendant Ellen is the wife of her co-defendant James M. Lyons, and the land is her separate property. The work done by the plaintiff was performed under a written contract, entered into between it and the defendant James, and after its completion the plaintiff filed a claim of lien with the county recorder, which it now seeks to enforce against the property. Section 1191, Code Civ. Proc., provides: "Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished." Much of the argument herein has been directed to the question whether it appears from the record that the defendant James was the "reputed owner" of the land in question, but in the view taken by us of the foregoing section it is unnecessary to decide this question. The owner of real property may by his acts or conduct be estopped from questioning the acts of a reputed owner of such property, and may thereby be bound by the acts of such reputed owner; but, in the absence of the elements of an estoppel, he will not be bound by the unauthorized acts of one who is merely reputed to be the owner of the land. He cannot be deprived of his title to the land, nor can a lien be imposed thereon, against his will, by virtue of any agreement or contract on the part of one who is merely reputed to be the owner of such land, unless he has in some way held such person out as the reputed owner, with authority to do the act or make the agreement by which it is sought to create the lien. It is no more within the constitutional power of the legislature to authorize a reputed owner of a lot or parcel of land to create a lien thereon against the will of the real owner than it would be to authorize such reputed owner to transfer the title to said land; and we hold, therefore, that so far as the foregoing section of the Code purports to authorize the creation of a lien upon land by virtue of a contract for the improvement of the street adjacent thereto, entered into with one who is only the reputed owner of the land, or to affect the interest of the real owner therein, it is unconstitutional. There was no evidence before the court that the defendant Ellen gave to her husband any authority to enter into the contract for the improvement of the street; and the finding of the court that he entered into said contract as her ostensible agent, and in her behalf, is not sustained by the evidence. The plaintiff also offered evidence tending to show that the defendant Ellen knew of the work while it was being performed, and neither made objection thereto nor gave any notice to it that she would not be responsible therefor, and has argued that by reason thereof it is entitled to enforce the lien. Section 1192, Code Civ. Proc., however, limits the right of lien in such cases to "every building or other improvement mentioned in section 1183" in the Code; and section 1191, which alone provides for a lien upon a lot for the work done in improving the street in front of such lot, contains no provision of this nature. The judgment and order denying a new trial are reversed.

We concur: TEMPLE, J.; HENSHAW, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.

# MEMORANDUM DECISIONS.

HAWLEY v. GRAY BROTHERS ARTIFICIAL STONE PAVING CO. (S. F. 610.) (Supreme Court of California. April 3, 1897.) Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge. Action by Laura L. Hawley against Gray Brothers Artificial Stone Paving Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed. Fisher Ames, for appellant. Warren, Olney & Olney, for respondent.

PER CURIAM. Action to recover rent alleged to be due by virtue of a written lease executed between the parties. Two similar actions by the plaintiff against the defendant for other portions of the rent, provided for in the same instrument of lease, have been before this court, upon appeal from the judgment in favor of the plaintiff, and affirmed by this court. 106 Cal. 337, 39 Pac. 609, and 42 Pac. 457. There is no material difference between the facts in the present case and those presented in the cases heretofore determined, and upon the authority of those cases the judgment and order are affirmed.

KELLY v. HEARST. (S. F. 584.) (Supreme Court of California. May 24, 1897.) Department 1. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge. Action by Martin Kelly against William R. Hearst, in which there was a verdict for defendant. From an order granting a motion for a new trial, defendant appeals. Affirmed. W. W. Foote and Julius Kahn, for appellant. J. C. Bates (A. A. Barnard and A. J. Morgernstern, of counsel), for respondent.

PER CURIAM. One of the grounds of the plaintiff's motion for a new trial was the insufficiency of the evidence to justify the verdict, and the order granting the motion was general in terms. Without inquiring into the propriety of the ruling as to the other grounds, it is sufficient to say that, under the evidence, we should be clearly unwarranted in disturbing the order. Order affirmed.

Ex parte MARTEN. (Cr. 279.) (Supreme Court of California. March 29, 1897.) Department 2. Petition by Arthur Marten for a writ of habeas corpus for the purpose of obtaining a jury trial as to his insanity, and his discharge from the custody of an insane asylum to which he was committed. Writ granted. M. M. Foote, for petitioner. Wm. S. Barnes, Dist. Atty., and J. J. Dunne, Asst. Dist. Atty., for respondent.

PER CURIAM. It appearing that the petitioner is dissatisfied with the proceedings resulting in his commitment to an insane asylum, and has demanded a jury trial as provided in section 258 of the Civil Code, and the district attorney consenting thereto, it is ordered that the petitioner be remanded to the custody of the sheriff of the city and county of San Francisco, and that he be taken before the superior court of said county for a hearing and trial before a jury on the question of his insanity.

PEOPLE v. GEIGER. (Cr. 205.) (Supreme Court of California. April 7, 1897.) Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge. Ernest Geiger was convicted of grand larceny, and appeals. Affirmed. Geo. E. Colwell, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.

PER CURIAM. In this case the defendant was convicted of grand larceny. There are no legal questions of any consequence presented by the record differing from those which have been considered in the opinion this day filed in the cause of the same title (Cr. 201; 48 Pac. 389), and upon grounds there stated the judgment and order appealed from are affirmed.

RANDALL v. RANDALL et al. (Sac. 177.) (Supreme Court of California. May 12, 1897.) Department 2. Appeal from superior court, Colusa county; E. A. Bridgford, Judge. Suit by Mary J. Randall against Nicholas W. Randall and others for partition. From a judgment for plaintiff, and from an order denying a new trial, defendants Randall and J. T. Davis appeal. Reversed. H. M. Albery, for appellants. C. W. Eastin and P. H. Griffin, for respondent.

PER CURIAM. For the reasons given in the opinion in the case of Davis v. Randall (Sac. 178; this day decided) 48 Pac. 906, the judgment and order denying a new trial are reversed.

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REED v. CROSS. (L. A. 70.) (Supreme Court of California. April 7, 1897.) Department 2. Appeal from superior court, San Luis Obispo county; J. W. McKinley, Judge. Action by F. C. Reed against John Cross. From that part of the judgment denying a recovery on a counterclaim, defendant appeals. Affirmed. W. H. Spencer, William J. Variel, and William H. Davis, for appellant. Hughes & Garrison and Anderson & Anderson, for respondent.

PER CURIAM. The portion of the judgment in the above-entitled cause appealed from by defendant, Cross, is affirmed for the reasons given in Reed v. Cross (No. 53; this day decided) 48 Pac. 491.

RHOADS et al. v. GRAY. (Sac. 313.) (Supreme Court of California. May 13, 1897.) Department 1. Appeal from superior court, Kings county; Justin Jacobs, Judge. Action by one Rhoads and others against one Gray. From a judgment in favor of defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed. Horace L. Smith, for appellants. J. A. Hannah, M. L. Short, and Newman Jones, for respondent.

PER CURIAM. The facts upon which the present appeal is to be considered are the same as those in Rhoads v. Gray (Sac. 312; this day decided) 48 Pac. 971, and upon the principles there stated the judgment is affirmed. The appeal from the order denying a new trial was dismissed at the hearing of the cause.

SWOPE v. SHERMAN et al. (L. A. 223.) (Supreme Court of California. March 3, 1897.) Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge. Action by John A. Swope against M. H. Sherman and others. Judgment for plaintiff. Defendants appeal. Affirmed. Bicknell & Trask, J. S. Chapman, and John D. Pope, for appellants. Wells, Monroe & Lee, for respondent.

PER CURIAM. This action is in its nature identical with that of Ferguson v. Sherman (L. A. 222; this day decided) 47 Pac. 1023, and the appeal presents the same questions as were in that case considered. For the reasons there given the judgment and order appealed from are affirmed.

VENTURA & O. V. RY. CO. v. COLLINS. (L. A. 232.) (Supreme Court of California. March 11, 1897.) In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge. Action by the Ventura & Ojai Valley Railway Company against one Collins to recover on a subscription to the capital stock of plaintiff corporation. From a judgment for plaintiff, defendant appeals. Reversed. Blackstock & Ewing, for appellant. Barnes & Selby, for respondent.

PER CURIAM. Upon the authority of Railway Co. v. Hartman (L. A. 231; this day decided) 48 Pac. 65, the judgment entered herein is reversed, and the superior court is directed to sustain the demurrer to the complaint.